

(1964) KLJ 829

High Court Of Kerala

Case No: A.S. No. 55 of 1964

Ashia Ummal and
Another

APPELLANT

Vs

Vasanthi

RESPONDENT

Date of Decision: June 11, 1964

Acts Referred:

Transfer of Property Act, 1882 " Section 54

Citation: (1964) KLJ 829

Hon'ble Judges: T.K. Joseph, J; T.C. Raghavan, J

Bench: Division Bench

Advocate: K. Mohammed Naha and M.A. Hameed, for the Appellant; G. Viswanatha Iyer and S. Subramonia Sarma, for the Respondent

Final Decision: Dismissed

Judgement

Joseph J.

1. This appeal arises from a suit for declaration of title and recovery, of possession of immovable property with mesne profits. The suit was

decreed by the trial court, and defendants 1 and 2 have preferred this appeal. The property which forms the subject matter of the suit comprises of

50 cents obtained by the third defendant under Ext. P.1 dated 11--4--1956 from her parents, defendants 1 and 2 the first defendant being the

mother and the second defendant the father of the third defendant. The remaining 11 cents were purchased in the name of the third defendant later

under Ext. P.2 dated 9-2-1960; Ext. P.1 purported to convey 50 cents of land and a building to the third defendant in lieu of streedhanam

promised to her at the time of her marriage to the fourth defendant. The whole area was sold to the plaintiff, under Ext. P.7 dated 22--8--1960.

According to the plaintiff, defendants 3 and 4 resided in the suit property for some time after the marriage and thereafter they left for kayamkulam,

the native place of the fourth defendant, entrusting management of the property to defendants 1 and 2. It is further alleged by the plaintiff that after

the date of the sale in her favour, she was in possession for six or seven days when she was obstructed from enjoyment of the property by

defendants 1 and 2. She therefore filed the suit for declaration of her title and recovery of possession of property.

2. The main contentions of defendants 1 and 2 were that the third defendant was promised a streedhanam of Rs. 4,000/- at the time of her

marriage, that Ext. P.1 was executed as security for the fulfillment of the promise and to evidence the same, that the original deed was not handed

over to the third defendant, that it was surreptitiously removed by her from the possession of the first defendant, that Ext. P.1 was not intended to

come in to effect nor had it come into effect, and that in any event it has to be treated only as a gift pursuant to which possession has not passed. It

was further contended that the third defendant and her vendee, the plaintiff, had no right to the property and that a sum of Rs. 3,000/- out of the

streedhanam promised had been paid to defendants 3 and 4. According to defendants 1 and 2 the building in the property was erected by them

after the date of Ext. P.1.

3. The court below found that Ext. P.1 was a deed of sale and not a gift, that it had come into effect, that possession had not passed to the third

defendant, that the plaintiff was not a bona fide purchaser for value without notice, that the third defendant was competent to sell the property and

that the plaintiff was entitled to the declaration prayed for as well as recovery of possession with mesne profits.

4. The first point urged on behalf of the appellants is that Ext. P.1 cannot be viewed as a deed of sale. It was "pointed out that it was executed out

of love and affection and that it would not come within the definition of. "sale" in the Transfer of Property Act. ""Sale"" according to section 54 of the

Transfer of Property Act ""is a transfer of ownership in exchange for a price paid or promised or part paid and part promised"". Ext. P.1 does not

say that it is a transfer of property for any sum fixed as price. There is a statement that the property is worth Rs. 10,000/-This has to be taken as

having been inserted only for the purpose of payment of stamp duty and registration fees. The mere fact that streedhanam was promised at the time

of the marriage will not make a subsequent deed of transfer for the streedhanam promised, a sale. The learned Judge relied on the decision

reported in 24 T.L.J. 265 which, in our opinion, has no application to the facts of this case. Ext. P.1 was executed out of a natural love and

affection, and this cannot but be treated as a deed of gift.

5. The next question is whether possession passed under Ext. P.1. The learned Judge held that possession had not passed. We are unable to agree

with this conclusion. Ext. P.1 directed the third defendant to obtain mutation of names in her favour, to pay tax and to enjoy the property with full

rights. It is seen from Exts. P.10, P.10 (a), P.11 and P. 12 that the third defendant accordingly got the property transferred in her name in the

revenue records and that she was paying the tax after the date of Ext. P.1. We may in this connection refer to a contention of defendants 1 and 2

that the original of Ext. P.1 was not handed over to the third defendant. According to defendants 1 and 2, the third defendant while visiting her

parents surreptitiously obtained possession of the deed which was kept by defendants 1 and 2. That this is a false plea can be seen from the fact

that defendants 3 and 4 handed over the original deed, Ext. X (i), to the Lakshmi Chit Funds in favour of which they executed a chitty

hypothecation bond, Ext. P.3, on 6--11--"58. Ext. X (i) was produced in the case by the Manager of the Lakshmi Chit Funds. Again, defendants

1 and 2 had a contention that the building in the property was constructed by the second defendant some time after the date of Ext. P.1. The

learned Judge has found this contention to be false; and we agree with him in view of the fact that the building was described in Ext. P.1 as part of

the property conveyed and as no record to prove the date of construction was produced by the second defendant.

6. There is another piece of evidence in Ext. P.2. The third defendant purchased 11 cents of land lying contiguous to the property covered by Ext.

P.1. Ext. P.2. was executed on 9--2--1960. The 2nd defendant, when he was examined as Dw.1, deposed that Ext. P.2 was obtained by him in

the name of the third defendant. It follows that he was aware of the contents of Ext. P.2. In describing the property conveyed thereunder it is

stated that it lies adjoining the plot obtained by the third defendant under the streedhanam deed. The second defendant, who admits that he was

responsible for getting Ext. P.2 in the third defendant's name, cannot evade responsibility for this statement in Ext. P.2. It has also to be stated that

Ext. P.2 was executed by the first defendant's sister who must have been aware of the possession of the neighbouring property by the third

defendant. Another circumstance against defendants 1 and 2 is that the second defendant admitted that similar deeds had been executed in favour

of other married daughters and that they were in possession of the property conveyed to them. There is no reason to think that when it came to the

turn of the third defendant, he adopted a different practice.

7. No doubt, a few receipts for the payment of electric charges of the building as well as for the payment of initial charges for electrification were

produced by the second defendant. These cannot outweigh the effect of the evidence and circumstances mentioned above. The plaintiff has an

explanation for the possession of these records by the second defendant. The third defendant was at Kayamkulam and somebody had to look

after the building which was given on lease to two medical officers of the locality. The tenants might have paid the electric charge and handed Over

the receipts to the second defendant. The second defendant also produced Ext. D.1 as a rent deed executed by one of the medical officers in his

favour. This is an unstamped paper and the executant of the same has not been examined. We are not prepared to attach any weight to Ext. D.1.

8. Considering the evidence adduced by both sides we are of opinion that the finding of the court below on the question of possession cannot be

upheld. We hold that possession passed to the third defendant under Ext. P.1.

9. There is also another aspect to be mentioned. Ext. P.1 indicates that the third defendant was residing along with her parents at that time. At any

rate it is not stated in Ext. P.1 that she had a separate residence. When the donor and the donee are residing together the formal entry by the

donee is not necessary to make the gift complete:

No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing

at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer

possession and to divest himself of all control over the subject of the gift. The principle for the determination of questions of this nature was thus

stated by West J., in a Bombay case ""When a person is present on the premises proposed to be delivered to him, a declaration of the person

previously possessed puts him into possession..... without any physical departure or formal entry

This means that there was a completed gift and that the plaintiff as vendee of the third defendant is entitled to the declaration as well as recovery of

possession prayed for in the plaint. Before we part with the case we may also observe that we cannot uphold the finding of the court below that the

plaintiff is not a bona fide purchaser for value without notice. The learned Judge observed that the plaintiff must have been aware of the fact that

defendants 1 and 2 were in possession. Such possession could only be under the third defendant as there was a completed gift. Ext. P.7 was

executed after inserting an advertisement in a newspaper that the property was available for sale. The major part of the consideration was paid

before the Sub-Registrar and the balance which was recited towards payment of the chitti dues to the Lakshmi Chit Funds has also been paid.

Although this finding is immaterial in view of our conclusions on the other points, we have to state that the plaintiff is a bona fide purchaser for value

without notice.

It follows that the decree of the court below has to be confirmed. We do so and dismiss the appeal with costs to the plaintiff-respondent.