

(1984) 09 KL CK 0015

High Court Of Kerala

Case No: S.A. No. 84 of 1979

M. Kunka Kurup and Another

APPELLANT

Vs

Lakshmikutty Amma and others

RESPONDENT

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**Date of Decision:** Sept. 5, 1984**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100(5)
- Partition Act, 1893 - Section 4
- Transfer of Property Act, 1882 - Section 11

**Citation:** (1984) KLJ 786**Hon'ble Judges:** K.S. Paripoornan, J**Bench:** Single Bench**Advocate:** T.S. Venkiteswara Iyer, P.K. Balasubramonian and S.V. Balakrishna Iyer, for the Appellant; T.P.K. Nambiar and R. Bhaskaran, for the Respondent

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**Judgement**

K.S. Paripoornan, J.

Plaintiff in O.S. 46 of 1973 of the Subordinate Judge's Court, Badagara are the appellants herein. Defendants in the above suit are the respondents. The suit was one for partition and separate possession of plaintiffs' share in the B schedule properties with future profits. Plaintiff B Schedule consists of three items. Item 1 is a residential building. Item No. 2 is a compound about 22 cents in extent wherein the residential building is situate. Item No. 3 is a nilam about 40 cents in extent. Plaintiffs 1 and 2 and deceased Chathu Kurup are the children of one Kalyani Amma. The 1st defendant is the widow of Chathu Kurup and defendants 2 to 5 are their children. Kajyani Amma, Plaintiffs 1 and 2 and Chathu Kurup are members of the Thavazhi. They belong to Moniyarathu Tarwad. There was a partition in the tarwad evidenced by Ext. A1 dated 11-4-1965. It is labelled as a "partition deed". Plaintiff B schedule items 2 and 3 (compound and nilam) were allotted to the share of Kalyani Amma and B Schedule item No. 1 building was allotted jointly to Kalyani Amma and her children-plaintiffs 1 and 2 and Chathu Kurup. Ext. A1 contained certain

conditions and directions regarding the allotments so made. It was stated in Ext. A1 that the building was left in common to these persons. It is common ground that Kalyani Amma died in 1973. Chathu Kurup died in the year 1969(7). Defendants 1 to 4 are the legal heirs of deceased Chathu Kurup. Supplemental 5th" defendant was impleaded since the other defendants contended that 71/2 cents of land in item No. 2 was orally assigned by deceased" Chathu Kurup to the 8th defendant, and in pursuance there to the 8th defendant is in possession. The plaintiffs allege that this is incorrect. It is alleged by the plaintiffs that after the demise of Kalyani Amma, plaintiffs came to know about a gift deed dated 21-7-1969 (Ext. B1) alleged to have been executed by deceased Kalyani Amma. By the said deed, Kalyani Amma gifted her entire property obtained as per Ext. A1 to Chathu Kurup, to the exclusion of the plaintiffs. The plaintiffs attack Ext. B1 as invalid and not binding on them. It is alleged that deceased Kalyani Amma did not execute the document and even so it was brought about by fraud, undue influence and coercion. Deceased Kalyani Amma was about 90 years old at the time of the document (Ext. B1) and deceased Chathu Kurup was residing with her and looking after her. Chathu Kurup took advantage of the situations and brought about the deed. The said gift deed Ext. B1 is against the terms of Ext. A1 partition deed and so, to the extent it militates against Ext. A1 it is invalid. In view of the infirmity attached to Ext. B1, all the three items of plaintiff. B schedule properties are liable to be partitioned, ignoring both Ext. B1 and the oral assignment alleged to have been given in favor of the 8th defendant. On these premises, the plaintiffs laid the suit for partition and separate possession of the plaintiffs" share in the plaintiff B schedule properties with future profits. The defendants contested the suit on many grounds. It is the defence case, that the plaintiffs are not entitled to any relief and that the plaintiff B schedule properties were gifted by deceased Kalyani Amma in favor of deceased Chathu Kurup by Ext. B1 dated 21-7-1969. The defendants also pleaded that deceased Chathu Kurup executed Ext. B2 will dated 27-10-1972 with respect to all his properties, including the plaintiff B schedule items in favour of defendants 2 to 4 and they are in possession accordingly. It is urged that Chathu Kurup died on 13th Dhanu 1148 and Kalyani Amma died on 1st Karkatakam 1148. It is the defence case that the plaintiffs have no right over items 2 and 3 of the plaintiff schedule and they are only entitled to 2/4 shares over item 1 (building) as per Ext. A1 partition. The plaintiff allegations that the gift deed was brought about by fraud, coercion and undue influence, were denied. Deceased Kalyani Amma though was of advanced age at the time of E.xt. B1 document, was capable of understanding things correctly and Ext. B1 is not vitiated for the reasons stated in the plaintiff. After the death of Chathu Kurup, the properties are in the possession of defendants except 71/2 cents which was given to the 6th defendant by an oral assignment by deceased Chathu Kurup. The trial court held that Ext. B1 is a genuine document and was executed by deceased Kalyani Amma. The suit as it related to items 2 and 3 was dismissed. A preliminary decree for partition of plaintiff schedule item No. 1 in four equal shares and allotment of two such shares to the plaintiffs was ordered. The court also held that partition of item

No. 1 will be effected on the money value, the plaintiffs being allowed their share" in money. The preliminary decree so passed also directed that costs will be borne by the respective parties. The plaintiffs filed A.S. No. 132 of 1976 before the District Court, Kozhikode. By judgment dated 22nd August 1978 the decree and judgment of the trial court were confirmed. The lower appellate court held that Ext. B1 gift deed in favor of Chathu Kurup was not brought about as a result of any fraud, undue influence or coercion brought upon Kalyani Amma by deceased Chathu Kurup and that it is a valid document. Regarding the contention of the plaintiffs-appellants, that in view of the terms of Ext. A1 document Kalyani Amma was not entitled to transfer or alienate her rights over plaint B schedule item No. 1, building or other items, the learned District Judge took the view that the restriction upon alienation contained in Ext. A1 document is invalid because the property had become vested in Kalyani Amma by the earlier provisions of the deed. The appeal was dismissed with costs. Plaintiffs have come up in second appeal. Appellants' counsel Sri. T. S. Venkiteswara Iyer attacked the approach made by the courts below in adjudicating as to whether Ext. B1 document is tainted or infirm as one brought about by undue influence, coercion or fraud. According to counsel the pleadings, the evidence and the circumstances brought about in the case would unmistakably point out that Ext. B1 document is invalid and infirm and so the subsequent will-Ext. B2 executed by Chathu Kurup and the claim of the defendants pleaded in the written-statement will fall to the ground. It is urged that the courts below mis-read and mis-understood the relevant clauses of Ext. A1, deed, which will demonstrate that the said document is really a family arrangement which will conclusively show that Kalyani Amma was incompetent to deal with either item No. 2 compound or item No. 3 nilam. Clauses III, V, VI and VII of Ext. A1 were relied on in this connection. It is argued that Kalyani Amma was not given an absolute estate as per Ext. A1-deed, styled as partition deed, that she undertook not to alienate the properties allotted to her, so that after her demise, the other sharers (plaintiffs and Chathu Kurup).will take the properties allotted to her equally, that Ext. A1 being a partition is not a transfer within the meaning of the Transfer of Property Act. The view of the courts below, that the relevant clauses in Ext. A1 imposing a fetter against alienation, are repugnant to the earlier clause by which the property become vested in Kalyani Amma, are invalid, is assailed. Counsel argued that at any rate Ext. A1 should be construed as a "family arrangement".

2. Counsel for the respondents, Mr. Rajagopal, as also Mr. Bhaskaran contended that the courts below on the facts and in the nature of evidence rightly came to the conclusion that Ext. B1 is a valid document executed by Kalyani Amma. It is contended that what was intended by the parties was that Kalyani Amma (alone) will be entitled to B schedule items 2 and 3 absolutely and that Kalyani Amma's three children will be jointly entitled to B scheduled item No. 1 residential building (only). The judgments of the courts below negating the claim made by the plaintiffs are sought to be justified as legal and proper and it is the respondents' case that no

interference is called for in Second Appeal.

3. At the time of admission of the appeal, the following substantial questions of law were formulated as arising in this second appeal:

(1) Whether the provision in Ext. A1 in regard to the tarawad house is not a family arrangement.

(2) Whether Ext. A1 being only a deed of partition and in the nature of a family settlement, section 11 of the Transfer of Property Act relating to restraint on alienation being void, is at all applicable and

(3) whether the donee under Ext. B1 being himself a party to Ext. A1 can claim to have obtained any title against the terms of Ext. A1.

4. Having heard counsel at length, it cannot be denied that the construction of Ext. A1 (parent document) styled "partition deed" (Karar) as also the devolution of rights and the extent thereof as per Ext. A1 falls to be considered in this appeal. The further question as to whether the subsequent deed, Ext. B1 executed by Kalyani Amma is valid and proper in view of the terms and conditions contained in Ext. A1 necessarily arises for adjudication. As to whether the said document, even if legally competent, is vitiated by the exercise of undue influence is another important and vital aspect or question that arises for consideration. This is a fundamental question. At the time of arguments, in the second appeal and after intimation to both counsel in exercise Of the powers vested in this court as per Section 100(5) Proviso of the Code of Civil Procedure, I heard them on the larger and more vital or fundamental question involved in this case as to whether Ext. B1, gift deed, is vitiated by undue influence. It is covered by question (B) formulated in paragraph 19 of the appeal memorandum.

5. Counsel appearing for both sides argued the matter rather elaborately. The appellants' counsel contended that the question as to whether Ext. B1 is vitiated for the various reasons stated by the plaintiffs has not been adverted to or adjudicated in a proper perspective by the courts below. The following facts were highlighted. Kalyani Amma was aged 84 at the time of Ext. B1 document. She knew to read and write. She was in an advanced age. Chathu Kurup alone was residing with her and the other two sons, the plaintiffs, were away. Kalyani Amma had no animosity towards the plaintiffs. She was treating all the sons alike. The stamp papers for the document were purchased on 24-3-1969 in the name of one Sankaran Nambiar, who has not been examined in the case. The date of the document is 21-7-1969 and was registered on 13-8-1969. There is no material to show that a draft was ever prepared for the document. The scribe was not examined as a witness. There is no evidence to show that the contents of the document were either read or brought to the notice of the executant. The Sub Registrar who registered Ext. B1 has not been examined. The prior title deeds have not been mentioned. Ext. B1 contains wrong recitals. The fetters in dealing with the property mentioned in Ext. A1 have been ignored totally.

That Kalyani Amma has only qualified rights in Ext. A1 was not borne in mind nor does it appear to have been adverted to in the execution of Ext. B1 document. By Ext. B1 Kalyani Amma gave the entirety of the property to Chathu Kurup, even without reserving any right for her maintenance. The document was registered in the house and the application for house registration is not before court. It is common ground that Chathu Kurup was residing with Kalyani Amma and taking care of her. D.W. 1 one of the attesters to the document, Ext. B1, is a stranger, who did not know Kalyani Amma. The document is seen returned to the second identifying witness Sankara Kurup who was not examined. According to counsel, these circumstances are telling. In brief, the result is that Kalyani Amma who was really of an advanced age, purported to give away her entirety of properties to Chathu Kurup, one of the sons, who was looking after her to the exclusion of other, even without reserving anything for her maintenance. According to counsel, the cumulative effect of the salient features stated above, will demonstrate that the document Ext. B1, is "unnatural and immoderate" and was brought about by undue influence and fraud. The observations in the decisions reported in *Inche Noriah Mate Mohamed Tahir v. Shaik Allie bin Omar bin Abdulla Bahashuan* (AIR 1929 PC 3) at p. 6, [Dubash D.K. Ahmad Ibrahim Sahib Vs. A.K.R.M.K. Meyyappa Chettiar and Others,](#) [Lakshmi Amma and Another Vs. Talengalanarayana Bhatta and Another,](#) and the observations in an unreported decision of a Division Bench of this Court in *Chakkalath Ammalu Amma v. Chakkalath Madhavi Amma* (A.S. No. 73 of 1979) dated 14-1-1983 were pressed into service. Counsel argued that the courts below, without adverting to the salient features highlighted above, which are evident approached the question only in a rigid manner and in the light of the guide-lines indicated in *Reghunath Prasad Sahu v. Sarju Prasad Sahu* (1924 PC 60) which was reiterated in [Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta,](#) [Ladli Prasad Jaiswal Vs. Karnal Distillery Co. Ltd. and Others,](#) and other cases. It was argued that in order to decide as to whether Ext. B1 is vitiated as having been brought about by undue influence, the entirety of facts and circumstances should be looked into and the approach or guidelines indicated in *Raghunath Prasad Sahu's* case (1924 PC 60) is not the sole approach and the question can be viewed in another or different way, reckoning the salient features stated above as was done by the Supreme Court in [Lakshmi Amma and Another Vs. Talengalanarayana Bhatta and Another,](#) . It is true that in the unreported decision in A.S. No. 78 of 1979, to which I was a party, the decisions reported in [Lakshmi Amma and Another Vs. Talengalanarayana Bhatta and Another,](#) , and in [Dubash D.K. Ahmad Ibrahim Sahib Vs. A.K.R.M.K. Meyyappa Chettiar and Others,](#) were referred to, as indicating that an alternate or different way of approach to the question as suggested, is also possible and it was held: It is no doubt true that the matter can also be viewed in the alternate way suggested by the appellant's counsel.

6. A Division Bench of this court in *Narayana Bhatta v. Narasimka Bhatta* (1964 KLT 497) quoted the observations of the Judicial Committee of the Privy Council in AIR

1924 60 (Privy Council) and other leading cases on the subject and held as follows (The head-note clearly summarises the position):

The fact that the provisions in a document are so unconscionable that no right-minded man in his senses would have executed a document of that type is presumptive evidence of undue influence. Under S. 16 of the Contract Act if it is proved that a person was in a position to dominate the will of another and that the provisions in the document executed by the latter are unconscionable, there is a presumption that the document was executed under undue influence and the burden of proving that it was not so "is upon the person who takes the benefit under the document. It is an essential condition, for the application of S. 16 that one party should be in a position to dominate the will of the other. No further question will arise until this is proved. The test to decide whether the provisions in a particular document are unconscionable is whether a right-minded person would have executed a document of the type. In this case the burden of proof as regards the undue influence is upon the plaintiff. There is no case that the first defendant was in a fiduciary relationship with the plaintiff. Relationship of a grand-son to his grand-father cannot be said to resemble that relationship. Therefore that fact cannot give rise to a presumption of undue influence unless there is sufficient evidence to establish a general case of domination. In the absence of any special relation from which influence is presumed, the burden of proof is on the person impeaching the transaction, and he must show affirmatively that pressure or undue influence was employed.

The mere fact that the first defendant was helping the second-defendant in managing the affairs of the plaintiff is no reason for holding that the 1st defendant was in a position to dominate the will of the plaintiff especially when it is seen that the plaintiff was a clever man with a strong will.

The case of undue influence is really inconsistent with the case of want of mental capacity. The particulars of undue influence must be set forth in the plaint in sufficient detail so as to enable the defendant to meet the case of the plaintiff.

Even though the plaintiff did not provide for a right of residence for his wife in the house, that would not show that he made an improvident settlement of his properties. But the court is not entitled to take into account these matters as it is a matter exclusively for the owner of the properties. He has full domination over his properties and as to whom he should give them is a matter entirely within his discretion. Even if he made an improvident settlement of his properties the court cannot relieve him from that. The plaintiff may have developed affection for the 1st defendant and the fact that he voluntarily gave the bulk of his properties to the 1st defendant cannot be the ground for setting aside that document if there is no proof of undue "influence by him. There is no presumption that because the bulk of the properties were given to the 1st defendant the plaintiff was acting under undue influence of the 1st defendant.

The said decision was taken in appeal before the Supreme Court and in the decision reported as [Lakshmi Amma and Another Vs. Talengalanarayana Bhatta and Another](#), the Supreme Court reversed the aforesaid decision of this Court and observed at page 1369 (paragrah 5):

The first noticeable feature is that the deed of settlement on the face of it was an unnatural and unconscionable document. Narasimha Bhatta made negligible provision for his wife who was his third wife, the first two having died before he married her. She was left mainly to the mercy of respondent No. 1. Admittedly there was a residential house and no provision was made regarding her right to reside in that house till her death. Apparently there was no reason why he should have left nothing to his two daughters or to his other grand-children and given his entire estate to only one grand-son namely respondent No. 1.

The circumstances leading to the execution of the deed may next be considered...

It is also difficult to comprehend how the High Court thought that the terms of Ext. B-3 were not unconscionable enough as to raise a fair amount of suspicion in the matter. In view of the unnatural character of the dispositions made in Ext. B-3 coupled with the other facts and circumstances mentioned above the burden shifted to respondent No. 1 to establish that Ext. B-3 was executed by Narasimha Bhatta voluntarily and without any external pressure or influence while he was not of infirm mind and was fully aware of the dispositions or gifts which he was making in favour respondent No 1...

The dispositions which were made by Ext. B-3, as already pointed out before, were altogether unnatural and no valid reason or explanation has been given why Narasimha Bhatta should have given everything to respondent 1 and even deprived himself of the right to deal with the property as an owner during his life-time. All these facts and circumstances raised a grave suspicion as to the genuineness of the execution of the document Ext. B-3 and it was for respondent No 3 to dispel the same.

The decision in *Inche Noriah binte Mohamed Tahir v. Shaik Allia bin Omar bin Abdulla Behqshuan* (AIR 1929 PC 3) is to the following effect:

Where the donor was a feeble old woman, unable to leave the house, relying entirely upon the donee, her nephew, for everything even for her food and clothes leaving the management of her affairs to him, so that she had no knowledge of her own affairs or as to the value of her properties, and so that she was totally and completely in the donee's hands.

Held: that the relations between the donor and donee were sufficient to raise the presumption of the influence of the donee over the donor and to render it incumbent upon him to prove that the gift was the spontaneous act of the donor acting under circumstances which enabled her to exercise an independent will, and

which justified the Court in holding that the gift was the result of the free exercise of her will.

So also in *Dubash D. K. Ahmad Ibrahim Sahib v. A.K.R.M.K. Mayyappa Chettiar* (AIR 1940 Madras 285) delivering the judgment of the Bench, Varadachariar J. observed at page 289:

It was contended by the learned counsel for the respondents that it is one thing to prove the existence of the relationship making undue influence possible but it is another thing to ask the Court to hold that undue influence has been exercised. But as observed by Lord Macnaghten in 1911 AC 120 at p. 137:

It may well be argued that when there is evidence of over powering influence and the transaction brought about is immoderate and irrational, proof of undue influence is complete.

The same principle is clearly implied in cl. 3 of S. 16, Contract Act. which provides.

Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie on the person in a position to dominate the will of the other.

7. The above decisions indicate the alternate method of approach in adjudicating as to whether in a given case a deed is vitiated as having been brought about by undue influence, fraud, etc. The courts below have not adjudicated the matter bearing in mind the aforesaid alternate approach also. The facts and circumstances highlighted by the appellants' counsel and enumerated in Para 6 should be evaluated in the light of the relevant evidence and legal position before entering a finding as to whether the document Ext. B1, is vitiated by undue influence or fraud. This is a matter to be adjudged by the courts on an appraisal of all relevant facts and circumstances. The courts below have not done so. This is a clear legal error. The adjudication, on this vital question by the courts below fails to take into account relevant materials and also totally ignored a different and alternate approach indicated by the decisions referred to above. So, in the circumstances, the finding that Ext. B1 is not vitiated by undue influence or fraud and the resultant conclusion that the plaintiffs' claim should fail, cannot hold good. The matter has not been dealt with in accordance with law. This necessitates a fresh appraisal and adjudication by the courts below on this vital and main issue that arose for consideration in the case.

8. The appellants' counsel attacked the decision of the courts below on other aspects as well. It was contended, that Ext. A1 partition deed was not properly interpreted or understood by the courts below. According to counsel, Ext. A1 is labelled a "partition deed". The "label" given to the document is not without



significance, and is prima facie a valuable indication, as held by Raman Nair, J. in Hussain v. Ali (1961 KLT 1033). The document should be construed as a whole, fairly and reasonably. It is settled law that the true scope and import of the document, can be understood only by the words used therein. The words are not to be interpreted in the presumed intention of the parties. The law in this regard has been stated in the decision reported in [Delhi Development Authority Vs. Durga Chand Kaushish](#),; and also in Hussain Thangal v. Ali (1961 KLT 1033) (1042). If there is inconsistency between two provisions in the document, it is trite law that the earlier clause will prevail in the case of gift, and the last clause will prevail in the case of testament or will. But, inconsistency should not be presumed or imputed to a document, ordinarily. On reading the document as a whole, the attempt should be to harmoniously construe the different clauses of the deed. Even then, if it appears that there is inconsistency between the different clauses in the document, the attempt of the court should be to find out which is the "leading provision" and which is the "subordinate provision" in the document, so that the subordinate one, must give way to the leading provision. Such a principle is applicable in the case of construction of statutes. (See Halsbury's Law of England. Third Edition - Vol. 36. page 395/396 (para 594). There is no reason why the said principle should not apply in the case of construction of deeds as well. It is seen that the courts below have totally ignored the above salient principles in construing Ext. A1. Holding that by the earlier clauses in Ext. A1, Kalyani Amma has been given absolute right over B schedule items 2 and 3, the courts have come to the conclusion that the fetter or limitation imposed by subsequent clauses are invalid in view of the provisions of the Transfer of Property Act. The entirety of the document should have been considered and an attempt should have been made in the first instance, if possible, to understand all the clauses harmoniously. It was not done. The courts failed to notice that Ext. A1 is a "partition Karar". In construing such a document, can it be said that there is "transfer" as contemplated by the Transfer of Property Act? The decision of the Madras High Court in Gutta Radhakrishnayya v. Gutta Sarasamma (ILR 1951 Madras 607 = AIR 1951 Madras 213) cited with approval by the Supreme Court in [Commissioner of Income Tax, Gujarat Vs. Keshavlal Lallubhai Patel](#), and also the later decision of the Supreme Court in [The Commissioner of Gift Tax, Madras Vs. N.S. Getty Chettiar](#), are very relevant in this context and they point out that a partition is not a transfer in the strict sense. Another aspect in the alternative, that was highlighted and which will arise for consideration is, whether Ext. A1 can be viewed as a family arrangement, bearing in mind the principles laid down in [Jatru Pahan and Another Vs. Mahathma Ambikajit Prasad and Another](#), . On all such aspects, bearing on the construction of Ext. A1, the courts below have not borne in mind the principles stated herein above. The reasoning and conclusion of the courts below disclose errors of law on these vital aspects arising in the case. I hold that the findings in this regard are not in accordance with law and the entire matter requires reconsideration.

9. The counsel for the appellants pleaded that the provisions of Section 4 of the Partition Act should have been considered by the courts below. Counsel referred to C.M.P. No. 24952(83 filed in this court and prayed for. appropriate reliefs in that regard. The decisions reported in AIR 1941 Pata 4, AIR 1938 Patna 13. AIR 1930 Allahabad 3, [Bharat Singh Vs. Rishi Kumar and Others](#), , AIR 1956 Orissa 56, and AIR 1971 Orissa 127 were relied on in this connection. I should state, that in the view I have taken regarding the other vital issues that were posed before me, that the courts below have not considered the matter in accordance with law and so the entire matter necessitates a fresh consideration by the courts below, I do not think that C.M.P. No. 24962 of 1983 requires any consideration at this stage. I do not propose to deal with that aspect. I hold, for the reasons stated in paras 8 & 9 herein above, that the judgments and decree of the courts below are unsustainable and deserve to be vacated or set aside. I hereby do so and remit the matter to the trial Court, Subordinate Judge"s Court, Badagara for a fresh consideration according to law. The Suit, O.S. No. 46 of 1973 will be posted before the Sub Court, Badagara for hearing after remit on 1-10-1984. There shall be no order as to costs in this appeal.