Janu Vs Cheeru

Court: High Court Of Kerala

Date of Decision: June 24, 1960

Acts Referred: Trusts Act, 1882 â€" Section 81, 82

Citation: (1960) KLJ 970

Hon'ble Judges: T.K. Joseph, J; M.S. Menon, J

Bench: Division Bench

Advocate: V.P. Gopalan Nambiar, for the Appellant; K. Kuttikrishna Menon, for the Respondent

Final Decision: Allowed

Judgement

Joseph, J.
The decree from which this appeal is brought is one partially allowing a suit for partition. The plaintiff-appellant is the widow of

one Kunhikanaran who died issueless in June 1944. The plaintiff''s case was that the eight items of immovable property which form the subject-

matter of the suit belonged to Kunhikanaran and that the plaintiff and Kunhikanaran''s mother (the defendant in the suit) were entitled to the

properties in equal shares. The defence was that all the items were acquired by Puzhakkal Kannan, the husband of the defendant and father of

Kunhikanaran. Documents in respect of items 2 to 6 had been taken by Kannan in the name of one Kelappan who was his kariasthan and the

latter had conveyed those items to Kunhikanaran for and on behalf of Kannan. Kelappan and Kunhikanaran were only two benamidars of Kannan

and they had no title. The court below found that items 1, 7 and 8 belonged to Kunhikanaran and that the plaintiff was entitled to a decree for

partition in respect of the same. As regards items 2 to 6, the suit was dismissed holding that the same belonged to Kannan. The plaintiff has

therefore preferred this appeal. The defendant has preferred a memorandum of cross-objections to the decree in so far as it allows the suit as

regards items 1, 7 and 8. Though the appeal relates to items 2 to 6, the appellant did not press her case regarding items 2 and 3 and the

respondent did not press the memorandum of cross-objections either. The subject-matter of the appeal has thus become limited to items 4 to 6 in

the plaint schedule.

2. The point for decision is whether items 4 to 6 belonged to Kunhikanaran or his father Kannan. For a proper appreciation of the evidence on this

point, a few facts have to be stated. Kannan was a fairly rich man having been an abkari contractor for a number of years. He died in 1950.

Kunhikanaran was the eldest of his 13 children of whom only 11 were surviving at the time of his death. The plaintiff was Kannan''s niece and she

was married by Kunhikanaran. It is in evidence that Kunhikanaran had some sources of income and the finding of the court below is that he had

some funds. Items 2 to 6 were acquired by Kunhikanaran under Ext. A2 dated 29--6--1934 executed by Kelappan in his favour. Kunhikanaran

was 22 years at that time. Kannan had some right or other in every one of these items included in Ext. A2. At the time of institution of this suit all

the documents of title were in the possession of the defendant. It was held by the court below that in the circumstances of the case possession of

title deeds was not very material, as Kunhikanaran at the time of his death was residing with his parents and his wife was not there at the time of his

death or later. The evidence in the case has to be considered in the light of the above facts.

3. It has been proved that Kelappan was the kariasthan of Kannan or that he was at any rate associated with Kannan in the various transactions

under which Kannan obtained some right to these properties. It is seen from Exts. B32 and B44 that Kelappan deposed on behalf of Kannan as

his litigation agent in an enquiry before the District Registrar, North Malabar. Ext. B34 shows that Kelappan represented Kannan when a

commissioner went to inspect the property involved in O. S. No. 437 of 1930, a suit filed by Kannan. There are several documents in this case,

such as Exts. B5, B1O, B17, etc., taken by Kannan in which Kelappan figured as an attestor, Kelappan died 8 or 9 years before the institution of

this suit and his son who was examined as D. W. 11 stated that Kelappan was the kariasthan of Kannan, that the latter had acquired some

properties in the name of Kelappan, that Kelappan had only four or five items of immovable property and that the plaint items did not belong to

him. The plaintiff relies on a deposition Ext. A18 given by Kannan in Calendar Case No. 435 of 1940 on the file of the Second Class Magistrate,

Badagara. This was a case filed by Kannan against Kelappan''s brother Kunhappu who was alleged to have committed theft of cocoanuts from a

garden belonging to Kannan. Kannan had obtained a melpattom from Kelappan in respect of this property and the defence as seen from Ext. A18

was that Kannan was only a benamidar of Kelappan and that the latter had no right to grant a melpattom. The trend of cross-examination was to

establish that Kannan and Kelappan had mutual trust and that they figured as benamidars of each other. When cross-examined in that case,

Kannan stated that he had no recollection of having purchased any property through court or otherwise in the name of Kelappan. It is urged that

this admission cuts at the root of the defence case that Kelappan was a benamidar of Kannan, as some of the properties covered by Ext. A2 were

acquired in Kelappan''s name by the court sale and others by private transactions. In the circumstances of the case we are not prepared to attach

much importance to this statement. There is no unqualified admission in Ext. A18 that Kelappan had not acquired any property as benamidar of

Kannan. Kannan appears to have been prevaricating in cross-examination. Even assuming that this amounts to an admission, it does not conclude

the question as an admission is not conclusive. The above admission in Ext. A18 is insufficient to dislodge the inference following from the evidence

in the case that Kelappan was a trusted karisthan or dependent of Kannan.

4. Though the appellant does not press the case regarding items 2 and 3, the evidence relating to the same is relevant as items 2 to 6 were together

conveyed to Kunhikanaran under Ext. A 2. Kannan had originally an oral lease of item 2 in 1918. He took an assignment of a lease-hold right over

the same under Ext. B5 from one Katheesumma, her brother and mother. Katheesumma also acted as guardian of her minor children. Kelappan is

an attestor to Ext. B5. It is seen that Kelappan had taken a melcharth (Ext: B6) of this property from her in 1924. Seven years later another

assignment Ext. B9 was obtained in Kannan''s name from the parties who were minors on the date of Ext. B5. Kannan leased a portion of this

property to one Chekkotti and Ext. B10 is the marupat executed by Chekkotti. Kelappan is seen to have attested Ext. B10. Again in 1945

Kannan took a renewal deed Ext. Bll from the jenmi for this and another item of property. Much weight need not be attached to Ext. Bll as it came

into existence after Kunhikanaran''s death. The significant point about these transactions is that Kelappan who took Ext. B6 was an attestor to the

earlier assignment deed Ext. B5 and the later marupat deed Ext. B10 in favour of Kannan. It is unlikely that Kelappan who was acting as

Kannan''s agent in various transactions would have entered into competition with the latter and taken Ext. B6 for his personal benefit. Although

Kelappan took Ext. B6 in 1924 he does not appear to have taken any step to recover possession of the property from Kannan. He assigned the

melcharth right in item 2 to Kunhikanaran under Ext. A2 in 1934 and the latter also has not attempted to recover possession from Kannan. The

plaintiff has no case that there was any estrangement between Kannan and Kunhikanaran. Their subsequent conduct also supports the defence

case. Kannan appears to have been a shrewd businessman and he must have taken Ext. B6 in the name of Kelappan in order to protect his

interests against any possible attempt of the minors to question the assignment deed Ext. B5. So far as this item is concerned, it is clear that

Kelappan was only acting as benamidar of Kannan. The case regarding item No. 3 is also similar. Kanpan was in possession of this property from

1917 having obtained kanam kuzhikanam right from one Matha under Ext. B15. Matha had mortgaged the property to one Raman and the latter

released the mortgage right to Kannan on 30--3---1921 under Ext. B16. Kelappan was one of the attestors to this deed. There was an edajenmi,

one Ayisumma, whose rights he could not obtain. A melcharth of this property was taken in the name of Kelappan and Ext. B45 dated 25--6--

1928 is a copy of this melcharth deed. The respondent''s case is that Kannan got this melcharth in Kelappan''s name in order to protect his interest.

This appears to be the case because Kelappan did not seek to enforce his rights under the melcharth against Kannan. Dw. 6 is one of the attestors

to Ext. B45. He deposed that Sankunni Marar who granted the melcharth was his uncle''s son and that Kelappan and Kannan together went to

Sankunni Marar for taking Ext. B45. Sankunni Marar''s son is Dw. 9 who deposed that Kannan asked his father for the melcharth and that he

took it in Kelappan''s name. The evidence of these witnesses and the circumstances of the case fully support the defence case that Ext. B45 was

taken by Kelappan as benamidar of Kannan. Thus it is clear that so far as items 2 and 3 were concerned Kelappan had no title which he could

convey to Kunhikanaran under Ext. A2. Though the appellant does not press her case regarding items 2 and 3, the fact that Kelappan assigned

these as well as items 4 to 6 to Kunhikanaran under single transaction evidenced by Ext. A2 is a fact of considerable significance.

5. The case regarding item 4 may now be considered. The jenmi of this property was one Govindan Adiodi under whom Thengil Andi had kanam

kuzhi- kanam right. Kantian had obtained a decree against Andi for money in O. S. No. 161 of 1931 charged on his kanam kuzhikanam right.

There was another unsecured decree against Andi obtained by Thalaikaran Andi in O. S. No. 240 of 1930. An assignment of this decree was

obtained in the name of Kunhikanaran as per Ext. B33 dated 2-12-1931. Notwithstanding the assignment, the original decree-holder proceeded

with execution and the property was sold reserving the right of Kannan and it was purchased by Kelappan. Ext. Al 1 is the sale certificate.

Kunhikanaran does not appear to have done anything pursuant to the assignment of the decree. He never executed the decree, but on the other

hand we see that the original decree-holder executed the decree even after the assignment and got the property sold through court. Though

Kelappan obtained the sale certificate, he too did not seek recovery of possession. The case of the defendant is that the purchase in court auction

by Kelappan was for and on behalf of Kannan and this is supported by the evidence in the case. The stamp paper for the sale certificate Ext. All

was purchased by Kannan and not Kelappan. Kannan already had a decree charged on this property and an assignment of the decree in O. S.

No. 240 of 1930 had been obtained in the name of Kunhikanaran. Still it was the original decree-holder who executed the decree and brought the

property to sale. As pointed out by the learned Judge the idea appears to have been to enforce the assignment in case Kannan could not purchase

the property in court sale. Once the object was achieved by purchasing the property in Kelappan''s name there was no need for Kunhikanaran to

execute the decree or for Kannan to put the decree in O. S. No. 161 of 1931 in execution. There is no evidence either that Kelappan discharged

the charged decree in favour of Kannan.

6. Items 5 and 6 go together. Arakkal tarwad which had a kanam kuzhikanam right in these properties executed a simple mortgage Ext. B17 in

favour of Kannan on 16--1--1923. Kelappan was an attestor to this deed. On 19--1--1926 Kannan took a mortgage with possession Ext. B18

from Arakkal tarwad for a sum of Rs. 375/-inclusive of the amount under Ext. B17, On the same day Arakkal tarwad took the properties back on

lease under Ext. B19. Thereafter the jenmi of the properties sued Arakkal tarwad for recovery of dues under the kanam kuzhikanam transaction.

Kannan was impleaded as the second defendant in that case. Items 5 and 6 were sold in execution of the decree in that case and were purchased

by Kelappan. Ext. A10 is the sale certificate and the same is engrossed on stamp paper purchased by Kannan. Kelappan does not appear to have

taken any step to recover possession of the properties from Kannan. In view of the relation between Kannan and Kelappan at that time it is

unlikely that Kelappan was only competing with his master Kannan to secure these properties for himself.

7. So far as the acquisition of these properties in Kelappan''s name is concerned there is no direct evidence regarding the source from which

consideration proceeded for purchasing items 4 to 6 in court sale. However there is clear evidence that the stamp papers for the sale certificates,

Exts. A10 and Al 1 were purchased by Kannan. This shows that at least part of the consideration must have proceeded from Kannan. If Kelappan

had utilised his own funds for purchasing these properties in court sale, it is difficult to explain why he did not himself purchase the stamp papers.

The evidence and circumstances referred to earlier are such as to lead to the inference that the whole consideration must have proceeded from

Kannan. As pointed out by the Federal Court in Gangadhara Ayyar v Subramonia (A. I. R. 1949 F. C. 88) the real test in such a case is the

source whence the consideration came and when it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the

case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. Surrounding circumstances such as

the relation between Kannaa and Kelappan, the fact that Kannan had some rights in the properties at the time of the court purchase by Kelappan

and that he had a motive for strengthening his title, and the subsequent conduct of the parties especially Kelappan''s indifference in enforcing his

rights under the court sales clearly indicate that Kelappan was a benamidar of Kannan and that the title to the properties was vested in the latter.

8. Till now we were considering the question whether Kelappan was a benamidar of Kannan. The question remains whether Kunhikanaran to

whom Kelappan conveyed the properties under Ext. A2 was also a benamidar or whether it was intended that the title should vest in

Kunhikanaran. The consideration under Ext. A2 is Rs. 500/- of which Rs. 450/- is stated to have been adjusted towards the sum due from

Kelappan under a promissory note and the balance paid in cash. Learned counsel for the appellant brought to our notice the fact that

Kunhikanaran had independent means and that he was entering into transactions from 1929 when he was only 17 years old. There are also the

admissions of P. Ws. 1 and 2. This by itself is insufficient to hold that Kunhikanaran paid consideration to Kelappan for obtaining Ext. A2. We

have already found that Kelappan was only a benamidar of Kannan, and considering the nature of the relation between Kannan and Kelappan at

that time it is unlikely that Kelappan would have sold the properties to Kunhikanaran who was Kannan''s eldest son. The details of the promissory

note transaction referred to in Ext. A2, such as the date, the principal sum borrowed, etc. are not available. The subsequent conduct of

Kunhikanaran in respect of items 2, 3 and 4 is also inconsistent with the case that title was intended to be vested in him as a result of Ext. A2.

Items 5 and 6 stand on a different footing. While referring to items 2 to 4 earlier we have shown that Kunhikanaran had no intention to assert the

rights obtained by him in respect of these properties. As regards items 5 and 6 he took a renewal deed Ext. A13 from the jenmi on 19--5--1942

and the case regarding these items will be considered later. In view of the surrounding circumstances we are unable to accept the plaintiff''s case

that Kunhikanaran obtained title to the properties under Ext. A2.

9. It is necessary at this stage to deal with an argument advanced by the appellant''s counsel that u/s 82 of the Indian Trusts Act the defence had to

prove not merely that consideration passed from Kannan but also that Kannan did not intend to benefit Kunhikanaran. In other words, the

argument is that the burden of showing that Ext. A2 is not a gift is on the defence. Section 82 of the Indian Trusts Act is in the following terms:

Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not

intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person

paying or providing the consideration.

Nothing in this section shall be deemed to affect the Code of Civil Procedure, section 317, or Act No. XI oflS99 (to improve the law relating to

sales of land for arrears of revenue in the lower Provinces under the Bengal Presidency), section 36

The clause ""and it appears that such other persons did not intend to pay or provide such consideration for the benefit of the transferee"" is relied on

as indicating the rule regarding onus of proof in such cases. No doubt, this argument gains some support from the decisions in Raj Kunwari v

Maharaj Kunwar Kunwari(A. I. R. 1925 Oudh 243) and Mt. Sardar Jahan v Mt. AfzalBegam (A. I. R. 1941 Oudh 288). In the latter case Yorke

and Agarwal JJ., after referring to the decision in Raj Kunwari v Maharaj Kunwar Kunwari observed :

As this section is worded, it appears that in order that a transfer should be held to be benami and the transferee compelled to hold the property for

the benefit of the person who has paid or provided the consideration, not only must it be shown that the consideration was paid or provided by

another person but it must also be shown that ''it appears that such other person did not intend to pay or provide such consideration for the benefit

of the transferee'', that is there is some burden on the person claiming that a transfer was benami to show, by evidence or by circumstances or by

subsequent conductor however it may be possible to show anything of the kind, that there was no intention on the part of the person who paid or

provided the consideration to do so for the benefit of the transferee.With great respect, we are in full agreement that section 82, Trusts Act, though

it may not have really altered the burden of proof, has made it much clearer than it was before that the burden of proof of establishing all the facts

necessary to lead to the inference that a transfer was benami lies upon the person asserting it to be so.

The question came up before the Allahabad High Court in Siddiqa Begam v Abdul Jabbar (A. I. R. 1942 Allahabad 308). Yorke J. who was a

member of the Bench which decided the case, declined to follow his decision in "Mt. Sardar Jahan v Mt. Afzal Begam (A. I. R. 1941 Oudh 288)

and observed:

Learned counsel for the respondent has also sought to place some reliance on a case decided by a Bench of the Chief Court of Oudh, of which I

was a member, namely, 16 Luck. 341. His contention is that S. 82, Trusts Act, has altered the burden of proof in this matter and it is no longer

sufficient merely to show that the fund from which the purchase money proceeded belonged to someone other than the person in whose name the

purchase was taken in order to lead to an inference that that person is only a benamidar. In that case the result of our examination of S. 82, Trusts

Act, and its effect upon the question of the burden of proof in connection with alleged benami transaction was stated in the following terms.

Referring to a quotation from the headnote of 1 O. W. N. 710 which ran as follows :

A party cannot be relieved from the burden of proving the benami nature of the transaction by merely showing that a large proportion of the

consideration was paid by the real purchaser.S. 82, Trusts Act, appears to throw the burden of proving that a transaction is benami on the party

alleging it, whereas previously to that enactment the position may well have been that plaintiff who came into court with the proof that he had paid

the consideration money himself would have been able to throw the burden of proving that the transaction was not benami on the other side.

We said:

With great respect we are in full agreement that S. 82, Trusts Act, though it may not really have altered the burden of proof, has made it much

clearer than it was before that the burden of proof of establishing all the facts necessary to lead to the inference that a transfer was benami lies upon

the person asserting it to be so.

In point of fact it has been laid down by their Lordships in earlier cases that the burden of proof that a transfer is benami does lie in the first

instance upon the person asserting it to be so, but that burden is discharged upon the said person showing that the purchase money was provided

by him. Section 82, Trusts Act, is in the following terms:

This section puts in statutory form the proposition laid down many years earlier in 6 M. I. A. 53 and the only question was whether c1. (2) made

any difference to the legal position as it stood before the enactment of this section. I do not think that I should have felt myself in any way

embarrassed by the proposition which was laid down in the Oudh case to which I was a party in view of the circumstances of the present case, but

in any case in view of a subsequent decision of their Lordships of the Privy Council which was not brought to the notice of the Bench before whom

16 Luck. 341 was argued, 1 am satisfied that in so far as we felt that S. 82, Trusts Act, had in any way altered the legal position we were under a

misapprehension. The question whether S. 82, Trusts Act, affected the matter was considered by their Lordships in 47 I. A. 275. In argument it

was said about S. 82 that it did not affect the matter as it left open the question of intention, and their Lordships remarked at p. 280: ""The

provisions of Ss. 81 and 82, Trusts Act, do not appear to affect this case"". I therefore take it that c1. (2) of the section does not have any bearing

on the burden of proof and does not make it necessary for a person who alleges that the consideration for a transfer was paid or provided by

someone other than the nominal transferee to show further that there was no intention upon the part of the person providing the money to pay or

provide it for the benefit of the transferee

Braund J. who concurred, observed:

Sir Wazir Hasan on the plaintiff''s behalf has very properly relied on that long line of authorities of the Judicial Committee, starting with 6 M. I. A.

532 and continuing up to and beyond 47 I. A. 275 in which their Lordships have held that in the case of a ''benami'' transaction, in the sense of a

real transaction (as the present one admittedly is), the ''benamidar'' becomes a trustee holding on a resulting trust which ''differs but little, if at all,

from the general rule of English law upon the same subject'', with the exception that the English equitable doctrine of the presumption of

advancement has never been admitted into the law of India. The law, therefore, is in my view, too well settled by the highest authority now to be

challenged, that, in the case of a real, as opposed to a purely fictitious, purchase by a father in the name of a son in which the father admittedly

provided the purchase money, a resulting trust in all cases arises in the father''s favour, unless there is positive evidence of an advancement or gift.

And> if a gift is alleged by the son in whose name the transaction stands, it is for him to prove it. But Mr. Banerji, on the defendants'' behalf has

referred us to S. 82, Trusts Act of 1882, which he says, has entirely altered the law, whatever it may have been prior to 1882. He contends that,

inasmuch as that section provides that the Court not only has to be satisfied that the purchase money was provided by a third party, but also that

the third party had no intention of making a gift of it to the actual transferee, the burden of proving the latter negative fact has been thrown on to the

person who seeks to deny that the actual transferee is also the beneficial owner. This at first sight is alarming, as if it is true, it appears to my mind,

not only to obliterate from Indian law the whole doctrine of the resulting trust, which the Privy Council has in many cases acknowledged to exist in

India, but also to introduce, in much extended form, the doctrine of advancement, which the Privy Council has with equal regularity said does not

exists in India.

In my opinion, S. 82, Trusts Act, does not, on its true construction, require any such drastic change in the law. When considered carefully, it, to my

mind, says no more than that the Court has to be satisfied of two things before a resulting trust can be declared; first that someone other than the

actual transferee provided the purchase money, and secondly that that person did not intend the money to be a gift. It does not say how the Court

is to be satisfied of this latter fact and still less upon whom the onus of proving it is to lie. The position, therefore, is that, having arrived at the

conclusion that the purchase money was provided by someone other than the transferee, the court has to consider whether that person intended it

as a gift or not. It is at that point that the established doctrine of the resulting trust at once comes into full and immediate play, and, if there is no

other evidence in the case, that doctrine, as the Privy Council has pointed out, must apply. In order to displace it, it becomes necessary, therefore,

for the acutual transferee to prove, if he can, that the money was intended as a gift. The position is, therefore, wholly unaltered by S. 82, Trusts

Act. I regreat that, with great respect, I cannot agree with the conclusion reached by the Chief Court of Oudh in 16 Luck. 34 i. If I may say so,

that case, in my opinion, overlooked that the moment the fact was proved that the purchase money was not provided by the transferee, the

doctrine of the resulting trust at once, and automatically, applied, unless the opposite intention was proved. It is right to say that in that case 47 I.

A. 275 (ubi supra) in which the same argument based on S. 82, Trusts Act, was advanced and rejected by the judicial Committee, was not

brought to the notice of the learned Judges who decided it"".

Section 82 of the Indian Trusts Act, if we may say so with respect, has been correctly construed in the above decision, and we decline to follow

the decisions of the Oudh Court on that point.

10. It was also contended that the rule that the equitable principle of the presumption of advancement in English law does not apply to India (which

was first laid down over a hundred years ago in Gopeekrist Gosain v Gungapersaud Gosain (6 M. I. A. 53) requires reconsideration in view of the

conditions in modern times. It is true that whatever may have been the position in 1854 and later years, benami transactions are not very common,

at any rate, in this part of the country. However, the rule has been well-established by decisions of the Privy Council and we do not feel justified in

making a departure until the question is authoritatively decided by the Supreme Court. It was pointed out by Sir John Edge, in Lakshmiah Chetty v

Kothandaram Pillai (A. I. R. 1925 P. C. 181):

There can be no doubt that a purchase in India by a native of India of property in the name of his wife unexplained by other proved or admitted

fact is to be regarded as a benami transaction by which the beneficial interest in the property is in the husband, although the austensible title is in the

wife.

This rule applies only when the purchase is ""unexplained by other proved or admitted facts"".

11. There are facts which have special application to items 5 and 6. Reference has been made earlier to a deposition of Kannan (Ext. A18).

Kannan deposed in that case on 5--9--1940 that Arakkal paramba belonged to his son and that property might have been assigned by Chathiath

Kelappan. Arakkal paramba is item 5 in the plaint schedule. Item 6 is a small holding quite close to Arakkal paramba. In fact, three boundaries of

items 5 and 6 are common. Although Kunhikanaran did not exercise his right in respect of items 2 to 4 he took a renewal from the Jenmi under

Ext. A13 in respect of items 5 and 6 on 29-5-1942. After Kunhikanaran''s death the jenmi sued for arrears of dues under Ext. A13 and the

defendants in that suit, as seen from Ext. A34, a copy of the plaint in that suit, were the plaintiff and the defendant in this suit. The suit was decreed

ex parte and Ext. A20 is copy of the decree. This was during the life-time of Kannan and although it was stated in the plaint that the plaintiff was

one of the heirs of Kunhikanaran in respect of items 5 and 6, the allegation was not challenged by his mother. There was a later suit, O. S. No.

729 of 1949, for similar dues and Ext. A35, is copy of the plaint. The plaintiff in this suit was again made a defendant. The defendant who was the

second defendant in that suit did not contend in that suit either, that the plaintiff had no right to the properties. The amount claimed in O. S. No,

729 of 1949 was paid by Gopalan, another son of the defendant. Ext. A50 is a joint petition filed by the plaintiff and the second defendant for

dismissing the suit and Ext. B42 is the decree. The payment of the sum sued for was on 20--4--1951 after the institution of this suit. The fact

remains that the defendant did not deny the plaintiff''s title at that time. This, taken along with Kannan''s admission in Ext. A18, leads to the

inference that he intended the title in respect of items 5 and 6 to vest in Kunhikanaran. It is clear that Kahnan treated these properties as a gift to

Kunhikanaran. The plaintiff is therefore entitled to a share in these items. It follows from what has been stated above that the decree dismissing the

suit in respect of items 5 and 6 must be set aside and the plaintiff given a decree for partition and recovery of one-half of these items also together

with one-half share of the mesne profits; and we order accordingly. The appeal is allowed to the above extent and is dismissed in respect of item 4

in the plaint schedule. The memorandum of cross-objections is dismissed. The plaintiff will get one-half of the costs incurred in this court from the

estate and bear the rest.