

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K. SURENDRA MOHAN

&

THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

FRIDAY, THE 11TH DAY OF DECEMBER 2015/20TH AGRAHAYANA, 1937

RFA.No. 36 of 2004 ()

AGAINST THE JUDGMENT IN OS 433/1997 of PRINCIPAL SUB COURT, ERNAKULAM
DATED 22-09-2003

APPELLANT/IST DEFENDANT.:

A.N. MOHANAN, AGED 51 YEARS, S/O. NARAYANAN,
ALAZHATH HOUSE, KADAVANTHRA P.O. ERNAKULAM VILLAGE
KANAYANNOOR TALUK, KOCHI - 20. ERNAKULAM DISTRICT.

BY ADVS. SMT. VILASINI NAYAK
SRI. V. T. RAGHUNATH

RESPONDENTS/PLAINTIFF AND DEFENDANTS 2 TO 6.:

1. T.A. MINI, AGED 39 YEARS,
D/O. T.K. APPU, THATTASSERIL HOUSE, PERUMANNOOR DESOM,
ELAMKULAM VILLAGE, KANAYANNOOR TALUK,, KOCHI - 36,
ERNAKULAM DISTRICT.
2. A.N. VIDYASAGAR, AGED 42, S/O. NARAYANAN,
ALAZHATH HOUSE, KADAVANTHRA P.O. ELAMKULAM VILLAGE,
KANAYANNOR TALUK, KOCHI - 20, ERNAKULAM DISTRICT.
3. A.N. PRAMEELA, AGED 43,
W/O. GOPALAKRISHNAN, THEKKEDATH HOUSE,, ELAMKUNNAPPUZHA P.O.
VYPEEN, KOCHI TALUK.
4. A.N. SATHY, AGED 53,
W/O. GOPALAKRISHNAN, PATHANIPADAM HOUSE,, AMBELIPPADAM ROAD,
VYTTILA P.O. KOCHI 19,, ERNAKULAM DISTRICT.
5. A.N. VINAYAVATHY, AGED 48,
W/O. GOPALAKRISHNAN, KALATHIL HOUSE, NAYRAMBALAM PO,
VYPEEN, KOCHI TALUK.
6. A.N. JALAJA, AGED 45 W/O. MOHANAN,
THAKARAKANDATHIL HOUSE, PERUVA P.O., KOTTAYAM DISTRICT.

RFA.No. 36 of 2004

R1 BY ADV. SRI.T.SETHUMADHAVAN (SR.)
SRI.K.MOHANAKANNAN
R2-R3 BY ADVS. SRI.S.K.BALACHANDRAN
SRI.V.K.NANDAKUMARAN
SMT.N.D.DEEPA

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 11-12-2015,
ALONG WITH RFA. 158/2005, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

smv

**K. SURENDRA MOHAN
&
SHAJI P. CHALY, JJ.**

R.F.A. No.36 of 2004 & RFA No.158 of 2005

Dated this the 11th day of December, 2015

JUDGMENT

Surendra Mohan,J.

As per a common judgment dated 22.9.2003, the Principal Sub Court, Ernakulam, has decreed O.S.No.433 of 1997 and dismissed O.S. No.466 of 1996. Both these appeals are directed against the said judgment. The appellant in RFA No.36 of 2004 is the 1st defendant in O.S. No.433 of 1997. The appellants in RFA No.158 of 2005 are the plaintiffs in O.S No.466 of 1996 of the Sub Court, Ernakulam. The dispute in both these cases is with respect to the right, title and interest relating to an extent of 5.730 cents of land and the building situate therein.

2. The brief facts of the case are summarized as under:

3. It is an admitted fact that, the property in question originally belonged to one Velu, who is no more. Late Velu was an employee of the Cochin Port Trust. Late Velu and his wife Ammu had no children. Ammu was also insane. As per Ext.A1,

a registered gift deed dated 2.6.1973, late Velu had conveyed the said property owned by him to Smt. Mini, daughter of his sister and Appu. It is stated in Ext.A1 gift deed that, Mini was his adopted daughter aged 7 years and that she was residing with him in his house. Later on, as per Ext.A2 dated 17.7.1981, late Velu had cancelled Ext.A1 gift deed. On coming to know of the execution of Ext.A2 cancellation deed, O.S. No.879 of 1992 was filed by Mini before the Sub Court, Ernakulam for a declaration that, Ext.A2 cancellation deed was invalid. Velu was the defendant in the said suit. Late Velu had contested the suit. However, he died on 10.04.1988 during the pendency of the suit. Thereafter, his brother Narayanan's son Mohanan who claimed ownership rights in respect of the property on the basis of Ext.B45 Will alleged to have been executed by Late Velu on 2.5.1994 contested the suit after he was brought on the party array as the second defendant therein. After trial, the suit was decreed finding that Mini was the adopted daughter of Velu, that Ext.A1gift deed was valid and that the gift had taken effect. Consequently, Ext.A2 cancellation deed was found to be invalid.

Ext.A3 is the judgment in O.S No.879 of 1992.

4. The 2nd defendant, Mohanan, challenged Ext.A3 judgment before this Court in A.S. No.347 of 1995. A Division Bench of this Court by Ext.A5 judgment, dismissed the appeal confirming the judgment and decree of the Sub Court in O.S No.879 of 1992. The dissatisfied 2nd defendant preferred a Special Leave Petition before the Supreme Court. As per Ext.A14 order dated 28.07.1995, the SLP was also dismissed.

5. In the above circumstances, the other children of late Velu's brother Narayanan instituted O.S.No.466 of 1997 seeking a declaration that they had perfected a right of possession over the property by their continuous, uninterrupted and unobstructed possession thereof and alternatively seeking a declaration that the judgment and decree in O.S. No.879 of 1992 was not binding on them for the reason that, they were not parties thereto. A further declaration that Mini was not the adopted daughter of Sri.Late Velu and a consequential injunction against her from interfering with the possession of the property was also sought. Smt.Mini had filed O.S. No.433 of 1997 against

the children of late Narayanan for a declaration of her right, title and interest over the property and seeking recovery thereof on the strength of her title. She had also claimed mesne profits for use and occupation thereof by the defendants in the suit.

6. Both the suits were tried together. Evidence was adduced by both sides and the suits were tried treating O.S.No.433 of 1997 as the leading case. Exts.A1 to A18 documents were marked on the side of the plaintiff and Smt.Mini examined herself as PW1. On the side of defendants, Exts.B1 to B113 documents were marked and Dws.1 to 6 were examined as witnesses. Ext.X1 Property Tax assessment list of the Corporation of Cochin was summoned and marked through the witnesses.

7. The trial court considered the rival contentions of the parties in the light of the evidence adduced. The Court below found that the validity of Ext.A1 gift deed had become concluded by Ext.A3 judgment in O.S. No.879 of 1992. The said judgment having been confirmed by this Court by Ext.A5 judgment in A.S. No.347 of 1995, there was merger. The SLP filed against the

said judgment having been dismissed, the issues have become unimpeachable. The various contentions advanced against the validity of Ext.A3 judgment on the ground that, all the children of late Narayanan had not been made parties to O.S. No.879 of 1992, were repelled. The other contentions regarding the validity of Ext.A1 gift deed were also negated by the Trial Court. Accordingly O.S. No.433 of 1997 has been decreed while O.S. No.466 of 1996 has been dismissed. The decree in O.S. No.433 of 1997 is challenged in RFA No.36 of 2004 by the 1st defendant in the said suit. The other defendants have not preferred any appeal. The decree in RFA No.158 of 2005 is challenged by the plaintiffs. We have heard both the appeals together since they arise from a common judgment.

8. According to Adv.V.T.Raghunath who appears for the appellant in RFA No.36 of 2004, the appellant is the owner of the disputed property having obtained title to the same under Ext.B45 Will executed by late Velu on 2.5.1984. Ext.A1, according to the learned counsel, is a document vitiated by fraud and misrepresentation. Late Velu had no children and his wife

was a mental patient. Taking advantage of the said situation, Appu, father of Mini had influenced late Velu to execute Ext.A1 document settling his property on Smt.Mini. It is the contention of the learned counsel that, Velu had not read or understood the contents of Ext.A1. It was only much later in the year 1981 that, he came to know of the real nature of the transaction. He had immediately executed Ext.A2 cancellation deed of 17.7.1981. The document Ext.A1 being vitiated by fraud and misrepresentation had not taken effect. It also did not convey any title to the beneficiary thereof, namely Mini. Therefore, according to the learned counsel, Mini was not entitled to claim any rights in respect of the property on the basis of Ext.A1. It is further contended that, the judgment and decree in O.S. No.879 of 1992 was not binding on the legal heirs of late Narayanan. Late Narayanan was the brother of Velu. Since Ext.A1 gift deed was non est, the children of Narayanan have succeeded to the estate of late Velu. As legal heirs of late Velu, they ought to have been made parties to the suit, O.S No.879 of 1992. However, only Mohanan who was the appellant in RFA No.36 of 2004 was

made a party to the said suit. In view of the above, the judgment and decree in the said suit though confirmed by this Court, cannot have any effect on the rights of the other children of late Narayanan in respect of the disputed property. The court below has proceeded on the assumption that, the issue regarding the validity of Ext.A1 gift deed stood concluded by the judgments Exts.A3 and A5 as confirmed by the order of the Supreme Court in the Special Leave Petition. According to the learned counsel, it is therefore, necessary to permit the other children of late Narayanan to agitate the issue regarding the validity of Ext.A1, afresh. The counsel has yet another contention that the reliefs sought for in O.S. No.433 of 1997 are barred under Order II, Rule 2, of the Code of Civil Procedure. The learned counsel also attacks Ext.A1 pointing out that, there was no valid adoption of Smt.Mini by late Velu. Since Ext.A1 gift deed was executed, on the presumption that there was adoption, when the adoption fails, the gift would also fail. Therefore, according to the learned counsel, the appeals are only to be allowed or at least remanded for fresh consideration in accordance with law.

9. Adv.V.K. Nandakumaran who appears for respondents 2 and 3 in both the appeals supports the contentions of the counsel for the appellant in RFA No.36 of 2004. Apart from the specific contentions put forward by the counsel for the appellant, it is contended by the learned counsel that, his clients are in possession of the property having been put in possession by late Velu as per Ext.B80, which is a deed of title. According to the learned counsel, after the death of Sri.Velu, the appellant who succeeded to the estate under Ext.B45 Will has also permitted them to be in possession. The net result is that, Smt.Mini has had no possession in respect of the property for the past many years. The continuance in uninterrupted possession of the said persons, according to the counsel, has resulted in their rights being perfected by adverse possession and limitation.

10. Advs.Philip T. Varghese and Monisha appear for the appellants in RFA No.158 of 2005. They also appear for respondents 4 to 6 in RFA No.36 of 2004. According to the learned counsel, since their clients were not parties to O.S. No.879 of 1992, the judgment and decree in the said suit or

the appeal can have no effect on their rights over the property. They are persons who ought to have been impleaded upon the death of late Velu in the said suit. They are persons who have been exercising possessory rights in respect of the property, according to the learned counsel, and they continue to be in possession of the property. The consequence, according to the learned counsel, is that Smt.Mini has neither possession nor title in respect of the property. The counsel also supports all the other contentions advanced by the other parties.

11. Adv.Sri.T.Sethumadhavan, Senior Counsel who appears for Smt.Mini who is the 1st respondent in RFA No.36 of 2004 and the 4th respondent in RFA No.158 of 2005 opposes the contentions put forward on behalf of the other parties. The learned Senior Counsel points out that all parties trace their title to late Velu. In other words, nobody has a dispute regarding the title of late Velu. Therefore, all parties are claiming under the very same person. O.S. No.879 of 1992 was instituted by his client challenging Ext.A2 cancellation deed. Late Velu was the sole defendant in the said suit. Upon his death, the appellant in

RFA No.36 of 2004 was made the 2nd defendant in the suit and the suit was tried. All the different contentions put forward in these appeals had been advanced in the said suit also. The contention that there was no valid adoption of Smt.Mini, the contention that Ext.A1 was vitiated by fraud and that Ext.A2 cancellation deed had no effect on the validity on Ext.A1, the gift having taken effect, were all considered by the Trial Court in Ext.A3 judgment. The suit was accordingly decreed. Though the judgment and decree were challenged by the said defendant before this Court as well as the Supreme Court, he was not successful. After the said proceedings had become final, the present attempt is to re-agitate all the issues afresh. The attempt, according to the learned Senior Counsel, cannot be countenanced. Since Ext.A1 gift deed was found to have taken effect, the bequest in Ext.B45 Will can have no effect on the property, it is contended. According to the learned counsel, since the parties are claiming under the same title, this is a case in which Section 11 of the Code of Civil Procedure squarely applies. Regarding the objection that all the legal heirs had not

been made parties to O.S. No.879 of 1992, Ext.A10, an affidavit filed by Smt.Prameela, daughter of late Narayanan, brother of late Velu is pressed into service by the learned Senior Counsel to point out that her case in another suit O.S No.729 of 1988 before the Munsiff's Court, Ernakulam was that, the appellant in RFA No.36 of 2004 was the sole owner of the property. Therefore, it is contended that, the parties were aware of the earlier proceedings. With respect to the objection raised under Order II, Rule 2, of CPC, the learned Senior Counsel points out that since Ext.A1 had reserved the life interest in favour of late Velu and his wife, he was continuing in possession of the property till his death. Therefore, at the time of filing of O.S.No.879 of 1992, Smt.Mini was not in a position to claim any rights or possession in respect of the property. After the death of Sri.Velu, since the dispute in relation to the validity of Ext.A1 gift deed was pending, no proceedings could be initiated. It was only after the proceedings were finally concluded by Ext.A14 order of the Supreme Court that the present suit was instituted. The cause of action to institute the present suit was not available

at any time during the pendency of O.S. No.879 of 1992. Therefore, according to the learned counsel, the bar under Order II, Rule 2, of CPC has no application to the facts of the present case. For the above reasons, it is contended by the learned counsel that the appeals are only to be dismissed.

12. Heard. As rightly pointed out by the learned counsel, there is no dispute regarding the fact that the property originally belonged to late Velu. It is also not disputed that, late Velu had executed Ext.A1 gift deed conveying his property to Smt.Mini. Thereafter, by Ext.A2 cancellation deed Velu had cancelled Ext.A1 gift deed. It was the cancellation of Ext.A1 that was the subject matter of O.S No.879 of 1992 at the instance of Smt.Mini. During the pendency of the said suit, Velu died and the appellant in RFA No.36 of 2004 was brought on the party array as the 2nd defendant. A perusal of Ext.A3 judgment in O.S No.879 of 1992 shows that the following issues were raised by the Court in the said case:

- “1. Whether the suit valuation and the court fee as calculated by the plaintiff is correct ?
2. Whether the document No.1148 dated 2.6.1973 is valid and whether it has come into force ?

3. Whether the plaint schedule property was possessed and enjoyed by the plaintiff or his father as per document No.1148 ?
4. Whether the plaintiff is the adopted daughter of the defendant?
5. Whether the cancellation deed No.3043 of 1981 is liable to be set aside on any or all of the reasons stated in the plaint ?
6. Reliefs and costs."

13. It is clear from the above that Ext.A1 document that was registered as No.1148 dated 2.6.1973 as well as the validity of Ext.A2 cancellation deed of 1981, another registered document were the main issues that arose for consideration therein. We notice that, the parties had contested the suit seriously with the defendant producing and marking Exts.B1 to B27 documents in support of his case. Pws.1 to 6 were examined on the side of the plaintiff while Dws.1 to 3 were examined on the side of the defendant. It was after considering the evidence on record that the suit was decreed by the Court. On the question of the validity of Ext.A1, the findings of the Sub Court reads as under:

"Now the question to be considered is whether Ext.A1 can be cancelled by a cancellation deed in a

subsequent stage. Admittedly, at the time of executing Ext.A1 the defendant was having an age of 62 years. He was an employee in the Cochin Port Trust who is able to think what is he doing at the time of execution. He repeatedly inserted in the document that Mini in his adopted daughter and he is the guardian and for her benefit he is executing the document in her favour. A reservation is made in Ext.A1 to take the usufructs during his life time as well as the life time of his wife Ammu. Admittedly, Ammu is insane. Defendant is having no children. Therefore, with the full knowledge that he is executing settlement settling this property in the name of his adopted daughter Mini he executed Ext.A1. The original document is in the custody of the plaintiff. The possession of the original document itself would show that the settlement deed was acted upon and come into effect."

14. On the basis of the above finding, that Ext.A1 gift deed had come into effect, it was found that the cancellation deed Ext.A2 was of no consequence at all. As already noticed above, as per Ext.A5 judgment, Ext.A1 has been confirmed. This Court has while considering the question of validity of Ext.A1 held as follows:

"We have heard counsel for the appellant at length. It is evident from the various recitals in Ext.A1 document that

the said deed was executed by the first defendant according to his own volition. The fact that the plaintiff was only 7 years old when Ext.A1 was executed and that the first defendant had no issues and also the fact that the deed itself provides that during the life time of the first defendant and his wife, they are entitled to take usufructs of the property and are entitled to utilise it for the expenses of the education of the minor Mini will go to show that the deed was executed voluntarily and with free mind. The beneficiaries of the deed were the plaintiff and the first defendant and his wife. Since the first defendant and his wife died, it is evident that the plaintiff has become the full owner of the property and is entitled to enjoy the property as a full owner. There is absolutely no evidence in the case to prove that Ext.A1 was executed by fraud or undue influence. Even the recital in Ext.A1 would indicate that Mini was the adopted daughter of the first defendant. The said document also refers to the fact that Ext.A1 was executed in favour of his adopted daughter. In other words, Ext.A1 was executed by the first defendant treating Mini as his adopted daughter. Ext.A1 is therefore, a valid settlement deed not liable to be revoked."

15. On the above findings this Court has found that, the owner of the property late Velu had divested himself of all his rights in respect of the property and that Smt.Mini was vested with the said rights as per Ext.A1. The contention that the

owner was entitled to revoke the gift in the circumstances stipulated by Section 126 of the Transfer of Property Act was also negated by this Court. The above findings have become final. The appellant in RFA No.36 of 2004 having been a party to both Exts.A3 and A5 and being a person who has suffered Ext.A14 order of the Supreme Court in the Special Leave Petition, is not entitled to re-agitate the said contentions in these proceedings.

16. The counsel for the appellant in RFA No.36 of 2004 has taken considerable strain to put forward a contention placing reliance on the decisions reported in **Laxman Basappa v. Ramappa Yallappa Kuchraddi** [ILR (Vol.XXXIL) Bombay 1907, Page 7], **L.Debi Prasad v. Smt.Tribeni Devi and others** [1970 (1) SCC 677], **Nilima Mukherjee v. Kanta Bhusan Ghosh** [JT 2001(6) SC 486], **Ghisalal v. Dhapubai** [(2011) 2 SCC 298], **Suresh C.V. v. Tobin (Minor) and Another** [2013(1) KHC 369] and **Pradeep Puri Goswami v. Nidhi Goswami** [2015 KHC 1240] to contend that the factum of adoption is a matter that has to be proved by positive evidence adduced on the basis

of specific pleadings. An omission to prove the factum of adoption, which would include evidence regarding the ceremonies associated therewith would be fatal to a claim of adoption put forward by any litigant. In the present case, in the absence of any evidence regarding the factum of adoption, according to the learned counsel, the contention that Mini was the adopted daughter of late Velu has to fall to the ground. Since Ext.A1 is a gift coupled with adoption, according to the learned counsel, in the absence of any evidence regarding adoption, the gift also has to fail. The decision in **Kallyantai v. Shivappa** [AIR 1924 Bombay 516] and **Prahlad Ambadas v. Shantabai** [AIR(84)1947 Nagpur 231] are relied upon in support of the above contention. Apart from the above, according to the learned counsel, Ext.A1 is shrouded in suspicion. Suspicious circumstances, according to the learned counsel, are that an examination of Ext.A1 document shows the stamp papers on which the document has been executed were purchased on 1.1.1973, six months prior to the execution thereof. Though Ext.A1 purports to convey the property by gift to Velu himself

who was acting as the guardian of Smt.Mini, the original of the document has been produced by Mini. The fact that she was in possession of the document is another suspicious circumstance. Exts.B1 to B113 are relied upon to contend that, a similar gift deed had been executed in favour of the children of Appu by a brother of his by name Sankaran, who also had no children. It is alleged that in respect of the said document also litigation was pending. According to the learned counsel, fraud vitiates even the most solemn of transactions. Therefore, upon discovery of fraud any transaction could be nullified, the judgment and decree of a Court is also of no exception. Exts.A3 and A5 judgments being vitiated by fraud are therefore, liable to be nullified.

17. In the first place it is worth noticing that, the allegation regarding fraud in respect of Ext.A1 had been raised in O.S. No.879 of 1992 by the appellant in RFA No.36 of 2004. That contention has been negatived by Exts.A3 and A5 judgments. The judgments have also become final. The appellant in RFA No.36 of 2004 having been a party to the said proceedings, it is

not open to him to re-agitate the said contentions. Apart from the above, we find that there is absolutely no evidence or material available to warrant a conclusion that Ext.A1 was vitiated by fraud. Fraud is a matter for evidence. The various circumstances from which fraud is to be inferred would have to be pleaded and proved. In these proceedings the circumstances referred to as arousing suspicion are not sufficient or capable of upsetting the validity of the documents against which they are raised. The said aspect has been considered in both Exts.A3 and A5 judgments. It is worth noticing that, late Velu was an employee of the Cochin Port Trust. He had executed Ext.A1 document, when he was 62 years old. He was capable of understanding the nature and consequences of the act that he was performing. He has referred to Smt.Mini as his adopted daughter in Ext.A1. It is also worth noticing that, Smt.Mini was only 7 years old at that time. We notice from a perusal of Ext.A1 that, late Velu himself had presented the documents for registration before the Sub Registry. It cannot therefore, be supposed that he was persuaded to execute the document on the

basis of some misrepresentation or fraud. The recitals in Ext.A1 further show that, he had not parted with his possession over the property. He had reserved his lifetime rights to take usufructs from the property in favour of both himself and his wife.

18. For all the above reasons, we are not persuaded to accept the contention that Ext.A1 was vitiated by fraud. A perusal of Ext.A2 shows that, even in the said document, late Velu had referred to Smt.Mini as his adopted daughter which is another circumstance pointing against the contentions raised challenging the factum of adoption.

19. The other contention that requires to be considered is whether the appellants in RFA No.158 of 2005 not having been made parties to O.S. No.879 of 1992 have been prejudiced. Their case is that, they are the legal heirs of late Velu and in that capacity, they ought to have been made parties to the said suit. Late Velu's succession opened immediately on his death. But, it was not an intestate succession. This is for the reason that he had admittedly left a Will. The Will is Exhibit B-45. Nobody has questioned the Will. As per the Will the sole legatee is the

appellant in R.F.A.No.36 of 2004. Therefore, upon Velu's death, none of the children of late Narayanan had acquired any rights in respect of his estate. The sole legatee as per Velu's Will was the 2nd defendant in O.S.No.879 of 1997. He had contested the suit and had suffered Exts.A3 and A5 judgments. Therefore, the omission to implead the other children of late Narayanan in the said proceedings cannot be said to be an infirmity affecting the very validity thereof, especially in view of the fact that they do not dispute Ext.B45 Will. Though as per the Will, the disputed property was bequeathed to the appellant in R.F.A.No.36/2004 the bequest did not take effect since late Velu did not have title to the property at the time of executing the Will. Therefore the same was a failed bequest. Consequently, no rights had accrued to the children of Narayanan as sought to be projected by the learned counsel.

20. Having executed a Will, there was no occasion for the children of Narayanan to have become the legal heirs of late Velu. Therefore, we are not satisfied that anything turns on the omission to make the appellants in RFA No.158 of 2005 as

parties in O.S No.879 of 1992. They have not acquired any rights or status as claimed by them, as the legal representatives of late Velu. It is also worth noticing that, as per Ext.A10 affidavit, the case pleaded by one of the appellants was that, the appellant in RFA No.36 of 2004 was the absolute owner of the property in question, having obtained title under Ext.B45 Will. The said fact has been relied upon by the court below also, to negative their claims.

The result of the above discussion is that, we do not find any grounds to interfere with the common judgment appealed against. Both the appeals fail and are dismissed. No costs.

Sd/-
K. SURENDRA MOHAN
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

//true copy//

P.A. To Judge

smv
14.12.2015