

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 14TH DAY OF SEPTEMBER 2015/23RD BHADRA, 1937

RSA.No. 1270 of 2011

**A.S.NO.68/2008 OF ADDITIONAL DISTRICT COURT, KOTTAYAM
O.S.NO.274/2004 OF MUNSIF COURT, CHANGANASSERY**

APPELLANT(S)/APPELLANT/PLAINTIFF :

**SULEKHA DEVI @ SOBHANA,
D/O.RADHAMMA, NOW RESIDING AT A-15, NTPC TOWNSHIP,
SAKTHIPURAM, NANGIARKULANGARA, KOTTAYAM DISTRICT.**

**BY ADVS.SRI.K.V.SOHAN
SMT.SREEJA SOHAN.K.
SRI.N.N.ARUN BECHU
SRI.ROVIN RODRIGUES**

RESPONDENT(S)/RESPONDENTS/DEFENDANTS 1 & ADDL.DEFENDANTS 3 TO 6.:

- 1. AJITH KUMAR, S/O.SUKUMARA PANICKER,
NOW RESIDING AT P.B.NO.522 DNATA CARGO SECTION,
DUBAI, U.A.E, REPRESENTED BY POWER OF ATTORNEY HOLDER,
AJAYAN, ADVOCATE, S/O.GOPALAKURUP,
RESIDING AT THONNALLOOR MURI, PANDALAM, ADOOR, PIN- 689 501.**
- 2. RAJENDRA PANICKER, S/O.SUKUMARA PANICKER,
ASWATHY HOUSE, PERUNNA, CHANGANASSERY,
KOTTAYAM DISTRICT, PIN-686 102.**
- 3. SUSEELA DEVI, D/O.RADHAMMA,
SREYAS HOUSE, PERUMPANACHY POSTAL AREA, MADAPPALLY,
CHANGANACHERRY, KOTTAYAM DISTRICT, PIN-686 546.**
- 4. SUNITHA DAYAL, W/O.DEVI DAYAL,
114B, KRL TOWNSHIP, AMBALAMUGHAL POSTAL AREA,
ERNAKULAM DISTRICT, PIN-682 302.**
- 5. RADHAMMA, W/O.SUKUMARA PANICKER,
LATHI NIVAS, KARIMUTTATHU, THRIKKODITHANAM,
THRIKKODITHANAM MURI, KOTTAYAM DISTRICT, PIN-686 105.**

**R1,R3 TO R5 BY ADV. SRI.K.JAYAKUMAR (SENIOR ADVOCATE)
BY ADV. SRI.M.SREEKUMAR**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 09-09-2015, THE COURT ON 14-09-2015 DELIVERED THE
FOLLOWING:**

Msd.

P.B.SURESH KUMAR, J.

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R.S.A.No.1270 of 2011.

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Dated this the 14th day of September, 2015.

J U D G M E N T

The plaintiff in the suit is the appellant.

2. The suit property belonged to the second defendant, the father of the plaintiff. The first defendant is the brother of the plaintiff. The suit property was obtained by the second defendant as per the terms of a partition deed executed in the year 1953. The second defendant executed Ext.A1 gift deed in respect of the suit property in favour of the plaintiff on 13.4.1994. According to the plaintiff, she accepted Ext.A1 gift deed, took possession of the property pursuant to the same and has been enjoying the suit property and residing in the building therein. The case of the plaintiff is that later at the instance of the first defendant, the second defendant cancelled Ext.A1 gift deed as per Ext.B1 cancellation deed and executed Ext.B2 sale deed in respect of the same in favour of the first defendant. According to the plaintiff, Exts.B1 and B2 documents are void *ab*

initio. She, therefore, claimed a decree declaring her title and possession over the suit property and for a decree of permanent prohibitory injunction restraining the defendants from trespassing into the same or committing waste therein.

3. The first defendant contested the suit by filing a written statement. According to the first defendant, though the second defendant had executed Ext.A1 gift deed in respect of the suit property in favour of the plaintiff, she has not accepted the same and as such, the gift has not taken effect. In support of the said contention, the first defendant has pleaded in the written statement filed by him that the plaintiff has neither taken possession of the suit property nor effected mutation in respect of the same pursuant to the gift. He has also pleaded that the plaintiff has never obtained the original of the gift deed. He has also pleaded that the plaintiff was not even aware of the execution of the gift deed by the second defendant in her favour in respect of the suit property. According to the first defendant, he obtained the suit property from the second defendant for valuable consideration as per Ext.B2 sale deed; that the suit

property belongs to him absolutely and that the plaintiff is not entitled to the reliefs sought for in the suit.

4. The second defendant filed a written statement, contending among others, that the original of Ext.A1 gift deed was handed over by him to the plaintiff after the execution of the said document and the original of the said document which was retained by the plaintiff in the family house situated in the suit property has been obtained by the first defendant from the family house when the plaintiff started residing at her place of employment. He has also stated in the written statement that thereafter, the first defendant obtained Ext.B2 sale deed from him by playing fraud.

5. The plaintiff gave evidence in the suit as PW1. Two witnesses were also examined on her side as PW2 and PW3. The first defendant did not give evidence in the suit personally. Instead, his brother-in-law gave evidence on his behalf as DW1 on the strength of the power of attorney executed by him. Another witness was also examined on the side of the first defendant as DW2.

6. The trial court found that Ext.A1 gift deed has not taken effect and consequently dismissed the suit. In appeal, the appellate court confirmed the decision of the trial court. The plaintiff is aggrieved by the decisions of the courts below.

7. Heard the learned counsel for the appellant and also the learned Senior Counsel for the first respondent. The lower court records have also been perused.

8. The learned counsel for the appellant attacked the concurrent findings of the courts below that Ext.A1 gift deed has not taken effect, on various grounds. According to him, in so far as Ext.A1 gift deed is not an onerous one, a little evidence is sufficient to establish the acceptance of the gift. It was pointed out by the learned counsel that the courts below held that Ext.A1 gift has not been accepted, mainly on the ground that the plaintiff has not taken possession of the property and that she is not in possession of the original of the gift deed. According to the learned counsel, it is not necessary to establish that the donee of a gift has taken possession of a property to prove that the gift has been accepted by him/her. As regards the

possession of the original of the gift deed, it was pointed out by the learned counsel that the plaintiff was a widow residing with her parents at the time when Ext.A1 gift deed was executed and therefore, there is no reason for the plaintiff not to accept the gift. It was also pointed out by the learned counsel for the appellant that the plaintiff as PW1 has categorically stated in her evidence that the original of Ext.A1 gift deed was handed over to her by her father after its execution and that she retained the said document in the family house itself and that the said document was taken away by the first defendant from the family house when she was away at her place of employment. According to the learned counsel, the said case advanced by the plaintiff should have been accepted by the courts below in the absence of any evidence to the effect that the plaintiff was not aware of the execution of Ext.A1 gift deed. The learned counsel for the plaintiff has also relied on the stand taken by the second defendant in the written statement filed by him that the original of Ext.A1 gift deed was handed over by him to the plaintiff.

9. Per contra, the learned Senior Counsel for the

first respondent, relying on the decision of the Madras High Court in **R.Jamuna Bai v. M.A.Anusuya** (AIR 2001 Madras 392), contended that an inference of acceptance of a gift can be made only based on acts of positive conduct on the part of the donee or persons acting on his behalf and not merely passive acquiescence. According to the learned counsel, the plaintiff has not established in this case any acts of positive conduct on her part from which the court can draw an inference of acceptance of Ext.A1 gift. He has also pointed out that the plaintiff as PW1 has accepted in her cross examination that after the execution of Ext.A1 gift deed, the first defendant altered the building in the suit property and annexed the same to the building which he has constructed in the adjacent property and that the plaintiff has not objected to the said conduct of the first defendant. According to the learned counsel, from the said conduct of the plaintiff, it can be safely inferred that the plaintiff was not aware of the execution of Ext.A1 gift deed at all. The learned Senior Counsel for the first respondent also contended that the question as to whether the gift has been accepted by the

plaintiff or not is a pure question of fact and since the fact has been decided against the plaintiff by the courts below concurrently, the plaintiff is not entitled to raise this issue again in this Second Appeal preferred under Section 100 of the Code of Civil Procedure. As regards the statements made by the second defendant in the written statement filed by him, the learned Senior Counsel pointed out that the said statements which are contrary to the recitals in Ext.B1 cancellation deed and Ext.B2 sale deed cannot be relied on by this Court to decide the question as to whether Ext.A1 gift has been accepted by the plaintiff or not.

10. The question of law formulated at the time of admission for decision of the Second Appeal is the following:

When Ext.A1/B7 gift deed specifically recites that possession of the property gifted thereunder was handed over to the plaintiff, whether on the evidence courts below were justified in holding that Ext.A1 gift deed was not accepted and therefore, Ext.B1 cancellation deed is valid.

Having heard the learned counsel for the parties and having perused the records, I deem it appropriate to formulate the following questions of law also for decision:

(i) Do not the facts and circumstances of the case eloquently speak of acceptance of Ext.A1 gift by the plaintiff?

(ii) Are not the findings of the courts below that the plaintiff has not accepted Ext.A1 gift deed perverse?

11. The fact that the second defendant had executed Ext.A1 gift deed in favour the plaintiff in respect of the suit property is not in dispute. The dispute is only on the question as to whether Ext.A1 gift has been accepted by the plaintiff or not. Section 122 of the Transfer of Property Act which defines gift provides that gift is a transfer of certain existing movables or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. In the light of the provision contained in Section 122 of the Transfer of Property Act, a gift of immovable property would take effect only when it is accepted by or on behalf of the donee. The Transfer of Property Act does not prescribe any particular mode of acceptance of gift. It is now settled that an express acceptance is not necessary for completing the transaction of gift and as such, it is not obligatory for the donee to prove any overt act to

establish acceptance of the gift. The dispute relating to acceptance, in the circumstances, is to be decided taking into account the facts and circumstances attending to the transaction. [**See Asokan v. Lakshmikutty** (2008(1) KLT 54 (SC)]. In **Narayani Bhanumathi v. Lelitha Bhai** (1973 KLT 961), this Court held that slightest evidence is sufficient to establish acceptance of the gift. It was also held by this Court in the said case that there may be cases where the circumstances themselves speak of such acceptance. As far as non onerous gifts are concerned, it was held by this Court that one may expect the donee to accept the gift when it comes to his knowledge and refusal to accept such gifts would only be in exceptional circumstances. The question as to whether the plaintiff has accepted Ext.A1 gift or not is to be considered in the light of aforesaid principles.

12. Ext.A1 gift was executed by none other than the father of the plaintiff. At the time when Ext.A1 was executed, the plaintiff was a widow living with her parents. It is recited in Ext.A1 that the said document has been executed for her future

sustenance having regard to her rights in the family properties. It is also recited in Ext.A1 that the possession of the property has been handed over to the plaintiff. The specific case of the plaintiff is that she was aware of the execution of Ext.A1 gift deed and she accepted the same. It is also her case that the original of Ext.A1 gift deed has been handed over to her by the second defendant and that she retained the same in the family house. Since the plaintiff was residing with the second defendant in the family house when Ext.A1 gift deed was executed, it is only reasonable to infer that the plaintiff was aware of the execution of the said document. Further, as noticed above, the second defendant himself has stated in Ext.A1 gift deed that the possession of the property has been handed over to the plaintiff. The knowledge of the plaintiff about Ext.A1 gift deed can be inferred from the said recital contained in the document also, for, possession of the property could not have been handed over to the plaintiff by the second defendant without her knowledge. Even though the first defendant has raised a specific contention in the written statement filed by him that the plaintiff was not

aware of the execution of Ext.A1 gift deed, no circumstances indicating that the plaintiff was not aware of the execution of Ext.A1 deed was brought out in evidence. In the said circumstances, it is only reasonable to infer that the plaintiff knew about the execution of the said document. Ext.A1 gift is not an onerous gift. As such, there is no reason also why the plaintiff shall not accept Ext.A1 gift deed in the normal course of human conduct. That apart, Ext.B1 is the document executed by the second defendant by which Ext.A1 gift deed has been cancelled. Ext.B1 cancellation deed does not recites that the gift has not been accepted by the plaintiff. In the circumstances, in the absence of any evidence indicating the reasons for non acceptance of the gift, it is only reasonable to infer that the plaintiff has accepted Ext.A1 gift.

13. A perusal of the impugned judgments indicates that the courts below have come to the conclusion that the gift has not been accepted by the plaintiff mainly for two reasons namely, that the plaintiff has not taken possession of the suit property pursuant to the gift and that she was not holding the

original of the gift deed with her. As noticed above, the second defendant has categorically stated in Ext.A1 that the possession of the property has been handed over to the plaintiff. The first defendant who is claiming under the second defendant cannot be heard to contend that what the second defendant has stated in Ext.A1 is incorrect. That apart, in **Renikuntla Rajamma v. Sarwanamma** (AIR 2014 SC 2906), the Apex Court held that delivery of possession is not an essential prerequisite for making of valid gift in case of immovable property. As far as the possession of the original of Ext.A1 document is concerned, the explanation offered by the plaintiff is that she had kept the original of the document in the family house where she was residing at the time of execution of the document and that the same was taken away by the first defendant from the family house when she was away at her place of employment. In this context, the stand taken by the second defendant in the written statement filed by him is also relevant. In the written statement filed by the second defendant, it is stated by him that he had handed over the original of the document to the plaintiff and the

first defendant had obtained the same from the family house, when the plaintiff was away at her place of employment. The explanation offered by the plaintiff for not holding the original of Ext.A1 document, in the circumstances, appears to be probable and the courts below were not justified in relying on the said circumstance to hold that the gift has not been accepted by the plaintiff.

14. The argument advanced by the learned Senior Counsel for the respondent, relying on the decision of the Madras High Court in **R.Jamuna Bai v. M.A.Anusuya** (AIR 2001 Madras 392) is only to be rejected. I have found on facts that the case set up by the plaintiff that the second defendant had handed over the original of Ext.A1 gift deed to the plaintiff immediately after the execution of the said document and that the same was taken away by the first defendant from the family house when the plaintiff was away at her place of employment, is correct. According to me, an inference of the acceptance of the gift can be made from the said circumstances alone. [See **Kalyanasundaram v. Karuppa** (AIR 1927 P.C. 42)]. As

regards the contention raised by the learned counsel concerning the alteration of the family house, the evidence tended by PW1 indicates that she has only stated in her cross examination that some alterations have been made in the family house in the suit property by the first defendant and she has not objected to the same. A close reading of the evidence of PW1 indicates that she has clarified in her deposition that there is a passage in between the building in the suit property and the building in the property of the first defendant. Merely because the plaintiff has not objected to the alterations made by the first defendant who is her brother in the family house given to her by her father, it cannot be inferred that the plaintiff was not aware of the gift at all.

15. In the aforesaid facts and circumstances, the substantial questions of law formulated for decision are answered in favour of the plaintiff.

In the result, the Second Appeal is allowed, the impugned decisions of the courts below are set aside and the suit is decreed declaring the title and possession of the plaintiff over the suit property. There will also be a decree of permanent

prohibitory injunction restraining the defendants from trespassing into the suit property or committing waste therein. In the facts and circumstances of the case, there will be no order as to costs. All the interlocutory applications in this case are closed.

Sd/-
P.B.SURESH KUMAR,
JUDGE.

Kvs/-

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PA TO JUDGE.