

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.03.2018

PRONOUNCED ON : 28.03.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.1862 of 2003
and
C.M.P. No.860 of 2010

Saraswathi Ammal ... Appellant/Appellant/Plaintiff

Vs.

1. Minor @ Muthu Kounder
2. Palanivel
3. Selvam ammal
4. Senthilraj
5. Babu @ Vijayaraj ... Respondents/Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 16.04.2003 in A.S.No.185/2002 on the file of the Principal District Judge, Villupuram, confirming the judgment and decree dated 14.03.2002 in O.S. No.53/97 before the Subordinate Judge, Kallakurichi.

For Appellant : Mrs. Hema Sampath, Senior Counsel
for M/s. R.Subramanian

For R3 to R5 : Mr.N.Manokaran

For R1 and R2 : No appearance

JUDGMENT

This second appeal is directed against the judgment and decree dated 16.04.2003 passed in A.S.No.185/2002, on the file of the Principal District Court, Villupuram, confirming the judgment and decree dated 14.03.2002 passed in O.S. No.53/97 on the file of the Sub Court, Kallakurichi.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for partition.

4. The case of the plaintiff, in brief, is that the suit properties belonged to the first defendant having been purchased by him out of his own exertion and he had two sons Palanivel, the second defendant and one Somasundaram, who died about two and half years ago and the third defendant is the wife and the defendants 4 and 5 are the sons of the deceased Somasundaram. The plaintiff is the wife of Palanivel, the second defendant. As the owner of the suit property, the first defendant had conveyed half share in the suit property to the plaintiff, by way of registered gift deed dated 29.01.1971 and as the original gift deed is lost, the plaintiff has produced the registration copy of the same and the gift deed was executed by the first defendant on account of his natural love and affection towards the plaintiff, who was his daughter in law and the gift deed was accepted and acted upon and thus, the plaintiff has become entitled to half share in the suit property. In the first item, the motor and pumpset had been installed by the plaintiff, the defendants 1 and 2 and the deceased Somasundaram and the plaintiff is also entitled to half share in the same and accordingly, the plaintiff had been in possession and enjoyment of her share in the suit properties and accordingly, demanded the defendants to effect and allot her share in the suit properties amicably, but, the defendants failed to do so and hence, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendants, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts. The suit properties are not the self acquired properties of the first defendant and they are acquired out of the ancestral nucleus and enjoyed by the joint family consisting of the first defendant and his two sons and the suit properties being ancestral, the alleged gift deed dated 29.1.71, is invalid in law and it was not executed with the consent of the other coparceners. The plaintiff went to her house for delivery and at that point of time, the second defendant married a second wife and the plaintiff therefore refused to come and live with the second defendant, hence, to pacify the plaintiff, the settlement deed seems to have been executed by the first defendant. However, it was not acted upon as the plaintiff came to live with the second defendant and his second wife as one family and there was an oral partition of the family properties in or about 1995 into two shares, giving one share to the second defendant and one share to the deceased Somasundaram and the first defendant was given cash in lieu of his share and the suit

properties fell to the share of the deceased Somasundaram and thus, it is only Somasundaram and thereafter, the defendants 3 to 5, who are in possession and enjoyment of the suit properties and in this connection, the suit filed by the deceased Somasundaram and the second defendant against the first defendant in O.S. 568/91 on the file of the District Munsif Court, Kallakurichi for declaration of title and hence, the present suit laid by the plaintiff is barred by res-judicata and the first defendant had submitted to the decree passed in the above said suit and accordingly, the decree had been passed in the said suit on 09.8.91. Even in the alleged settlement deed projected by the plaintiff, the right is conferred on the male children of the plaintiff after the death of the first defendant and hence, the suit for partition laid by the plaintiff is not maintainable. The suit has been laid without any cause of action and hence, liable to be dismissed.

6. In support of the plaintiff's case, PWs 1 and 2 were examined and Exs.A1 to A4 were marked. On the side of the defendants, DWs 1 and 2 were examined and Exs.B1 to B6 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to dismiss the suit laid by the plaintiff. Aggrieved over the same, the present second appeal has been laid.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

1. Whether in law the Courts below are right in dismissing the suit when all the ingredients of a valid gift as contemplated in Section 123 of the Transfer of Property Act had been satisfied?

2. Whether in law the courts below are right in launching into an enquiry as to whether Ex.A1 was a settlement or a Will when no such pleading was made by the respondents?

C.M.P. No.860 of 2010

9. Petition filed under Order 41 Rule 27 of the code of civil procedure by the plaintiff. The plaintiff has filed certain documents to prove that she is in joint possession and enjoyment of the suit properties along with the defendants and

accordingly, while applying the encumbrance certificate in respect of the suit properties, found that the defendants 3 and 4 had mortgaged the suit properties to one Kailasa Kounder, on 27.2.2006, despite the order of injunction granted by this Court. Thereby, they have deliberately committed contempt of the order of this Court and on going through the encumbrance certificate, the plaintiff had noted that she had mortgaged the properties settled to the Government for borrowing money and the plaintiff had forgotten about the above said transaction and accordingly, applied for necessary documents from the Sub Registrar's office and hence, according to the plaintiff/appellant, after thorough search, the documents are found and accordingly, the plaintiff had been necessitated to place the said documents as additional evidence in support of her case and hence the petition.

10. The defendants have filed the counter contending that the petition laid by the plaintiff for the reception of additional evidence is not maintainable. The plaintiff, by way of the present petition, is attempting to fill up the lacunae in her case. The ingredients of Order 41 and Rule 27 of the code of civil procedure are not attracted and the additional documents projected are not relevant for deciding the issues involved in the matter and the plaintiff has not established the genuineness of the documents produced and the plaintiff has not given any valid reasons for not producing the said documents before the trial Court and hence, the petition is liable to be dismissed.

11. As regards the additional evidence sought to be projected by the plaintiff, it is found that no valid reason has been given by the plaintiff for not producing the said documents during the course of trial. It is not the case of the plaintiff that the said documents are not within her knowledge during the course of trial. She would only state that, on verification of the encumbrance certificate, she came to know about the additional documents and further, according to her, on a thorough search, she had come across the documents now projected and those are the reasons given by the plaintiff for the delay in filing the documents. The above said reasons given by the plaintiff are stiffly challenged by the defendants. According to the defendants, the petition preferred by the plaintiff for the reception of the additional evidence do not satisfy the requirements of law as provided under Order 41 rule 27. Further, according to them, the said documents are not relevant for deciding the issues involved in the matter. Hence, the petition deserves rejection. Considering the reasons given in the petition, they being found to be unacceptable and also when it is found that the projected additional evidence are within the knowledge of the plaintiff, in such view of the matter, it

is found that the plaintiff has not given sufficient cause for not producing the said documents during the course of trial. In such view of the matter, when it is found that the plaintiff prima facie has not satisfied any of the ingredients under Order 41 and Rule 27 of the code of civil procedure, I am not inclined to entertain the present petition. As rightly contended by the defendants' counsel, considering the principles of law outlined in the decision reported in (2012) 8 SCC 148 (Union of India Vs. Ibrahim Uddin and another), it is found that the petition preferred by the plaintiff for the reception of the additional evidence deserves no acceptance and accordingly it is dismissed.

12. The relationship between the parties is not in dispute. According to the plaintiff, she is the daughter in law of the first defendant, the second defendant is her husband, the third defendant is the wife and the defendants 4 and 5 are the sons of the deceased Somasundaram, who is the other son of the first defendant. Claiming that the suit properties are the self acquired properties of the first defendant, it is the case of the plaintiff that on account of love and affection, the first defendant had settled half share in the suit properties on her, by way of a gift deed dated 29.1.71. The copy of which has come to be marked as Ex.A1. According to the plaintiff, the original gift deed had been lost. Further, according to the plaintiff, the settlement deed dated 29.1.71, marked as Ex.A1 has been accepted and acted upon and inasmuch as the defendants refused to divide and allot her half share in the suit properties by metes and bounds, according to the plaintiff, she has been necessitated to lay the suit for partition.

13. Per contra, the defendants had raised the plea that the suit properties are not the self acquired properties of the first defendant and on the other hand, acquired by the first defendant out of the income of the joint family nucleus and thus, it is contended that the gift deed executed by the first defendant in favour of the plaintiff is invalid in law and further, according to them, the gift deed Ex.A1 has not been accepted and acted upon and further, it is their case that the suit properties had been allotted to the share of the deceased Somasundaram in the oral partition effected in the family and the same is also accepted by the first defendant by submitting to the decree in O.S. No.568/91, on the file of the District Munsif Court, Kallakurichi and therefore, it is stated that the plaintiff is not entitled to obtain the reliefs sought for.

14. The Courts below had come to the conclusion on an analysis of the materials placed that the suit properties are only the self acquired properties of the first defendant. It is to be noted at this juncture, the first defendant is not

contesting the claim of the plaintiff and remained ex-parte. The suit properties are stated to be acquired out of the income realised from the sale proceeds of the ancestral properties by way of Ex.B1. However, as rightly determined by the Courts below, there is no material placed as such to hold that the properties comprised in Ex.B1 are the ancestral properties of the family. In addition to that, there is no valid material placed to evidence that the sale proceeds derived out of Ex.B1, formed the consideration for the acquisition of the suit properties. Thus, it is found that the plea of the defendants that the suit properties had been acquired out of the ancestral nucleus is not supported by acceptable and reliable materials. It is found that as rightly determined by the Courts below, the suit properties are only the self acquired properties of the first defendant and accordingly, it is found that the first defendant is entitled to effect the settlement deed in respect of the suit properties as he desires.

15. The claim of the defendants that the suit properties and the other properties had been allotted to the share of the deceased Somasundaram in the oral partition effected during 1985 is not borne out by any acceptable and reliable evidence and the defendants have not pleaded as to what were the properties subjected under the oral partition, under whose presence the oral partition was effected, what are the properties allotted to the each sharer etc., With reference to the abovesaid facts, both the pleas as well as the evidence projected by the defendants appears to be bereft of particulars, also unacceptable and unreliable. No doubt, the proceedings of O.S. No.568/91, on the file of the District Munsif Court, Kallakurici are projected by the defendants, wherein, it is found that the first defendant had submitted to the decree in the said suit. However, as rightly determined by the Courts below, when the plaintiff is not a party to the abovesaid suit proceedings, it is found that whenever be the decree that may be passed in the said suit, the same is not binding on the plaintiff in any manner. In such view of the matter, the case of the defendants that the suit property had been allotted to the deceased Somasundaram, by way of the oral partition during 1985, as such, cannot be accepted. Similarly, from the proceedings marked as Exs. B2 to B4 and further, as above seen, when the plaintiff is not a party to the above said suit proceedings, the same is not binding upon the plaintiff. Accordingly, it is found that the Courts below had rightly disbelieved the oral partition projected by the defendants. I do not find any reason to interfere with the said determination of the Courts below.

16. The suit properties being the self acquired properties of the first defendant, now, it is the plaintiff's case that the first defendant had settled half share in the suit properties in

favour of the plaintiff, by way of a gift deed marked as Ex.A1. The plaintiff has examined the attesor of the settlement deed as PW2 and accordingly, PW2 has also tendered evidence as regards the execution of the settlement deed by the first defendant in favour of the plaintiff, in the presence of the witnesses including himself, and his witnessing the execution of the document by the first defendant and the witnessing of their attestation by the first defendant and the presentation of the document for registration etc., It is found that by tendering the evidence of the attesor as well as the evidence of the plaintiff PW1, as rightly determined by the Courts below, the plaintiff has established the execution of the settlement deed by the first defendant. Even the defendants, who are contesting the plaintiff's claim did not dispute the execution of the settlement deed as such. All that they would state is that the settlement deed had not been accepted and acted upon. Therefore, the plaintiff cannot derive any title to the suit property by way of the said document. It is mainly contended by the defendants that though there are recitals in the settlement deed that the possession of the properties settled had been delivered to the plaintiff, considering the fact that only half share in the undivided share had been settled by way of the said document, there could be no question of delivery of the same in reality to the plaintiff and on that premise, it is contended by the defendants that the possession of the properties settled not being delivered accompanying with the execution of the document, it is contended that the gift deed was not accepted and acted upon and therefore, the plaintiff's suit should fail.

17. The Courts below found concurrence with the above said contentions of the defendants by mainly holding that the undivided share in the suit properties would not have been delivered to the plaintiff on the execution of the gift deed. The Courts below also did not accept the case of the plaintiff on the footing that she had been given only life interest to enjoy the properties settled without any power of alienation and she had also been directed to maintain the first defendant till his life time and the plaintiff is to enjoy the properties only after the life time of the first defendant, accordingly, held that Ex.A1 gift deed could not be strictly termed as a gift deed and on that premise also, the Courts below did not accept the plaintiff's case.

18. In the decision reported in (2014) 9 SCC 445 (Renikuntla Rajamma Vs. K.Sarwanamma), it has been held that for making a valid gift in the case of the immovable properties, delivery of possession is not an essential pre-requisite and retaining the only right to use the property during the life time of the donor does not in any manner affect the transfer of the ownership in favour of the donee by the donor. The above

said principles governing the gift deed are detailed in the above said decision are as follows:

15. The matter can be viewed from yet another angle. Section 123 of the T.P. Act is in two parts. The first part deals with gifts of immovable property while the second part deals with gifts of movable property. Insofar as the gifts of immovable property are concerned, Section 123 makes transfer by a registered instrument mandatory. This is evident from the use of word "transfer must be effected" used by Parliament in so far as immovable property is concerned. In contradiction to that requirement the second part of Section 123 dealing with gifts of movable property, simply requires that gift of movable property may be effected either by a registered instrument signed as aforesaid or "by delivery". The difference in the two provisions lies in the fact that in so far as the transfer of movable property by way of gift is concerned the same can be effected by a registered instrument or by delivery. Such transfer in the case of immovable property no doubt requires a registered instrument but the provision does not make delivery of possession of the immovable property gifted as an additional requirement for the gift to be valid and effective. If the intention of the legislature was to make delivery of possession of the property gifted also as a condition precedent for a valid gift, the provision could and indeed would have specifically said so. Absence of any such requirement can only lead us to the conclusion that delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property.

16. That brings us to the decisions of this Court which have led to this reference. In K. Balakrishnan's case (supra) the donor executed a gift deed of a specified share of the property inherited by her from her maternal grandfather in favour of her minor son who was the donee-appellant before the Court and her four year old daughter. The property gifted included a school building. The gift deed stipulated that the

responsibility to sign in regard to the said school and the right to income would be with the donor during her lifetime and thereafter would be vested in the donee. After the execution of the gift deed the donor cancelled the same and made a will bequeathing the property in favour of her daughter whereupon the donee-appellant filed a suit for declaration of his title to the suit property on the basis of the gift and a further declaration for annulment of the cancellation deed and the will executed by the donor. The Trial Court dismissed the suit while the First Appellate Court decreed the same. The High Court restored the view taken by the Trial Court and held that when the donor had reserved to herself the right to sign the papers with respect to management of the school and the right to take usufruct from the property where the school was situated, no property was transferred under the deed. In appeal before this Court, the view taken by the High Court was reversed and that taken by the First Appellate Court restored. This Court held:

"10. We have critically examined the contents of the gift deed. To us, it appears that the donor had very clearly transferred to the donees ownership and title in respect of her 1/8th share in properties. It was open to the donor to transfer by gift title and ownership in the property and at the same time reserve its possession and enjoyment to herself during her lifetime. There is no prohibition in law that ownership in a property cannot be gifted without its possession and right of enjoyment. Under Section 6 of the Transfer of Property Act "property of any kind may be transferred" except those mentioned in clauses (a) to (i). Section 6 in relevant part reads thus:

"6. What may be transferred.—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

(a) * * *

(b) A mere right to re-entry for breach of a condition subsequent cannot be transferred to

anyone except the owner of the property affected thereby.

(c) * * *

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(e) A mere right to sue cannot be transferred."

11. Clause (d) of Section 6 is not attracted on the terms of the gift deed herein because it was not a property, the enjoyment of which was restricted to the owner personally. She was absolute owner of the property gifted and it was not restricted in its enjoyment to herself. She had inherited it from her maternal father as a full owner. The High Court was, therefore, apparently wrong in coming to the conclusion that the gift deed was ineffectual merely because the donor had reserved to herself the possession and enjoyment of the property gifted." (emphasis supplied)

17. We are in respectful agreement with the statement of law contained in the above passage. There is indeed no provision in law that ownership in property cannot be gifted without transfer of possession of such property. As noticed earlier, Section 123 does not make the delivery of possession of the gifted property essential for validity of a gift. It is true that the attention of this Court does not appear to have been drawn to the earlier decision rendered in Naramadaben Maganlal Thakker (supra) where this Court had on a reading of the recital of the gift deed and the cancellation deed held that the gift was not complete. This Court had in that case found that the donee had not accepted the gift thereby making the gift incomplete. This Court, further, held that the donor cancelled the gift within a month of the gift and subsequently executed a Will in favour of the appellant on a proper construction of the deed and the deed cancelling the same this Court held that the gift in favour of the donee was conditional and that there was no

acceptance of the same by the donee. The gift deed conferred limited right upon the donee and was to become operative after the death of the donee. This is evident from the following passage from the said judgment:

"7. It would thus be clear that the execution of a registered gift deed, acceptance of the gift and delivery of the property, together make the gift complete. Thereafter, the donor is divested of his title and the donee becomes the absolute owner of the property. The question is whether the gift in question had become complete under Section 123 of the TP Act? It is seen from the recitals of the gift deed that Motilal Gopalji gifted the property to the respondent. In other words, it was a conditional gift. There is no recital of acceptance nor is there any evidence in proof of acceptance. Similarly, he had specifically stated that the property would remain in his possession till he was alive. Thereafter, the gifted property would become his property and he was entitled to collect mesne profits in respect of the existing rooms throughout his life. The gift deed conferred only limited right upon the respondent-donee. The gift was to become operative after the death of the donor and he was to be entitled to have the right to transfer the property absolutely by way of gift or he would be entitled to collect the mesne profits. It would thus be seen that the donor had executed a conditional gift deed and retained the possession and enjoyment of the property during his lifetime...."

18. The above decision clearly rests on the facts of that case. If the gift was conditional and there was no acceptance of the donee it could not operate as a gift. Absolute transfer of ownership in the gifted property in favour of the donee was absent in that case which led this Court to hold that the gift was conditional and had to become operative only after the death of the donee. The judgment is in that view clearly distinguishable and cannot be read to be an authority for the proposition that delivery of possession is an essential requirement for

making a valid gift.

19. In the case at hand as already noticed by us, the execution of registered gift deed and its attestation by two witnesses is not in dispute. It has also been concurrently held by all the three courts below that the donee had accepted the gift. The recitals in the gift deed also prove transfer of absolute title in the gifted property from the donor to the donee. What is retained is only the right to use the property during the lifetime of the donor which does not in any way affect the transfer of ownership in favour of the donee by the donor.

19. The same view had been taken in the decision reported in (1979) 2 MLJ 88 (Ramaswami Naidu Vs. M.S.Velappan and others), (1997) (I) CTC 256 (J.Kuppuswami Mudali and others Vs. Mahalingam) and 2017 SCC Online Del 11319 (Harendra Pal Singh the Lrs & Ors. Vs. Rishi Pal Singh). It is found that merely because the disposition under the gift deed consummates only after the death of the donor, that by itself would not or such postponement by itself would not render the gift deed invalid and when it is found that the vesting of right had been done in the gift deed in praesenti, accordingly, it is seen that the reading of the instrument as a whole would only go to show that it is a gift deed and not a Will.

20. As far as the recitals found in Ex.A1, it is found that the same had come to be executed in favour of the plaintiff, on account of love and affection towards her by the donor. As earlier seen, the donor is the father in law of the plaintiff. It is further seen that, no doubt, the plaintiff is not given the power of alienation and only to enjoy the suit properties from the date of the settlement deed along with the donor and it is thus found that accordingly, the suit properties settled had been handed over to the plaintiff for her joint enjoyment along with the donor and in such view of the matter, merely because the donor had also enjoyed the properties along with the plaintiff that by itself would not render the document as an invalid one. As above seen, the physical delivery of the possession of the properties settled is not the sine qua non for validating the gift deed. Equally, though the recitals found in the gift deed are that the plaintiff should maintain the first defendant, the recitals by itself could not in any manner, be construed, that the first defendant had retained or continued to retain the absolute title to the properties settled. On the other hand, when the plaintiff is given all the right to enjoy

the properties settled excepting the power of alienation, during the life time of the donor and further, the gift deed also recites that her male descendants should take the properties absolutely, on a reading of the document wholly, it is found that the abovesaid recitals by themselves would not in any manner mitigate its validity for holding the document as a gift deed and considering the fact that the plaintiff has placed materials to show that right from the execution of the gift deed, she has been in possession and enjoyment of the suit properties, it is found that there has been vesting of right in favour of the plaintiff in praesenti and accordingly, it is seen that in the light of the position abovenoted, though there is postponement of the enjoyment of the properties independently till the life time of the donor, however, when the plaintiff has been give the right to enjoy the property settled along with the donor, it is seen that the Courts below had committed an error in holding the document projected by the plaintiff marked as Ex.A1 is not a gift deed. As rightly putforth by the plaintiff's counsel, when the plaintiff has been entrusted the delivery of the properties on the date of execution of the gift deed empowering her to enjoy the properties settled right from the date of execution along with the first defendant till his life time, no doubt, without the power of alienation and also the properties are directed to be enjoyed by her independently after the life time of the donor and the properties should be taken absolutely only by her male descendants, the recitals when read cumulatively would go to show that the interest in the properties settled had been conveyed in praesenti to the plaintiff and accordingly, it is seen that the plaintiff has placed materials to show that she has been in possession and enjoyment of the properties settled.

21. The argument has been putforth by the defendants' counsel that inasmuch as the plaintiff had not been given absolute title or ownership in respect of the property gifted by way of Ex.A1, the gift cannot be said to be complete as per law and inasmuch as the absolute title in respect of the property gifted had been directed to be taken only by the male descendants of the plaintiff, the plaintiff as such cannot lay any claim of title to the settled property. However, it is contended by the plaintiff's counsel that when the right to enjoy the property gifted had been transferred absolutely in favour of the plaintiff by way of Ex.A1 gift deed till her life time that by itself would be sufficient to constitute the document as a valid gift deed and the absence of the transfer of owner ship by itself would not in any way vitiate the validity of the document in question and therefore, the plaintiff is entitled to maintain the suit for partition on the basis of the gift deed. In this connection, a perusal of the definition of gift as stated in Section 122 of the Transfer of Property Act,

if perused, would go to show that the gift is the transfer of certain existing movable 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. The definition above stated does not postulate that the gift is completed only if there is a transfer of the ownership of the movable or immovable property in question by way of the document. It is only states that the transfer of certain existing movable or immovable property by itself would be sufficient to constitute a valid gift. Unlike Section 54 of the Transfer of Property Act, which deals with the definition of a sale, whereunder, the sale is defined as transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. As far as the definition of gift contemplated under Section 122 of the Transfer of Property Act, the same would only go to show that it does not speak of the transfer of ownership of the property involved and on the other hand, it only speaks of the transfer of certain existing movable or immovable property concerned. By way of the same, it could be seen that even if an interest in the movable or immovable property is gifted by way of a document as per the requirements of Section 122 of the Transfer of Property Act, the document would satisfy the definition of the gift as defined in the Act and therefore, the mere fact that the male descendants of the plaintiff are directed to take property absolutely, after the plaintiff, that by itself would not render Ex.A1 as an invalid gift deed, when it is found that the right of enjoyment of the properties gifted had been transferred in praesenti in favour of the plaintiff and following the same, the plaintiff has also accepted and acted upon it and shown to be in possession and enjoyment of the property gifted along with the donor and that apart, when the plaintiff is also given the right to enjoy the property independently after the lifetime of the donor, it is found that the abovesaid factors would go to show that the document satisfies all the requirements of the gift as defined in Section 122 of the Transfer of Property Act. That apart, as per Section 5 of the Transfer of Property Act, the definition " Transfer of Property " only states that the same is an act by which a living person conveys property in present or in future, to one or more other living persons or to himself and one or more other living persons and "to transfer property" is to perform such act. It is thus found that even as per the definition of transfer of property as outlined in Section 5 of the Transfer of Property Act, the same does not contemplate the transfer of ownership of the property for completing the transaction and accordingly, when it is found that by way of Ex.A1, the plaintiff has been transferred in praesenti the right to enjoy the properties gifted, it is found that Ex.A1 satisfies the definition of gift as provided under Section 122 of the Transfer of Property Act. Further, when it is found that as per Section 6 of the Transfer

of Property Act, the transfer of enjoyment of the immovable property has not been listed thereunder by way of exception, it is found that property of any kind may be transferred which includes the interest of the enjoyment of the property concerned and it is thus found that even if the interest of enjoyment in the property is gifted, the same would constitute a valid gift provided, the same is accepted and acted upon. In so far as this case is concerned, when it is found that the gift deed Ex.A1 has been established without any doubt as having been accepted and acted upon by the plaintiff and when the plaintiff has not been shown to be deprived of enjoyment of the properties gifted, it is found that merely because, the gifted property is ordered to be taken by the male descendants of the plaintiff, after the lifetime of the plaintiff, that by itself would not render the document invalid by any account.

22. In this connection, it is found that the plaintiff has produced the patta issued in her favour marked as Ex.A3, kist receipt marked as Ex.A4. No document has been placed by the defendants worth acceptance that the suit properties are in their possession and enjoyment, despite the execution of the gift deed in favour of the plaintiff, marked as Ex.A1, it is found that the suit has come to be laid by the plaintiff on 28.04.97. The patta book marked by the defendants as Ex.B5 is dated 30.06.1997 and the kist receipts marked by the defendants are found to be ranging from 26.02.98 and 28.1.2000. Therefore, all these documents being subsequent to the institution of the suit, by themselves would not construe that the defendants are in absolute possession and enjoyment of the properties. Therefore, it is found that no proof whatsoever has been placed by the defendants that the plaintiff has been deprived of the possession and enjoyment of the properties settled by way of Ex.A1. Thus, it is found that the possession and enjoyment of the suit properties had been simultaneously entrusted to the plaintiff by the first defendant by way of Ex.A1 and the plaintiff has also accordingly established her possession and enjoyment of the settled properties. In the light of the above position, the Courts below seem to have committed an error in holding that the gift deed Ex.A1 would not have been accepted and acted upon, based upon the erroneous interpretation of the recitals contained thereon, particularly, ignoring the authoritative pronouncements of the Apex Court and our High Court as cited supra.

23. In this connection, the defendants' counsel placed reliance upon the decisions reported in 2003-4-L.W.86 (Arthur Mary Ammal Vs. Aruldoss Pillai and six others), 2010 (2) MWN (civil)405 (Maruthayairmal and five others Vs. Pushpam and eight others) and 2014-LW-260 (Revathi Vs. Nanammal). The principles of law outlined in the above said decisions are taken into

consideration and followed as applicable to the case at hand.

24. In the light of the above said reasons, when it is found that all the ingredients of a valid gift as contemplated under section 123 of the Transfer of Property Act had been satisfied by the plaintiff as regards Ex.A1, gift deed, it is found that the Courts below had erred in embarking upon an enquiry, as to whether Ex.A1 is a gift deed or a Will, when there is no such pleadings projected by the defendant in the written statement. Even the defendants have accepted that the gift deed had been executed by the first defendant in favour of the plaintiff, all that they would contend is that the same had not been accepted and acted upon and when from the materials placed on record and in the light of the above discussions, when it is noted that the gift deed had been accepted and acted upon by the plaintiff and accordingly, she has been also established to be in possession and enjoyment of the suit properties settled and the defendants having failed to establish that the properties settled by way of Ex.A1 remain in their possession and enjoyment absolutely and further, they having failed to establish that the plaintiff had been deprived of the possession and enjoyment of the properties settled, the substantial questions of law formulated in the second appeal are accordingly answered in favour of the plaintiff and against the defendants.

25. In conclusion, the judgment and decree dated 16.04.2003 passed in A.S.No.185/2002, on the file of the Principal District Court, Villupuram, confirming the judgment and decree dated 14.03.2002, passed in O.S. No.53/97, on the file of the Sub Court, Kallakurichi are set-aside. Resultantly, the preliminary decree as prayed for is passed in O.S.No.53/97 with costs. Accordingly, the second appeal is allowed with costs. C.M.P. No.860 of 2010 is dismissed. Consequently, connected miscellaneous petition, if any, is closed.

सत्यमेव जयते Sd/-

Assistant Registrar(CS VIII)

//True copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
Villupuram.

2. The Subordinate Judge,
Kallakurichi.

3. The Section Officer, (2 Copies)
V.R.Section,
High Court, Madras.

+1cc to Mr.N.Manoharan, Advocate SR.No.24060
+1cc to Mr.R.Subramanian, Advocate SR.No.24136

S. A.No.1862 of 2003
and
C.M.P. No.860 of 2010

GJII(CO)
GN(06/06/2018)



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