IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

WEDNESDAY, THE 24TH DAY OF JULY 2024 / 2ND SRAVANA, 1946

RFA NO. 200 OF 2004 (B)

AGAINST THE JUDGMENT AND DECREE DATED 09.01.2004 IN OS NO.6 OF 1998 OF SUBORDINATE COURT, CHERTHALA

APPELLANT/7th DEFENDANT:

SANTHOSH KUMAR,
S/O.GOPALAKRISHNAN NAIR,
RESIDING AT KARTHEE BHAVANAM,
KURUPPAMKULANGARA,
CHERTHALA VADAKKU VILLAGE,
VADAKKUMURI.

BY ADV SRI.BIJU ABRAHAM

RESPONDENTS/PLAINTIFFS & DEFENDANTS 1, 3 TO 6 & 8 TO 11:

1 **SREEDHARAN PILLAI**
RESIDING AT RAJASREEYIL,
CHERTHALA VADAKKUM VILLAGE,
VADUKKUM MURI. (DIED)

2 **GOPALAKRISHNAN NAIR RESIDING AT**
KARTHIBHAVAN, KURUPPANKULANGARA,
CHERTHALA VADAKKU VILLAGE, VADAKKUMMURI.(DIED)

3 **PADMAVATHI AMMA RESIDING AT**
PULIKKEZHUMANGATTU VEETTIL,
VALANKAVATTOM,, THIRUVALLA. (DIED)

4 **KARTHIYAYANI AMMA MEENAKSHI AMMA**
RESIDING AT MEENA BHAVANIL, ALUNKAL,
CHERTHALA VADAKKU VILLAGE, VADAKKUMMURI. (DIED)

5 **SARASWTHI AMMA RESIDING AT**
CHENGARATHU LAKSHIMI VILASSOM,
EZHUPUNNA MURI, KODAMTHURUTHU VILLAGE.

6 **SARADA DEVI RESIDING AT NANDANATHIL**
CHERTHALA VADAKKU VILLAGE, VADAKKUMMURI.

7 **SNANDAVALLY WO. RAMACHANDRAN NAIR**
KATTIKKATTU, NARAYANEEYAM,
KANNAMKULANGARA,, TRIPPUNITHURA.

8 **K.A. CHITHRA DO. ANANDAVALLY**
KATTIKATTU, NARAYANEEYAM,
KANNAMKULANGARA,, TRIPPUNITHURA.

9 **K.A. KARTHIKA DO. ANANDAVALLY**
KATTIKKATTU, NARAYANEEYAM,
KANNAMKULANGARA,, TRIPPUNITHURA.

10 **K.R. ANANDAN S/O. RAMACHANDRAN NAIR KATTIKATTU, NARAYANEEYAM, KANNAMKULANGARA,, TRIPPUNITHURA.**

***11** **ADDL. R11 PADMAVATHI AMMA, W/O.LATE GOPALAKRISHNAN NAIR, AGED 82 YEARS, KARTHEE BHAVANAM , KURUPPAMKULANGARA, CHERTHALA VADAKKU VILLAGE, VADAKKUMMURI, ALAPPUZHA DISTRICT -688 539**

***12** **ADDL. R12 RADHAKRISHNAN P.G. S/O.LATE GOPALAKRISHNAN NAIR, AGED 60 YEARS, RADHIKA, ERAMALLUR, ALAPPUZHA DISTRICT- 688537**

***13** **ADDL. R13 SURESH P.G. S/O. GOPALAKRISHNAN NAIR, AGED 52 YEARS, KARTHEE BHAVANAM , KURUPPAMKULANGARA, CHERTHALA VADAKKU VILLAGE, VADAKKUMMURI, ALAPPUZHA DISTRICT -688 539**

***14** **ADDL. R14 JAYAKUMAR P.G. S/O LATE GOPALAKRISHNAN, AGED 50 YEARS, GOPIPADMAM VADAYAR P.O., VAIKOM- 686605**

***15** **ADDL. R15 MALLIKA M.NAIR, D/O.LATE GOPALAKRISHNAN NAIR, AGED 55 YEARS, KARTHEE BHAVANAM, KURUPPAMKULANGARA, CHERTHALA VADAKKU VILLAGE, VADAKKUMMURI, ALAPPUZHA DISTRICT -688 539**

***16** **ADDL. R16 MAYA MANOJ, W/O.MANOJ AND D/O.GOPALAKRISHNAN NAIR, AGED 46 YEARS, FLAT NO. 9C, D.D.BHAVANAM, VIDHYA NAGAR, KADAVANTHRA, COCHIN - 682020.**

***17** **ADDL. R17 SULEKHA MOHANACHANDRAN, D/O.LATE GOPALAKRISHNAN NAIR, AGED 58 YEARS, KARTHEE BHAVANAM, KURUPPAMKULANGARA, CHERTHALA VADAKKU VILLAGE, VADAKKUMMURI, ALAPPUZHA DISTRICT -688 539 (LEGAL HEIRS OF THE DECEASED R2 ARE IMPLEADED AS ADDL R11 TO R17, AS PER ORDER DATED 30.01.2024 IN I.A.NO. 1705/2016.)**

***18** **ADDL. R18 ARAVINDA BABU, S/O.PADMAVATHI AMMA, AGED 77 YEARS, D.33, ASHOKA FLAT, MARINE DRIVE, ERNAKULAM 682031.**

***19** **ADDL. R19 GANESH BABU S/O.PADMAVATHI AMMA, AGED 63 YEARS,PULIKKEZHUMANGATTU VEETTIL, VALANJAVATTOM, THIRUVALLA - 689104.**

***20 ADDL. R20 MANJULA BHAI,**
D/O.PADMAVATHI AMMA, AGED 59 YEARS,
PADMA VILASAM, THIRUMUKKU,
CHATHANNUR, KOLLAM- 691 572
(LEGAL HEIRS OF THE DECEASED R3 ARE IMPLEADED AS ADDL R18 TO R20, AS PER ORDER DATED 30.01.2024 IN I.A.NO. 1703/2016.)

***21 ADDL. R21 RAJALAKSHMI AMMAL,**
W/O.LATE SREEDHARAN PILLAI,
AGED 83 YEARS, RAJASREE,
VADAKKUMMURI, CHERTHALA VADAKKUM VILLAGE,
ALAPPUZHA DISTRICT- 688 539.
(IT IS RECORDED THAT THE LEGAL HEIRS OF DECEASED R1 IS IMPLEADED AS ADDL. R21 AS PER ORDER DATED 15.03.2024 IN I.A. NO.3/2019)

BY ADVS.
SRI.P.CHANDRASEKHAR
SRI.P.GOPAL
SRI.P.G.PARAMESWARA PANICKER SR.
SRI.SANTHEEP ANKARATH

THIS REGULAR FIRST APPEAL HAVING COME UP FOR ORDERS ON 24.07.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 24th day of July, 2024

This appeal stems from the judgment and decree of the Sub Court, Cherthala dated 09.01.2004 in O.S. No.6/1998, as per which, a suit for partition was allowed, negating the claim for exclusive title set up by the 7th defendant on the basis of an oral gift. The 7th defendant is the appellant herein.

2. The essential pleadings are as follows:

The suit was filed by the plaintiff on the premise that the plaint schedule properties belong to one Balakrishnan Pillai @ Balakrishnan Nair, who died unmarried, issueless and intestate. Upon his death, the scheduled properties devolved upon the plaintiff and defendants 1 to 6, who are the siblings of late Balakrishnan Pillai, each being entitled to one-seventh share in the scheduled properties. The

7th defendant was impleaded for the reason that, he was the nominee to one treasury deposit of late Balakrishnan Pillai. The plaintiff sought for partition separating his one-seventh share in the scheduled property.

3. Defendants 2 to 6 filed written statement accepting the plaint averments, however, seeking separation of their one-seventh share each in the scheduled properties.

4. The 7th defendant is the son of 1st defendant. Defendants 1 and 7 filed a written statement contenting *inter alia* that, all the scheduled properties were not standing in the name of Balakrishnan Pillai at the time of his death. He gifted the properties to the 7th defendant and the properties are in the possession and enjoyment of the 7th defendant, accordingly. A contention is seen raised to the effect that the father of Balakrishnan

Pillai by name Sivarama Panicker passed away in the year 1960, when Balakrishnan Pillai was only 20 years old and he was taken care of by the 1st defendant, for the purpose of his upbringing. Other siblings (plaintiffs and defendants 2 to 6) were inimical to Balakrishnan Pillai and that he was even physically assaulted by them. The 7th defendant was treated by Balakrishnan Pillai as his own son, for which reason, he gifted the properties to the 7th defendant. Balakrishnan Pillai had fixed deposits in the treasury savings account, as also, his pension account, wherein, the 7th respondent was nominated as nominee, in which capacity the amounts standing in the name of Balakrishnan Pillai were withdrawn by the 7th defendant. On such premise, the plaint averments were denied and defendants 1 and 7 sought for dismissal of the suit.

5. The plaintiff had not adduced any evidence. On behalf of the defendants, Exts.B1 and B2 were marked

and the 7th defendant was examined as DW1. Exts.X1 to X4 were marked as third party exhibits.

6. On an analysis of the facts evidence and probabilities of the case, the learned Sub Judge decreed the suit, eschewing the contention of defendants 1 and 7 that the scheduled properties were gifted to the 7th defendant. The learned Sub Judge found that the gift of an immovable property has to be by virtue of a registered document, without which, no interest will pass to a donee. Since the oral gift was claimed to be of the year, 1994, the question of adverse possession and limitation does not arise, is another finding of the learned Sub Judge. As regards nomination, the learned Sub Judge found that the same would only enable the 7th defendant to collect the money from the bank or the treasury, as the case may be. The same will not confer any entitlement on the nominee to appropriate the amounts covered and that the nominee holds such

amount in trust for other legal heirs, is what has been found by the learned Sub Judge. On such premise, the suit was decreed, directing division of the scheduled properties into seven equal shares and to allot one such share to the plaintiff. The decree also directed that the plaintiff will be entitled to recover possession of the property allotted to him from the 7th defendant. As regards the amount in the credit of late Balakrishnan Pillai in his treasury account, which is described as 'B' schedule property, the decree directs that the plaintiff is entitled to realise one-seventh of his share. Accordingly, a preliminary decree was passed.

7. Heard the learned counsel for the appellant and the learned counsel for the respondents. Perused the records.

8. The learned counsel for the appellant submitted that no evidence oral or documentary, whatsoever, was

adduced by the plaintiff. It was the 7th defendant alone who mounted the box as DW1 and produced Exts.B1 and B2 documents. In the absence of any evidence adduced, a decree in favor of the plaintiff cannot be sustained, is the submission made. The second submission is to the effect that the 7th defendant, in juxtaposition with the plaintiff and other defendants, is a stranger, who is in admitted possession of the plaint schedule properties. In such circumstances, a decree for partition, in the absence of a prayer for recovery of possession, could not have been passed. The decree is liable to be set at naught for that reason also. As regards oral gift, it is the contention of the appellant that the same, is accepted by all the parties, wherefore the trial court should not have nullified the same, relying upon legal provisions alone.

9. As against the above contentions, the learned counsel for the plaintiff would argue that a claim

for oral gift amongst Hindus cannot be recognized in law. The same can only be by virtue of a registered instrument. The learned counsel relied upon a judgment of this Court in *Velayudhan K.* v. *Taluk Land Board, Palakkad and others* [2008 (1) KHC 708].

10. The following points arise for consideration:-

i) Can the appellants claim for exclusive title based on an oral gift amongst Hindus, is liable to be recognised in law? Is not a gift to be legal and valid be registered compulsorily in terms of Section 17 of Registration Act?

ii) Whether the plaintiff's failure to mount the box, in the attendant facts and circumstances, fatal?

iii) Whether absence of a relief for recovery of possession from the appellant/7th defendant, fatal?

iv) Whether the judgment impugned warrants any interference from this Court?

11. Point No.1 :-

Having heard the learned counsel for the respective parties, this Court finds no reason to unsettle the well considered judgment of the trial court. The essential contention which is seen urged in the written statement filed by defendants 1 and 7 is a gift of the scheduled properties in favor of the 7th defendant. As a matter of fact, the written statements are not specific that the gift in question is an oral gift. It only refers to a gift in favor of the 7th defendant/appellant. Admittedly, it is not by virtue of any registered document. Section 17 of the Registration Act speaks of documents for which registration is compulsory. The first item coming under Section 17(1)(a) is instruments of gift of immovable property. Section 17 would also mandate

that any document, which purport to create, declare, assign, limit or extinguish any right, title or interest in immovable property of the value of ₹100/- and upwards are compulsorily registerable. Section 49 of the Registration Act speaks of the effect of non-registration, as per which, a document which is required to be registered under Section 17, will not affect any immovable property and that the same cannot be received as evidence of any transaction affecting such property, unless it has been registered.

12. The learned counsel for the respondents/plaintiffs relied upon a judgment of this Court in *Velayudhan K.*(supra) to contend that a gift of immovable property in terms of Sections 122 and 123 of the Transfer of Property Act can be effected only by way of a registered instrument, signed on behalf of the donor and attested by atleast two

witnesses. The relevant findings in paragraph No.8 are extracted here below:

> ***"Another reason to reject the contention raised by the petitioner is that a Hindu can validly create a gift only as provided under S.122 and S.123 of the Transfer of Property Act. "Gift" as defined in S.122 of the Transfer of Property Act is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration by one person, called the donor, to another, called donee, and accepted by or on behalf of the donee. S.123 provides that for the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. To constitute a valid gift, there must be a registered instrument as provided under S.123 of the Transfer of Property Act. If there is no valid gift as provided under S.123, the donee would not get any title to the property. An oral gift of immovable property is not contemplated under the Transfer of Property Act. As S.123 of the Transfer of Property Act specifically provides for the mode of transfer by way of a gift, there could be no other method by which a valid gift could be made. Mere delivery or possession, without there being a written instrument signed by or on behalf of the donor and attested by at least two witnesses, cannot confer any title on the donee. (See - Wg.***

Cdr. (Retd.) R. N. Dawar v. Shri Ganga Saran Dhama, AIR 1993 Delhi 19).”

13. In the circumstances, this Court finds no reason to interfere with the judgment of the trial court, which rightly rejected the claim of defendants 1 and 7 based on oral gift. This Court is in absolute agreement with the preposition of law as laid down by the trial court, in so far as nomination in fixed deposits etc., are concerned. The nominee, of course, is entitled to receive the amount, but is supposed to hold the amounts in trust for other legal heirs. Going by Section 8 of the Hindu Succession Act, upon the death of a male Hindu, the property will devolve upon the siblings, if such male dies unmarried and issueless. In the instant case, Balakrishnan Pillai is survived by his siblings namely plaintiff and defendants 1 to 6. Therefore, the partition enabling division of properties amongst the legal heirs and recognizing the plaintiff’s one-seventh share in the scheduled properties is only to be upheld.

14. <u>Point No.2</u> :-

As regards the first contention raised by the learned counsel for the appellant, this Court is of the opinion that absence of evidence adduced by the plaintiff in the peculiar facts and circumstances cannot be fatal. This Court has already found that a gift of immovable property can only be by way of a registered document as per Section 17 of the Registration Act. A claim for oral gift can hardly be recognised in law amongst Hindus. In such circumstances, when the answer to the contention of the 7th defendant/appellant in the written statement is purely based on a legal premise, absence of oral evidence in this regard cannot be treated as fatal. In other words, the defence contention is not liable to be met by adducing contrary oral evidence, but by virtue of the provisions of law and the legal

position governing the subject. The first contention is therefore, repelled.

15. <u>Point No.3</u> :-

Coming to the second contention of the appellant, this Court is of the opinion that a technical contention as regards the absence of a relief for recovery of possession cannot stand in the way of doing substantial justice between the parties. The contention that the 7th defendant/appellant is a complete stranger also cannot be appreciated in full. It is one thing to say that the 7th defendant is not a sharer/legal heir of deceased Balakrishnan Pillai by way of succession. However, the fact remains that he is the son of the first defendant, who is the brother and also the legal heir of late Balakrishnan Pillai. It is only on the strength of an oral gift that the 7th defendant claims title, as also, possession over the schedule properties. The situation is not liable

to be treated, as if the property is in the hands of a complete stranger and, as rightly found by the trial court, there is no room for any adverse possession or limitation. At any rate, the relief which is otherwise due to the plaintiff, cannot be refused on the specious ground that recovery of possession was not sought for, especially when the defence contentions are completely irreconcilable with the provisions of law and the legal position as regards gift governing Hindus. Needless to say that a court of law has the inherent power to mould a relief, if the same is established/demonstrated from the admitted facts and available evidence. The second contention is also therefore, repelled.

16. <u>Point No.4</u> :-

In view of the above discussion under points 1, 2 and 3, the judgment impugned warrants no interference from this Court.

The judgment and decree is upheld. This appeal fails and the same will stand dismissed, with cost.

Sd/-

C. JAYACHANDRAN
JUDGE

SSS