2019 INSC 1058

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1429 OF 2011

ILLOTH VALAPPIL AMBUNHI (D) BY LRS. Appellant(s)

VERSUS

KUNHAMBU KARANAVAN Respondent(s)

JUDGMENT

INDIRA BANERJEE J.

1. This Appeal is against a Judgment dated 12th March, 2009 in Second Appeal No. 229 of 1996 passed by a Single Bench of the Kerala High Court, whereby the High Court has set aside the concurrent decisions of the Trial Court and the First Appellate Court and declared that the suit property belongs to the Chuzhali Bhagavathi Dharmadeva Bhandaram (hereinafter referred to as 'the Bhandaram').

2. The High Court further declared that the deed of assignment dated 31st July, 1971 executed by Raman Aithan Ashari in favour of the appellant in respect of the suit property was null and void and not

binding on the respondents and allowed the respondents to recover possession of the suit property for and on behalf of the the Bhandaram.

3. The facts giving rise to this Appeal are very briefly enumerated hereinafter:

Raman Aithan Ashari, hereinafter referred to as Raman, executed a deed of gift of the said property in favour of the Bhandaram. According to the appellants, though the deed of gift stated that possession had been delivered, there was no evidence of acceptance of the gift or of the Bhandaram being in possession. No presumption of acceptance of the gift could arise on the basis of the recital of delivery of possession in the deed of gift as the donee was only an inanimate body and there was no evidence of any person accepting the gift or entering into possession on its behalf.

4. The appellants contend that the gift did not take effect and Raman continued in possession, paying rent and revenue for the property in his name. He later cancelled the gift by a deed of cancellation dated 15th July, 1971 and sold the property to the original appellant on 31st July, 1971. The original appellant was given possession thereafter and he made

improvements to the suit property.

5. According to the appellants, on or about 7th December, 1981, long after the original appellant had purchased the suit property, the respondents being the family members of Raman, and members of Kizhakke Veethil Tarwad filed the instant suit for declaration that the Deed of Cancellation and the deed of transfer were invalid, null and void.

6. It was the case of the respondents that they were owners of the Bhandaram which had come to own the suit property by virtue of the deed of gift. Upon execution of the deed of gift Raman had divested himself of title to the suit property and hence was incompetent to execute any further deed, transferring the suit property to the appellants herein and/or their predecessor in interest being the original appellant.

7. The appellants contend that the appellants are bonafide purchasers for value. They resisted the suit contending that the gift had not taken effect, as the same had not been accepted, and therefore Raman was perfectly justified in cancelling the gift and selling the property to the appellant.

8. On behalf of the appellants, it is argued that

the Trial Court went into detailed analysis of the evidence, and came to the conclusion that the gift executed by Raman had not taken effect, as it had not been accepted. Accordingly the deed of cancellation as well as the sale to the appellant were held to be valid and the suit was dismissed. The findings of the Trial Court were affirmed by the First Appellate Court.

9. It is true, as rightly argued by learned senior counsel appearing on behalf of the appellant, that the High Court does not, in Second Appeal, embark upon re-analysis of evidence and interfere with the concurrent findings of facts. It is well settled that the condition precedent for interference under Section 100 of the CPC is the existence of a substantial question of law.

10. What constitutes substantial question of law has been settled by innumerable decisions of this Court. Reference may be made to the Constitution Bench decision in *Sir Chunilal V. Mehta and Sons* VS. *The Century Spinning and Manufacturing Co. Ltd.* Reported in AIR 1962 SC 1314.

11. In Chunilal (*Supra*), a Constitution Bench of this Court held that the proper test for determining

whether a question of law raised in the case is substantial would be, whether it is of general public importance or whether it directly and substantially affects the rights of the parties, and if so, whether it is an open question in the sense that it has not finally been settled by this Court or the Privy Council or the Federal Court, or is not free from difficulty, or calls for discussion of alternative views. If the question is settled by the highest Court, or the general principle to be applied in determining the question are well settled and there is mere question of applying those principles, or that the plea raised is palpably absurd, the question would not be a substantial question of law. In the aforesaid case, the construction of the Managing agency agreement was not only found to be a question of law, but also neither simple, nor free from doubt and accordingly the High Court was held to be in error in refusing to grant the appellant a certificate that the appeal involved a substantial question of law.

12. Learned senior counsel appearing for the Respondent has cited a very recent judgment of this Court in *Gurnam Singh (D) by LRs. and Other* vs. *Lehna*

Singh (D) by LRs. **reported in 2019(7) SCC 641, where this Court re-affirmed that the jurisdiction of the High Court to entertain a Second Appeal under Section 100 of the CPC after the 1976 amendment is confined to a substantial question of law. Thus existence of a "substantial question of law" is a *sine qua non* for the exercise of jurisdiction under Section 100 of the CPC.**

13. In Gurnam Singh's case (*supra*) this Court held that in a Second Appeal under Section 100 of the CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the Court were erroneous being :

> **(1.) contrary to the mandatory provisions of the applicable law; or**
>
> **(2) contrary to the law as pronounced by this Court; or**
>
> **(3) based on inadmissible evidence or no evidence.**

14. It is now well settled that perversity in arriving at a factual finding gives rise to a substantial question of law, attracting intervention of the High Court under Section 100 of the CPC.

15. Learned senior counsel appearing for the appellants referred to the substantial questions of

law framed by the High Court, and in particular, the first question which reads as under:

> **Whether Exh. A1 -gift deed having been accepted on behalf of the donee could be revoked by the donor unilaterally?**

16. Counsel submitted that the questions have been framed on the patently erroneous premises that the gift had been accepted, on behalf of the donee when, in fact, both the Trial Court and the Appellate Court had concurred in their finding that the gift had never been accepted.

17. The other questions, i.e. whether the cancellation deed being Ex.P11 was contrary to the provisions of Section 126 of the Transfer of Property Act, 1882, or whether the relief of declaration in respect of the documents being Exh. P11 was barred by limitation, or whether the appellant had perfected title under Section 27 of the Limitation Act, cannot be said to be substantial questions of law, but are questions of fact, as argued by Counsel.

18. The first question may not have properly been framed. Perhaps the question should have read- whether the finding of the Trial Court with regard to non acceptance of the deed of gift, confirmed in

appeal, was vitiated by perversity and if it was so vitiated, whether the unilateral revocation of the deed, by the donor, can be sustained in law.

19. A careful reading of the judgment of the High Court under Appeal makes it absolutely clear that those are the questions which have, in effect and substance, been addressed. In our view, a mere error in framing a question of law would not render a judgment in Second Appeal liable to be set aside, if it is found that a substantial question of law existed and such substantial question of law has in fact been answered by the High Court as in this case.

20. The High Court rightly took note of the recital of the deed of gift which showed delivery of possession to the donee. The recital of the deed gift is as under:

> **"As described above, I hereby give possession of the under mentioned properties as gift for the expenses of the aforesaid Daiva Bhandram which belongs to over Tarward and in which I also have ownership rights.**
>
> **Therefore from today onwards yourself and in our absence those in our Tarwad who follow the rites of Chuzhali Ayathan etc. shall have possession of the properties given in the schedule below and shall meet the expenses of the Dharmadaivam from the income from time to**

time pay taxes and give me Rs.24/-towards my life interest before 30th of Kumbham every year from 1131 (M.E.). The said amount shall be given to me till my death and obtain receipt for the same. I will have no other rights on the property mentioned in the schedule except the aforesaid life interest."

The High Court further held :-:

"8. In the decisions relied on by the learned counsel for the respondent it has been held that there cannot be a presumption regarding acceptance of the gift, be it not onerous and that there must be some evidence to show that the gift was accepted during the life time of the donor but, what is stated in those decision is concerning the presumption as to the acceptance of the gift. But when the document itself recited that the possession of the property was given to the donee, then, a presumption of acceptance of gift would arise in favour of the donee."

21. The proposition of law that when the document of transfer by gift records delivery of possession, a presumption of acceptance would arise, in the absence of overt repudiation of the gift, by and/or on behalf of the donee, is unexceptionable. As held by the High Court, when the deed itself said that the possession of the property was given to the donee, the burden of proving, that the said recital was not correct, lay

on the party who asserted so. In our view, the law has correctly been appreciated and enunciated by the High Court.

22. The High Court took note of the recital to the effect that Karnavan (Malingan Chuzhali Ashari) acting on behalf of the Bhandaram was to enjoy the property from the date of the gift, which was strong evidence of transfer of possession.

23. The High Court rightly found that there was no direction in the gift deed which made the gift onerous as understood in Section 127 of the Transfer of Property Act. In all fairness to the appellants, this has not even been argued before the High court. The gift not being onerous, there was no reason why Malingan Chuzhali Ashari should not have accepted the gift on behalf of the Bhandaram.

24. The High Court held:

> **"It is indisputable that an idol is to be treated as a minor for all legal purposes. Hence, the acceptance of the gift as per Ext. A1 could be by any person on behalf of the donee. It is not disputed that Malingan Chuzhali Ashari was the Karnavan of the Tharawad during the time of Ext.A1 and that along with Malingan Chuzhali Ashari, the donor (Raman Aithan Ashari) was also a trustee of the Bhandaram."**

25. As noted by the High Court, there is no dispute that Malingan Chuzhali Ashari and the donor Raman were trustees of the Bhandaram (donee) at the time of execution of deed of gift. The fact that nothing was done by Raman or any other trustee of the Bhandaram to repudiate the gift in itself shows that the deed of gift was duly accepted by the Bhandaran.

26. The High Court rightly held that the Courts below had proceeded on the wrong assumption that even in spite of the recitals in Exh. A1, being the deed of gift and the admitted facts of the case, the burden of proof was on the respondents to show that the gift had been accepted. The findings of the Trial Courts and the First Appellate Court were based on a wrong assumption of law regarding the possession of an idol in the eye of law and the relevant recitals in Exh. A1 (deed of gift).

27. The High Court rightly declined to accept the findings of the Courts below that the deed of gift had not been accepted during the lifetime of the donor, in the absence of any evidence of non acceptance of the same. The deed of gift did not provide for reversion of the suit property to the donor in case of failure to pay maintenance to the

donor in terms of the deed of gift. The High Court, therefore arrived at the conclusion that Raman was not competent to execute the deed of cancellation or the deed of transfer, as he had ceased to be the owner of the suit property.

28. In *Md. Noorul Hoda* vs. *Bibi Raifunnisa & Ors*. reported in (1996 (7) SCC 767), this Court held that Article 59 of the Limitation Act would be applicable if a person affected is a party to a decree or an instrument or a contract which was questioned by initiation of a suit. Article 59 would apply to set aside the decrees, instruments or contracts between the parties *inter se.* However, in the case of a person claiming title through a party to the decree or instrument or contract who seeks to avoid the instrument, contract or decree by a specific declaration, the starting point of limitation under Article 59 would be the date of knowledge of the fraud and/or illegality which renders the decree and/or instrument and/or other document void.

29. In *Prem Singh & Ors.* vs. *Birbal & Ors*. Reported in 2006 (5) SCC 353, cited on behalf of the appellant, this Court held that when a document is valid, no question arises of its cancellation; when a

document is void, initiating a decree for setting aside, the same would not be necessary as the same is *nonest* in the eye of law as it would be a nullity.

30. In Prem Singh & Ors. (*supra)* this Court *further* held that Article 59 of the Limitation Act deals only when relief is claimed on the ground of fraud, coercion, undue influence, mistake, etc. to avoid a voidable transaction. Article 59 is attracted where fraud, coercion, undue influence, mistake etc. have to be proved. It would not apply to instruments which are presumptively invalid.

31. The High Court held, and rightly, that Article 59 of the Limitation Act deals with suits for cancellation for setting aside an instrument or decree or for rescission of a contract and prescribes a period of three years commencing from the time when the fact entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded is first known to him. So far as Exh. A1 being the deed of gift is concerned, the donor had no authority to revoke the same. Hence, the subsequent documents were in themselves without authority and null and void. The declaration was only incidental to the title and possession of the

donee and hence Article 59 had no application.

32. In *S. Sarojini Amma* vs. *Velayudhan Pillai Sreekumar* (2018 SCC Online SC 2200) this Court found on facts that the gift was conditional and the conditions had not been complied with. Furthermore on facts it was found that the gift in the aforesaid case was to take effect at a subsequent date. The Judgment is distinguishable on facts.

33. In our view, the Second Appeal has rightly been allowed by the High Court. The Appeal is therefore dismissed.

34. Needless to mention that the Appellant will be entitled to initiate such proceedings as the Appellant may be advised, against the vendor for damage and recovery of the consideration paid to him.

.....J.
(INDIRA BANERJEE)

.....J.
(SANJIV KHANNA)

NEW DELHI
SEPTEMBER 19, 2019