

Karthiyani Amma and Others

Vs

C. P. Kochunarayana Menon

Civil Appeals No. 7611 of 1997, With Nos. 7612-7613 of 1997

(S. B. Majmudar, S. P. Kurdukar JJ)

07.11.1997

ORDER

1. Delay condoned in SLPs (C) Nos. 9346-9347 of 1996.
2. Leave granted in all these special leave petitions. By consent of contesting parties who appear through their counsel, these appeals were taken up for final disposal forthwith. Before we proceed to deal with these appeals we may mention that the original Appellant 2 in civil appeal arising out of SLP (C) No. 26163 of 1995 has died pending proceeding but her son Rajesh, Appellant 8 is already on record and he, therefore, now shall be described as heir of Rathi Devi as representing her interest along with his interest. Similarly, in the cross-appeals arising out of SLPs (C) Nos. 9346-9347 of 1996, Rathi Devi having expired pending proceedings will now be represented by Respondent 8, Rajesh, her son who will represent her estate also along with his own estate. He though described as minor aged 17 years represented through his father in the appeal memo is now aged 27 years as informed to us. So, he shall be now described as major and his guardian will stand discharged.
3. So far as the merits of these appeals are concerned, in civil appeal arising out of SLP (C) No. 26163 of 1995, the appellants are the original plaintiffs who filed a suit for declaration of title, injunction and possession of the properties mentioned in the respective schedules of the plaint. The case of the appellants in the cross-appeals is that the brother of Plaintiff 1 had filed the aforesaid suit. We may refer to the contesting parties hereinafter as plaintiffs and defendants in the latter part of this order. The plaintiffs' case is that their mother, Lakshmikutty Amma executed a gift deed on 15-5-1956 in favour of Plaintiff 1 giving rights over the entire Plaints A & B properties to the donee and consequently the contesting defendants had no interest in the said properties and therefore, the aforesaid reliefs were prayed for.
4. The contesting defendants resisted the proceedings and submitted that the so-called gift deed of their mother in favour of Plaintiff 1 was in effect a Will. Their further case was that by a subsequent Will she had already cancelled the earlier Will and therefore, the plaintiff's suit was liable to be dismissed in its entirety.
5. The trial court after recording the evidence of the parties came to the conclusion that the document of 15-5-1956 is a gift deed and not a Will and on the basis of that gift deed, the suit of the plaintiff was decreed against the defendants. Defendant 1 who is the appellant in the cross-appeals before us carried the matter in first appeal before the District Court. But he was unsuccessful in getting the decree of the trial court reversed. The result was that the appeal was dismissed by the First Additional Sub-Court, Ernakulam. Thereafter, Defendant 1, the appellant in the cross-appeals filed second appeal before the High Court. Learned Single Judge of the High Court who decided the

second appeal assumed that it was a gift deed but even so, according to the learned Judge the original donor, Lakshmikutty Amma was having undivided interest in the said properties and had conveyed her rights over the properties in favour of Plaintiff 1. Consequently, decrees passed by the trial court and as confirmed by the first appellate court were modified by the High Court by allowing the second appeal to that extent and by directing preliminary decree to be passed accordingly. A preliminary decree was granted to the appellant for partition and delivery to them of 4/7th share in Plaintiff Schedule Items 1 to 4 and 2/5th share in Plaintiff Schedule Item 5. The said judgment of the learned Single Judge of the High Court was later modified and the shares were recomputed by the order dated 28-3-1995. The appellant-plaintiffs being aggrieved by the said modification of the decree of the trial court and as confirmed by the first appellate court by the High Court filed SLP (C) No. 26163 of 1995 challenging both the orders dated 20-3-1995 and 28-3-1995 which has resulted in civil appeal while two cross-appeals are filed by the original Defendant 1 challenging the very same order of the High Court.

6. At the time of hearing of these appeals it was vehemently contended by learned counsel for the appellant-plaintiffs that on the assumption that Ext. A/1 was a gift deed, the High Court made out clearly a new case for the parties especially the contesting defendants by observing that the donor had undivided interest in tharwad properties. In fact, there was already prior partition on 16-5-1953 by the parties and the donor, Lakshmikutty Amma had been given exclusive ownership of certain properties which came to her share and therefore is full owner of those properties received by her in partition of which she had effected a gift deed in favour of Plaintiff 1. On the other hand, learned counsel for Defendant 1-appellant in the cross-appeals vehemently contended that the High Court has not considered whether Ext. A-1 was really a gift deed or a Will and if it was a Will it was subsequently cancelled and thereafter a fresh Will was executed by the said Lakshmikutty Amma. All these questions remained to be examined by the High Court. We find considerable force in these contentions. The High Court had not considered whether Ext. A/1 was a Will or not. Nor had it an opportunity to consider partition deed dated 16-5-1953 which was not on record. In our view, the interest of justice will be served if these appeals are allowed and the judgment and order of the High Court and lower appellate court are set aside and the proceedings are remanded to the first appellate court namely, to the District Court at Ernakulam for fresh disposal of the first appeal filed by Defendant 1. In the said appeal it will be open to the plaintiff-respondents to produce by way of additional evidence the partition deed dated 15-5-1953. It will be equally open to Defendant 1 to produce rebuttal evidence, if any, against the additional evidence to be produced by the plaintiffs. Thereafter, the first appellate court shall decide the appeal afresh on all points especially, keeping in view the following points for consideration :

- (i) whether Ext. A- 1 is a gift deed or a Will;
- (ii) if it is a Will, whether it is subsequently rescinded by execution of a fresh Will by the aforesaid Lakshmikutty Amma;
- (iii) what shares should be allotted to the contesting parties in the light of the aforesaid orders;
- (iv) whether the tharwad partition deed dated 16-5-1953 is a partition deed and if so, what is the share which was allotted to Lakshmikutty Amma in the said deed.

7. It will be open to the first appellate court to frame any additional points for determination as may be deemed necessary in the light of the contentions of the contesting parties. The judgment of the

High Court and the first appellate court are set aside. The appeals are allowed as aforesaid. As the remanded proceedings will result in First Appeal No. AS 78 of 1990 being restored for fresh decision, it is directed that the first appellate court will dispose of the appeal as expeditiously as possible. No costs.