SUPREME COURT OF INDIA

Mathai Samuel & Ors.

Vs.

Eapen Eapen (dead) by Lrs. & Ors.

C.A.No.8197of2012

(Dipak Misra and K.S. Radhakrishnan)

21.11.2012

JUDGMENT

K. S. Radhakrishnan,J.

1. Leave granted.

2. We are, in this appeal, called upon to determine the question whether the recitals in exhibit A1 concerning item No.1 of schedule No. 8 therein (item No. 1 of the plaint schedule) discloses a testamentary disposition or a settlement creating vested rights in favour of the plaintiffs and defendant Nos. 1 to 3 though possession and enjoyment stood deferred until the death of the executants.

3. O.S. No. 169 of 1990 was instituted before the court of Subordinate Judge, Thiruvalla by the original plaintiffs and one Eapen for partition and separate possession of various items of properties, of which, we are in this appeal concerned only with item No. 1 of the plaint schedule. The trial court passed a preliminary decree giving various directions, however with regard to the above mentioned item which relates to 3 acre 40 cents, it was held that exhibit A1 document did not preclude the executants rights for disposing the same during their lifetime. Consequently, the trial court held that so far as item No.1 in schedule No. 8 of exhibit A1 is concerned, the same has the characteristics of a testamentary disposition, therefore not available for partition. The court held that B3 sale deed executed in favour of 3rd defendant in the year 1964 by Sosamma Eapen was valid so also B1 sale deed executed in the year 1978 by the 3rd defendant in favour of 4th defendant.

4. The plaintiffs took up the matter in appeal as A.S. No. 62 of 1991 before the court of District Judge, Pathanamthitta, which was allowed vide judgment dated 26.03.1994 and the decree and judgment of the trial court was modified and a preliminary decree was passed allowing partition and possession of 3/6th share of various items including sub-item 1 of schedule No. 8 of exhibit A1 document. The Appellate Court took the view that the above

item was settled by exhibit A1 in favour of the original plaintiffs and defendant Nos. 1 to 3 jointly though its possession and enjoyment were deferred till the death of the executants. It was also held that the assignment deed, executed by one of the executants and later by 3rd defendant, was not binding on the plaintiffs.

5. Defendant Nos. 3 and 4 then filed Second Appeal No. 686/1994 before the High Court. The High Court affirmed the judgment of the lower appellate court vide judgment dated 12.03.2009. While the appeal was pending before the High Court, the 3rd defendant died and his legal heirs got themselves impleaded. The High Court took the view that disposition with regard to the above mentioned item was not ambulatory in quality or revocable in character during the lifetime of the executants and held that the disposition of the plaint item No. 1 is a settlement though possession and enjoyment were deferred. It was held that the executants had no right of disposal of that item and hence the transfer in favour of defendant No.3 and the subsequent assignment in favour of defendant No.4 were invalid. Aggrieved by the same, these appeals have been preferred.

6. Shri T. L. Viswanatha Iyer, learned senior counsel appearing for the appellants submitted that exhibit A1 does not postulate any transfer of ownership or title over 8th schedule by the executants to their sons so also schedule Nos. 7 and 9. Learned senior counsel submitted that items in schedule Nos. 7, 8 and 9 were under their absolute control of the executants and they had the full freedom to deal with those properties. Learned senior counsel referring to the various recitals in exhibit A1 agreement submitted so far as schedule Nos. 1 to 6 are concerned, the transfer of interest was absolute in character and settled on all the sons equally and rest of the three items of the schedule, the executants had retained those items to themselves and to that extent exhibit A1 operated only as a Will. Learned senior counsel pointed out that so far as schedule Nos. 7 and 9 are concerned, the courts found that they are testamentary in character and the same reasoning should have been applied in the case of items in schedule No. 8 as well. Learned senior counsel has laid considerable emphasis on the Malayalam words adheenadha (control) and swathanthryam (liberty/freedom). Learned senior counsel submitted those words clearly indicate that the intention was to keep items in schedule Nos. 7 and 9 to the executants in their control with full freedom subject to certain stipulations. Learned senior counsel also pointed out that exhibit A1 clearly indicates that items in schedule No. 8 would devolve on his sons only after the executants lifetime, if available. Learned senior counsel submitted that in the absence of any words/recitals of disposition/transfer of items in schedule No.8 in exhibit A1 conferring title in praesenti on the sons, the High Court was not justified in holding that exhibit A1 was not a Will in respect of that item.

7. Shri Aljo K. Joseph, learned counsel appearing for the respondents on the other hand contended that the recital in the document relating to schedule No.8 is in the nature of a settlement bestowing vested rights in equal shares to all the children of late Shri Eapen and late Smt. Sosamma. Learned counsel submitted that the specific language of the recital in the agreement relating to schedule No.8 itself clearly indicates that rights are created in praesenti and at the most the enjoyment thereof was only postponed. Learned counsel submitted that while reading the agreement as a whole, the inevitable conclusion is that the document, particularly recital relating to schedule No.8, is in the nature of a settlement conferring vested rights on the sons of executants equally. Learned counsel submitted that the High Court was, therefore, justified in holding so, which calls for no interference by this Court in this appeal. Learned counsel also made reference to the judgments ofthis Court in P. K. Mohans Ram v. B. N. Ananthachary and Others (2010) 4 SCC 161 and RajesKanta Roy v. Shanti Debi and Another AIR 1957 SC 255.

8. We are, in this case, concerned only with the question whether the recitals in Exhibit A1document concerning the disposition of schedule No. 8 disclosed a testamentary disposition or is a settlement of that item in favour of the original plaintiffs and defendant Nos. 1 to 3 deferring its possession and enjoyment until the death of the executants.

9. Exhibit A1 is written in Malayalam language, the English version of that document is given below:

> "Agreement dated 2nd day of Thulam 1125 M.E. Ext A1 The agreement executed on this the 2nd day of Thulam one thousand one hundred and twenty five by (1) Eapen s/o Chandapilla aged 58 years, house hold affairs of Perumbral, Vennikkulam Muri of Kallooppara Pakuthi and wife (2) Sossamma of Perumbral, Vennikkulam Muri of Kallooppara Pakuthi Christian woman, house wife aged 54 years, in favour of (1) Cheriyan, Agriculturist aged 35 years (2) Chandapilla, Bank Job aged 30 years (3)Eapen, Agriculturist aged 28 years (4) Geevargheese, Agriculturist aged 25 years, (5) Chacko, Agriculturist aged 22 years and (6) Mathai aged 18 years student.We have only the six of you as our sons and Kunjamma, Mariyamma and Thankamma as our daughters, Kunjamma and Mariyamma have been married off as per Christian custom and had been sent to the husbands houses. Accordingly, they have become members and legal heirs of the said husbands family and are residing there. Thankamma remains to be married off. No.2 and 3 among you are married and the dowry amounts received thereby have been used for the needs of the family. The properties described in the schedules have been obtained as per partition deed No. 1933 of 1069 ME of the Sub Registrar Office, Thiruvalla and under other documents. They are held, possessed and enjoyed by us jointly, with absolute rights (word in

Malayalam is Swathanthryam) and dealing with the same with all rights and paying all taxes and duties thereon. There are some amounts to be paid off by us by way of debt, incurred for conducting the family affairs. This agreement is executed in as much as all of you have attained majority and since we are becoming old, it was felt that it will be to the benefit of all and to avoid future family disputes and for the purpose of discharging the debt, to execute this agreement to divide the properties separately subject to the conditions specified below. The parties are to act accordingly. The properties have been divided into schedule No. 1-9. The properties described as schedules 1, 2, 3, 4, 5, 6 are absolutely settled respectively on numbers 1 to 6 among you. Schedule 7 is required for the marriage and dowry purposes of Thankamma, schedule 8 for the purpose of discharging the debt due to Land Mortgage Bank. Schedule 9 for the purpose of meeting our needs of maintenance and they areretained by us in our full control (adheenadha) and freedom (swathanthryam). You shall separately possess and enjoy item 1 to 6 subject to the conditions specified in this agreement, paying taxes and discharging your duties acting as per our desires. Since item No.2 in schedule No. 2 property and item no. 5 in Schedule No. 3 property have been added additionally in consideration of dowry amount received from the marriage of party Nos. 2 and 3 among you, the responsibility for the dowry amount of the wife of the 2nd party has to be borne by the 2nd party, and the responsibility for the dowry amount of the wife of 3rd party is to be borne by the 3rd party among you and if any default occurs on their part, the respective party and the respective partitioned properties shall be liable. The right and responsibility of the dowry amount that parties Nos. 1, 4, 5 and 6 might receive when they get married shall lie on them only. The marriage of the said Thankamma shall be conducted by us, in our responsibility, during our life time, by creating for the purpose any kind of transactions as we desire on the property in schedule 7. If the said Thankamma is not married off during our life time, the property in schedule 7 shall, after our life time, belong absolutely (word used in Malayalam is Swathanthryam) on Thankamma with complete possession, title and right, and Thankamma shall pay taxes, redeem the mortgage and enjoy the property. We are keeping possession of schedule No.8 utilizing the income derived by us directly, or by leasing out, to discharge the amounts due to the Bank without default and after the clearance of the debt, the income from schedule 8 property shall be utilized for our maintenance. After our life time, No. 2 in schedule 8 will below separately and absolutely (word used in Malayalam is Swathanthryam) to the 3rd among you and No.1 and 3 will belong to all of you absolutely (word used in Malayalam is Swathanthryam) in equal shares and accordingly you may hold and enjoy the properties paying the taxes thereon. Schedule No. 9 property shall be possessed by us and income there from be taken directly or by leasing out and if need

be, by executing such documents as we desire on schedule No.9 property and matters carried out, and after our life time if the property is left, you all take it in equal shares. We will have the absolute (word used in Malayalam is Swathanthryam) right of residence in the house situated in schedule No.6 during our life time.If any transaction or debt is to be generated on the properties apportioned to each of you, the same has to be done jointly with us also, and if anybody acts contrary to the aforesaid, the said transaction or debt shall not be binding on those properties, and we shall have the right and authority to act on those properties allotted to the person causing such transaction. If any one of you dies issueless, if it is during our lifetime, that apportioned property shall be in our absolute possession with all title and freedom and such property shall vest in you equally if the death is after our life time, and if any widow is alive; she shall have right only for maintenance from the profits of the property, and if the widow is remarried or if the dowry is received back by her, she shall have no right for any maintenance.Schedule and description omitted except Schedule No.8. Mathai Samuel & Ors vs Eapen Eapen (Dead) By Lrs. & Ors on 21 November, 2012Schedule No.8 (1) In the said Kavumgumprayar Mury, West of Valiyaparambu property, East of Memalpadinjattumkara property and canal and South of Memalapadi farm land and Chelakkal Canal, do type 1 acre and 64 cent in survey No.689/1A do B 1 acre and 50 cents and 26 cents in survey No. 689/2 totalling 3 acres and 40 cents of farm land.(2) In the said Muttathukavanal farm land, that is described in the 3rd schedule, excluding those added in the said schedule one the southern side, 87 cents of farm land.(3) In the Lakkandam Kaithapadavu land, that is described in the 4th schedule, half in the south part, measuring 47 cents of farm land.Sd/-Executants."

10. Exhibit A1 document is composite in character having special features of a testamentary disposition and a settlement in respect of items and properties covered in the Schedules. Before examining those special features and characteristics, let us examine the legal principles which apply while interpreting such a composite document.

Settlement and Testamentary Disposition

11. We have already indicated that exhibit A1 document has both the characteristics of a settlement and a testamentary disposition. Let us examine the basic and fundamental difference between a testamentary disposition and a settlement. Will is an instrument whereunder a person makes a disposition of his properties to take effect after his death and which is in its own nature ambulatory and revocable during his lifetime. It has three essentials:

"1) It must be a legal declaration of the testators intention;

2) That declaration must be with respect to his property; and

3) The desire of the testator that the said declaration should be effectuated after his death."

12. The essential quality of a testamentary disposition is ambulatoriness of revocability during the executants lifetime. Such a document is dependent upon executants death for its vigour and effect.

13. Section 2(h) of the Indian Succession Act says Will means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. In the instant case, the executants were Indian Christians, the rules of law and the principles of construction laid down in the Indian Succession Act govern the interpretation of Will. In the interpretation of Will in India, regard must be had to the rules of law and construction contained in Part VI of the Indian Succession Act and not the rules of the Interpretation of Statutes.

14. Gift/settlement is the transfer of existing 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. Gift takes effect by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Section 122 of the Transfer of Property Act defines the gift as a voluntary transfer of property in consideration of the natural love and affection to a living person.

15. We may point out that in the case of a Will, the crucial circumstance is the existence of a provision disposing of or distributing the property of the testator to take effect on his death. On the other hand, in case of a gift, the provision becomes operative immediately and a transfer in praesenti is intended and comes into effect. A Will is, therefore, revocable because no interest is intended to pass during the lifetime of the owner of the property. In the case of gift, it comes into operation immediately. The nomenclature given by the parties to the transaction in question, as we have already indicated, is not decisive. A Will need not be necessarily registered. The mere registration of Will will not render the document a settlement. In other words, the real and the only reliable test for the purpose of finding out whether the document constitutes a Will or a gift is to find out as to what exactly is the disposition which the document has made, whether it has transferred any interest in praesenti in favour of the settlees or it intended to transfer interest in favour of the settlees only on the death of the settlors.Composite Document:

16. A composite document is severable and in part clearly testamentary, such part may take effect as a Will and other part if it has the characteristics of a settlement and that part will take effect in that way. A document which operates to dispose of properly in praesenti in respect of few items of the properties is a settlement and in future in respect of few other items after the deeds of the executants, it is a testamentary disposition. That one part of the document has effect during the life time of the executant i.e. the gift and the other part disposing the property after the death of the executant is a Will. Reference may be made in this connection to the judgment of this Court in Rev. Fr. M.S. Poulose v. Varghese and Others. (1995) Supp 2 SCC 294.

17. In a composite document, which has the characteristics of a Will as well as a gift, it may be necessary to have that document registered otherwise that part of the document which has the effect of a gift cannot be given effect to. Therefore, it is not unusual to register a composite document which has the characteristics of a gift as well as a Will. Consequently, the mere registration of document cannot have any determining effect in arriving at a conclusion that it is not a Will. The document which may serve as evidence of the gift, falls within the sweep of Section 17 of the Registration Act. Where an instrument evidences creation, declaration, assignment, limitation or extinction of any present or future right, title or interest in immovable property or where any instrument acknowledges the receipt of payment of consideration on account of creation, declaration, assignment, limitation or extinction of such right, title or interest, in those cases alone the instrument or receipt would be compulsorily registrable under Section 17(1) (b) or (c) of theRegistration Act. A Will need not necessarily be registered. But the fact of registration of a Will will not render the document a settlement. Exhibit A1 was registered because of the composite character of the document.Intention Guiding Factor:

18. The primary rule of construction of a document is the intention of the executants, which must be found in the words used in the document. The question is not what may be supposed to have been intended, but what has been said. We need to carry on the exercise of construction or interpretation of the document only if the document is ambiguous, or its meaning is uncertain. If the language used in the document is unambiguous and the meaning is clear, evidently, that is what is meant by the executants of the document. Contemporary events and circumstances surrounding the execution of the document are not relevant in such situations.

19.Lord Hale in King v. Meling (1 Vent. At p. 231), in construing a testamentary disposition as well as a settlement, pointed out that the prime governing principle is the law of instrument i.e. the intention of the testator is the law of the instrument. Lord Wilmot, C.J. in Doe Long v. Laming (2 Burr. At pp. 11-12) described the intention of the testator as the pole

star and is also described as the nectar of the instrument. In Re Stone, Baker v. Stone [(1895) 2 Ch. 196 at p. 200] the Master of the Rolls said as follows: When I see an intention clearly expressed in a Will, and find no rule of law opposed to giving effect to it, I disregard previous cases. Coleridge, J. in Shore v. Wilson [9 Cl. & F. 355, at p. 525] held as follows:

> "The intention to be sought is the intention which is expressed in the instrument, not the intention which the maker of the instrument may have had in his mind. It is unquestionable that the object of all expositions of written instruments must be to ascertain the expressed meaning or intention of the writer; the expressed meaning being equivalent to the intention It is not allowable . To adduce any evidence however strong, to prove an unexpressed intention, varying from that which the words used import. This may be open, no doubt, to the remark that although we profess to be explaining the intention of the writer, we may be led in many cases to decide contrary to what can scarcely be doubted to have been the intention, rejecting evidence which may be more satisfactory in the particular instance to prove it. The answer is, that the interpreters have to deal with the written expression of the writers intention, and courts of law to carry into effect what he has written, not what it may be surmised, on however probable grounds, that he intended only to have written.

20. In Halsburys Laws of England, 4th Edn., Vol.50, p.239, it is stated:

> "408. Leading principle of construction.- The only principle of construction which is applicable without qualification to all wills and overrides every other rule of construction, is that the testators intention is collected from a consideration of the whole will taken in connection with any evidence properly admissible, and the meaning of the will and of every part of it is determined according to that intention.

21. Underhill and Strahan in Interpretation of Wills and Settlements (1900 Edn.), while construing a will held that the intention to be sought is the intention which is expressed in the instrument not the intention which the maker of the instrument may have had in his mind. It is unquestionable that the object of all expositions of written instruments must be to ascertain the expressed meaning or intention of the writer; the expressed meaning being equivalent to the intention.

22.Theobald on Wills (17th Edn. 2010) examined at length the characteristics of testamentary instruments. Chapter 15 of that book deals with the General Principles of Construction. Referring to Lindley L.J. in Musther, Re (1889) 43 Ch.D. 569 at p.572, the author stated that the first rule of will construction is that every will is different and that prior cases are of little assistance. Referring to Sammut v. Manzxi [2009] 1 W.T.L.R. 1834, the author notices that the Privy Council had approved the approach of considering wording of the will first without

initial reference to authority, and commented that little assistance in construing a will is likely to be gained by consideration of how other judges have interpreted similar wording in other cases.

Golden Rule

23.We, therefore, have to examine the composite character of exhibit A1 document and interpret the same in accordance with the normal and natural meaning which is discernible from that document. In order to ascertain the intention of the testator, the point for consideration is not what the testator meant but what that which he has written means. It is often said that the expressed intentions are assumed to be actual intentions. This Court in A. Sreenivasa Pai and Anr. v. Saraswathi Ammal alias G. Kamala Bai (1985) 4 SCC 85 held that in construing a document, whether in English or in any Indian language, the fundamental rule to be adopted is to ascertain the intention adopted from the words employed in it. Reference may also be made to the judgment of the Privy Council in Rajendra Prasad Bose and Anr. v. Gopal Prasad Sen AIR 1930 PC 242 and C. Cheriathan v. P. Narayanan Embranthiri and Ors. (2009) 2 SCC 673. Exhibit A1 - Meaning and Effect

24. We may now examine the meaning and effect of exhibit A1 document. Some of the expressions used in exhibit A1 need emphasis which are absolutely settled, our lifetime, separately and absolutely and the Malyalam words adheenadha (control) and swathanthryam (liberty/freedom). The words which are used in a document have to be understood in its normal and natural meaning with reference to the language employed. The words and phrases used in a document are to be given their ordinary meaning. When the document is made, the ordinary meaning has to be given to the document, which is relevant. Executants have used the Malyalam words adheendha and swathanthryam which must be referable to the ordinary usage of Malayalam language at the time when the document was executed. Words of usage, in Malyalam language, therefore be given their usual, ordinary and natural meaning or signification according to the approved usage because primarily the language employed is the determinative factor of legislative intention. Consequently, the word adheenadha means control, domination, command, manage etc. Swathanthryam means liberty, freedom, independence etc. Those words emphasize the fact that the executants had retained the entire rights over the property in question and not parted with.

25. We have indicated that exhibit A1 document is divided into schedule Nos. 1 to 9. Properties described in schedule Nos. 1 to 6 as per the terms of the document stood absolutely vested in praesenti and undoubtedly settled in favour of the executants sons. Evidently, therefore, that part of the document has the characteristics of a settlement. Rest of the schedule Nos. 7, 8 and 9 have different characteristics in contradistinction with schedule

Nos. 1 to 6. Schedule No. 7 of exhibit A1 document clearly indicates that the same is required for the marriage and dowry purposes of the daughter of the executants, by name Thankamma. The document clearly indicates that the marriage of their daughter would be conducted by the executants since it is their responsibility. Further, it is also stipulated that if the daughter does not get married during their lifetime, the property in schedule No. 7 shall after their lifetime belong absolutely to their daughter.

26. So far as schedule No. 9 is concerned, the same would be retained by the executants in their full control (adheendha) and freedom (swathanthryam). In other words, schedule No. 9 shall be possessed by the executants and the income therefrom be taken directly by leasing out, if need be, by executing such documents as desired. Further, it is also stated with regard to schedule No. 9 that after our lifetime if the property is left, you all (all the sons) may take it in equal shares.

27. We are now to examine the crucial issue i.e. with regard to sub-item 1 of schedule No. 8 in exhibit A1. With regard to that item, it has been stated in the document that the executants are keeping possession and would utilize the income derived from them directly or by leasing it out to discharge the amounts due to the bank and after its clearance, the income from schedule No. 8 would be utilized for our maintenance. Further, it is also stated that after our lifetime, item No. 2 in schedule No. 8 will belong absolutely to third party and item Nos. 1 and 3 would belong to you absolutely and separately in equal shares and accordingly they may hold and enjoy the properties by paying tax thereof. No rights, in praesenti, were created, on the other hand all the rights including possession were retained by the executants. In other words, so far as item No.1 in schedule No. 8 of exhibit A1 is concerned, the executants had retained possession, full control as well as freedom to deal with it. The contention of the respondent that the executants had consciously omitted the power of alienation with regard to Schedule No.8, unlike Schedule No.7, is not correct: The question is not whether the executants had retained any right but whether the executants had conferred any right on the beneficiaries. Right, title, interest, ownership and the power of alienation of the executants were never in doubt and they had always retained those rights, the point in dispute was whether the property in question had been settled on the sons absolutely during their life time; barring possession and enjoyment. In our view, no right, title, interest, or ownership had been conferred when the document was executed or during the life time of the executants to their sons in respect of item No.1 of Schedule 8 of exhibit A1. We have noticed that there is marked difference in the language used in respect of properties covered by Schedule Nos. 1 to 6 and rest of the Schedules. Admittedly, Schedule Nos. 7 and 9 are testamentary in character and in our view, Schedule 8 also, when we examine the meaning ascribed to the various words used and the language employed. The judgments in K. Balakrishnan v. K. Kamalam and Ors. (2004) 1 SCC 581, Kale and Ors. v. Deputy Director

of Consolidation and Ors. (1976) 3 SCC 119 are, therefore, inapplicable to the facts of this case.Subsequent events: Mathai Samuel & Ors vs Eapen Eapen (Dead) By Lrs. & Ors on 21 November, 2012

28. Subsequent events or conduct of parties after the execution of the document shall not be taken into consideration in interpreting a document especially when there is no ambiguity in the language of the document. But we may refer to those events also only to re-enforce the fact that there is no ambiguity in the language employed in the document.

29. Subsequent conduct of Eapen and Sosamma has no bearing in understanding the scope of exhibit A1 document. The executants, it may be noted, had jointly executed a mortgage on 12.11.1955 (exhibit B2) to one Mathew in which they had affirmed their right to execute such a mortgage and traced it to exhibit A1 document. Further, the executants had not parted with possession of item No.1 of 8th Schedule of exhibit A1 to their sons, at any point of time and retained ownership. Exhibit B3 document was executed in favour of 3rd defendant on 18.07.1964 and later he sold the property to 4th defendant on 23.01.1978 (exhibit B1). Now from 1978 onwards, the 4th defendant, a stranger to the family, has been in exclusive possession and ownership of the property. We may also point out even though Ext.B3 was executed on 18.07.1964, the suit was filed only on 6.2.1978, that is, after more than thirteen years. It will also be unjust to deprive him of his ownership and possession at this distance of time.

30. We, therefore, find that the right, title, interest, possession and ownership of item No.1 of 8th Schedule of Ex.A1 were with the executants and they had the full control and freedom to deal with that property as they liked unlike Schedule Nos. 1 to 6. We have, therefore, no hesitation in holding that so far as that item is concerned, the document in question cannot be construed as a settlement or a gift because there is no provision in the document transferring any interest in immovable property in praesenti in favour of settlees i.e. their sons.

31. The judgment and decree of the lower appellate court, confirmed by the High Court, is, therefore, set aside and the judgment and decree of the trial court is restored. The appeal is allowed as above and there will be no order as to costs.