IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 3RD DAY OF APRIL 2025 / 13TH CHAITHRA, 1947

RFA NO. 491 OF 2005

AGAINST THE DECREE & JUDGMENT DATED 31.07.2004 IN OS NO.126 OF 1995 OF SUB COURT, PATHANAMTHITTA

APPELLANTS/DEFENDANTS NOS.1,2,7 & 8:

***1** ABRAHAM, S/O.CHACKO,
CHIRATTAVAYALIL HOUSE, IDAKKUNNAM MURI, MUNDAKKAYAM VILLAGE, KOTTAYAM DISTRICT, PRESENT ADDRESS: ABRAHAM, S/O. CHACKO, HOUSE NO.X/712, PLOT NO.12, VRINDAVANAM, RANNI TALUK.(DIED)

****2** SAJI MATHEW, S/O. MATHEW
CHARUVIL VEEDU, KOCHUKOICKAL, KUMARAMPEROOR, VADAKKEKARA MURI, CHITTAR SEETHATHODE VILLAGE, RANNI TALUK.(DIED)

3 T.M. VARGHESE S/O. T.K. MATHEW
THALAKUNNEL, MANIYAR, VADASSERIKARA.

4 T. ABRAHAM, S/O. THOMAS
CHIRATTUVAYALIL, MANIYAR, VADASSERIKARA VILLAGE.

5 PODIYAMMA,
WIFE OF LATE T.ABRAHAM,AGED 68 YEARS, CHIRATTUVAYALIL, MANIYAR, VADASSERIKKARA VILLAGE, RANNI TALUK, PATHANAMTHITTA DISTRICT, PIN-689672.

6 BINU A,
SON OF LATE T.ABRAHAM, CHIRATTUVAYALIL, MANIYAR, VADASSERIKKARA VILLAGE, RANNI TALUK. PATHANAMTHITTA DISTRICT, PIN-689679.

7 RAJU A, SON OF LATE T.ABRAHAM, CHIRATTUVAYALIL, MANIYAR, VADASSERIKKARA VILLAGE, RANNI TALUK. PATHANAMTHITTA DISTRICT, PIN-689679.

8 REJI A,
SON OF LATE T.ABRAHAM, CHIRATTUVAYALIL, MANIYAR, VADASSERIKKARA VILLAGE, RANNI TALUK. PATHANAMTHITTA DISTRICT, PIN-689679.

(*LEGAL HEIRS OF THE DECEASED FIRST APPELLANT ARE IMPLEADED AS ADDL.A5 TO A8 VIDE ORDER DATED 20.03.2025 IN IA.2/2023 IN MJC.96/2023 IN RFA.491/2005)

9 SUSAN @ MANJU, W/O.SAJI MATHEW, CHARUVIL HOUSE, CHIRAKADAVIL, VADASSERIKKARA.P.O, PATHANAMTHITTA, PIN-689662.

10 SHONE, S/O.SAJI MATHEW, CHARUVIL HOUSE, CHIRAKADAVIL, VADASSERIKKARA.P.O, PATHANAMTHITTA-689662.

11 SHAN, S/O.S/O.SAJI MATHEW, CHARUVIL HOUSE, CHIRAKADAVIL, VADASSERIKKARA.P.O, PATHANAMTHITTA-689662.

(LEGAL HEIRS OF THE DECEASED SECOND APPELLANT ARE IMPLEADED AS ADDL.A9 TO A11 VIDE ORDER DATED 20.03.2025 IN I.A.3/2024 IN MJC.96/2023 IN RFA.NO.491/2005.)**

BY ADVS.
A.A.MOHAMMED NAZIR
denizen komath
S.SANTHOSH KUMAR

RESPONDENTS/PLAINTIFF & DEFENDANT NOS.3, 5 AND 6:

1 AJITHA JAYAKUMAR, W/O.JAYAKUMAR, RESIDING AT JAYANIAS, T.C.NO.23/927, VALIYASALE WARD, CHANGANAZHASSERY VILLAGE, THIRUVANANTHAPURAM.

2 P.SYAMALAKUMARI JYOTHIS, KALAVAYAL MURI, VELINALOOR VILLAGE, OYOR, KOTTARAKARA.

3 K. GEETHA, W/O. LATE ANIL CHANDRAN, JYOTHIS, OYOOR, KOTTARAKARA TALUK.

4 ANAGHA, D/O. LATE ANIL CHANDRAN OF -DO- -DO-. (MINOR REPRESENTED BY MOTHER AND GUARDIAN ADDL.5TH DEFENDANT).

BY ADV SHRI.M.V.S.NAMPOOTHIRY FOR R1

THIS REGULAR FIRST APPEAL HAVING COME UP FOR ADMISSION ON 03.04.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R"

A. BADHARUDEEN, J.

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R.F.A.No.491 of 2005-B

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Dated this the 3rd day of April, 2025

J U D G M E N T

Aggrieved by the decree and judgment dated 31.07.2004 in O.S.No.126/1995 on the files of Sub Court, Pathanamthitta, defendants 1, 2, 7 and 8 have filed this appeal arraying plaintiff and defendants 3, 5 and 6 as respondents. During pendency of this appeal, the 1st and 2nd appellants died and the legal representatives of the 1st appellant got arrayed as additional appellants 5 to 8 and the legal representatives of the 2nd appellant got arrayed as additional appellants 9 to 11.

2. Heard the learned counsel for the appellants as well as the learned counsel appearing for the 1st respondent in detail. Perused the verdict under challenge.

3. Parties in this appeal will be referred to as `plaintiff' and `defendants' hereafter for easy discussion.

4. Short facts: Plaintiff filed this suit for declaration of her title

over plaint schedule property on the strength of settlement deed No.3390/1986, marked as Ext.A1. Recovery of possession was sought for on the allegation that while the plaintiff had been possessing and enjoying the plaint schedule property on the strength of Ext.A1 settlement deed, during the month of December, 1994 the defendants trespassed upon the property and took possession of the same after executing Ext.A3 partition deed and Exts.A4 and A5 sale deeds.

5. Defendans 1 and 2 filed written statement and raised contention that the total extent of property was 1 acre and 44 cents and out of which 27 cents were acquired by the Government for Kallada Irrigation Project. According to defendants 1 and 2, the plaint schedule property having an extent of 1.17 cents was owned and possessed by one Ramachandran till his death on 03.01.1991 and after his death, the property devolved upon defendants 3 and 4, who are the widow and son of Ramachandran, and in turn defendants 1 and 2 obtained title over the same on the strength of Exts.A4 and A5 sale deeds dated 09.11.1994, executed by defendants 3 and 4. Right of the plaintiff was denied contending the settlement deed as a false document.

6. The 3rd defendant filed written statement separately, supporting the contentions raised by defendants 1 and 2 and asserted title over the plaint schedule property being the successor of Ramachandran. Although the 4th defendant did not file written statement, the legal-heirs of the 4th respondent impleaded as additional defendants Nos.5 and 6 filed a separate joint written statement in tune with the contentions raised by defendants Nos.1 to 3.

7. On scrutiny of the pleadings as set forth, the trial court recorded evidence after raising necessary issues. PWs 1 to 5 were examined and Exts.A1 to A14 were marked on the side of the plaintiff. DW1 to DW4 were examined and Exts.B1 to B3 were marked on the side of the defendants. Apart from that, Exts.C1, C2, Xl, X2 and X3 were marked as court exhibits.

8. Finally the trial court found that the plaintiff perfected title over the plaint schedule property on the strength of Ext.A1 settlement deed and accordingly the same was declared and suit was decreed by granting the relief of recovery of possession of the property and also granting prohibitory injunction restraining the defendants from

executing any document in respect of the property and the building to any third party. The plaintiff was allowed to realise arrears of damages for use and occupation of the building @ Rs.600/- per annum and mesne profit of Rs.1,000/- per annum from 09.11.1994 till date of giving vacant possession also was granted with costs. The said verdict is under challenge.

9. The learned counsel for the contesting defendants argued at length to convince this Court that Ext.A1 settlement deed was not proved and the extent shown in Ext.A1 as 4 acre 44 cents as against 1 acre 44 cents itself would show the falsity of the document. Further, the status of defendants 1 and 2 as *bona fide* purchasers is being projected to protect their right over the property ignoring Ext.A1 settlement deed, on the strength of Exts.A4 and A5 sale deeds executed in favour of defendants 1 and 2 by defendants 3 and 4 after partitioning the property as per Ext.A3 partition deed.

10. Whereas the learned counsel for the plaintiff submitted that even though the extent of property shown as item No.1, the plaint schedule property herein, is wrongly described as 4 acre 44

cents instead of 117 cents (23 + 94), the same would not help defendants 3 and 4 to claim right over the property which is covered by Ext.A1 settlement deed. It is also pointed out by the learned counsel for the plaintiff that in Ext.A1 settlement deed, item No.2 property was also included and the same has been in possession and enjoyment of the plaintiff on the strength of Ext.A1 settlement deed, for which no challenge is raised by the defendants. Therefore, the finding of the trial court regarding genuineness of Ext.A1 settlement deed, which conferred title upon the plaintiff in relation to the plaint schedule property, is only to be confirmed.

11. Having addressed the rival contentions, the points arise for consideration are:

(i) Whether the finding of the trial court holding Ext.A1 settlement deed as a valid document, whereby the plaintiff perfected title over the plaint schedule property is wrong?

(ii)Whether the plaintiff proved the execution of Ext.A1 settlement deed to perfect the title over the plaint schedule property?

(iii) Can it be held that defendants 3 and 4, being legal

heirs of deceased Ramachandran suceeded him to claim right over the plaint schedule property?

(iv) Whether the claim put forward by defendants 1 and 2 as *bona fide* purchasers is liable to succeed?

(v) Whether the decree and judgment would require interference?

(vi) Reliefs and costs.

12. Together, points (i) to (vi) are being considered:

As far as Ext.A1 settlement deed is concerned, the contention raised by defendants 1 and 2 as well as defendants 3 and 4 is that the same is a concocted document and Ramachandran did not create such a document and he never intended to gift the plaint schedule property to the plaintiff. In order to prove Ext.A1, plaintiff herself mounted the box and given evidence in support of Ext.A1 after filing affidavit in lieu of chief examination. The original title deed, viz. settlement deed No. 3390/1986, was let in by PW1 in evidence. Apart from the evidence of PW1, PW3-the document writer who wrote Ext.A1 also was examined. In fact, nothing extracted during cross examination of

PW1 and PW3 to disbelieve their version in the matter of execution of Ext.A1 by Ramachandran in favour of the plaintiff including 2 items of property, out of which item No.1 is now in dispute and no dispute is raised as far as item No.2 covered by Ext.A1. PW3 further given evidence that one of the attestors to Ext.A1 settlement deed expired six months back and another attestor died in the year 1993. In the judgment of the trial court, production of death certificates of the two attesting witnesses along with I.A.No.781/2004 and 784/2004 was discussed. But the trial court dismissed those petitions but believed the evidence of PW3 to the effect that the attesting witnesses were no more. In fact, no serious dispute raised from the other side as far as the death of the attesting witnesses are concerned. Therefore, the available witness, the document writer, was examined.

13. In the decision reported in [2025 KHC OnLine 281 : 2025 KHC 281 : 2025 KER 15982 : 2025 KLT OnLine 1441], ***Gopinath K.I.V. v. K.I.V. Vimala***, this Court considered the question as to whether it is mandatory to examine one among the attesting witnesses in a settlement deed or a gift deed to prove its execution and

in paragraph 10 this Court observed as under:

> *"xxxx xxxx xxxx It is true that as per Section 68 of the Indian Evidence Act, 1872, (for short, 'the Evidence Act', hereinafter) if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. Proviso to Section 68 would say that, it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied. Thus, it shall not be necessary to examine an attesting witness in proof of the execution of a gift deed other than a Will which is duly registered under the Indian Registration Act, 1908, unless its execution by the person by whom purports to have been executed is specifically denied. It is true that as per Section 123 of the Transfer of Property Act, 1882 (for short, 'the TP Act' hereinafter), it has been provided that for the purpose of making a gift of immovable 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. In fact, Section 123 would apply in relation to gift deeds. When a document executed as*

settlement deed having the trappings of a gift deed, though there is slight difference between gift deed and settlement deed, even if these terms are used interchangeably, then also, the same has to be attested by at least two witnesses. Reading Section 68 of the Evidence Act, 1872, in juxtaposition with Section 123 of the TP Act also, there is no legal mandate that one among the attesting witnesses shall be examined to prove a settlement deed or a gift deed when there is no specific denial of the execution of the same by the person by whom purports to have been executed the same. However, when there is a dispute as to the gift deed or settlement deed without specifically denying the execution, then also, examination of one among the attesting witnesses is not mandatory. However, when there is specific denial inasmuch as the execution of a settlement deed or a gift deed, it shall be necessary to call an attesting witness to examine so as to prove the same and therefore, examination of one among the attesting witnesses in such case is mandatory."

14. In the instant case, the available witness, the document writer, was examined to prove Ext.A1 and his evidence not at all shaken to disbelieve him. It is to be noted that the 3rd defendant, who claimed to be the wife of Ramachandran, admitted that the marriage was earlier divorced, but according to the 3rd defendant, she was remarried by Ramachandran. Admittedly, the 4th defendant is the son of

Ramachandran. Ext.A1 was executed on 28.07.1986 and thereafter Ramachandran died only on 03.01.1991. In fact, even though Ext.A1 is a settlement deed, the essentials to complete the gift as mandated under Section 122 of Transfer of Property Act, 1882 (`T.P Act' for short hereafter) would apply in cases of settlement deed also even though there is a slight difference between gift deed and settlement deed even if these terms are used interchangeably. The essentials to constitute a valid gift is no more *res integra* as held in [(2007) 13 SCC 210], ***Asokan v. Lakshmikutty***, wherein the Apex Court on an interpretation of Section 122 of the T.P Act and held as under in paragraphs 13 and 14:

> *"13. The definition of "gift" contained in Section 122 of the Transfer of Property Act provides that the essential elements thereof are:*
>
> *1. the absence of consideration;*
>
> *2. the donor;*
>
> *3. the donee;*
>
> *4. the subject-matter;*
>
> *5. the transfer; and*
>
> *6. the acceptance.*
>
> *14. Gifts do not contemplate payment of any consideration or compensation. It is, however, beyond any doubt or dispute that*

in order to constitute a valid gift, acceptance thereof is essential. We must, however, notice that the Transfer of Property Act does not prescribe any particular mode of acceptance. It is the circumstances attending to the transaction which may be relevant for determining the question. There may be various means to prove acceptance of a gift. The document may be handed over to a donee, which in a given situation may also amount to valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance."

15. In a latest decision of the Apex Court reported in [2024 KHC OnLine 6696 : 2024 KHC 6696 : 2025(1) KHC SN 8 : 2024 INSC 965 : 2024 KLT OnLine 2950], ***Naresh Kumari v. Chameli*** in paragraphs 13 and 14 the Apex Court held that, *under TPA a valid gift can be made without giving immediate possession to the donee as has been held by this Court in Renikuntla Rajamma v. K.Sarwanamma [2014 KHC 4466] where it was held that Section 123 of TPA supersedes Hindu Law and delivery of possession is not an essential requirement for the gift to be valid under provisions of TPA. Nevertheless, in Punjab and in all other places of North India where Mitakshara law was applicable, gift of land usually was accompanied by handing over possession to the donee, as there was no purpose of*

enjoying land without being in its possession. In other words, in cases governed by Hindu Law, possession is an extremely important ingredient where validity of the gift is to be determined. Since TPA was not in force, delivery of possession which has been done in the present case has an important bearing.

16. In **Renikuntla Rajamma (D) by LRs. v. K. Sarwanamma** [2014 KHC 4466 = (2014) 9 SCC 445], while dealing with Sections 122 and 123 of the Act, the Apex Court held thus:

> *"11. xxxxx xxxxx A conjoint reading of Sections 122 and 123 of the Act makes it abundantly clear that "transfer of possession" of the property covered by the registered instrument of the gift duly signed by the donor and attested as required is not a sine qua non for the making of a valid gift under the provisions of Transfer of Property Act, 1882.*

17. Thus in the instant case specific case of the plaintiff is that she got title and possession over the plaint schedule property on the basis of Ext.A1 settlement deed and she has been residing in Thiruvananthapuram. She received 2 letters from her neighbour marked as Exts.A10 and A11, regarding occupation of the building by defendants 3 and 4 on the strength of partition deed and subsequent

sale deeds executed without the knowledge of the plaintiff. This is the cause of action for filing the present suit which has been stated in the plaint.

18. In this matter, once Ext.A1 settlement deed is found to be genuinely executed on proof of the same, it was proved to be accepted by the plaintiff so as to complete the transaction. The production of the original gift deed in her possession by the plaintiff before the court is the vital evidence to prove the acceptance. Therefore, whether the 3rd defendant is the wife of Ramachandran or 4th defendant is the son of Ramachandran are matters of no relevance since nothing has been left by Ramachandran to be succeeded by them as he had transferred the entire plaint schedule property and other items of property as per Ext.A1 in favour of the plaintiff. It is true that in Ext.A1, the extent of property described is something more than the plaint schedule description. But the same in no way would affect the right of the plaintiff to get the available property covered by Ext.A1.

19. Having addressed the points in the above context, it has to be held that the plaintiff perfected title over the plaint schedule

property on the basis of Ext.A1 settlement deed and defendants 3 and 4 would not succeed upon the same. Therefore, they could not execute a partition deed and subsequent sale deeds in favour of defendants 1 and 2. Therefore, the trial court rightly granted decree in favour of the plaintiff.

20. The specific contention of defendants 1 and 2 is that they are *bona fide* purchasers for valid consideration. While addressing the status of *bona fide* purchasers the matter to be addressed is the vigil to be taken by buyer/buyers while purchasing a property. Normally, when a party proposes to sell an immovable property, the buyer would enquire about the liability of the property by getting an encumbrance certificate. If an encumbrance certificate was obtained in this case, the encumbrance in the form of Ext.A1 settlement deed could very well be found. Thus the inference is that defendants 1 and 2 even did not care to verify the encumbrance certificate before purchasing the property or if they obtained an encumbrance certificate, they had purchased the property after having knowledge regarding the encumbrance in the form of Ext.A1, with the risk of encumbrance in the property. If so,

they could not be held as *bona fide* purchasers in any manner. In such view of the matter the said contention also must fail as rightly found by the trial court. Thus on re-appreciation of evidence, this appeal is found to be meritless and the same deserves dismissal with cost of the plaintiff.

21. In the result, this appeal stands dismissed. It is ordered that the plaintiff is entitled to get her cost in the appeal, to be realised from the respondents.

22. All the interlocutory applications pending shall stand dismissed and all the interim orders shall stand vacated.

Registry shall forward a copy of this judgment to the jurisdictional court for information and further steps.

Sd/-

(A.BADHARUDEEN, JUDGE)

rtr/