Asokan vs Lakshmikutty & Ors on 14 December, 2007

Equivalent citations: AIRONLINE 2007 SC 56, (2008) 1 LAND LR 40, (2008) 1 MAD LJ 193, (2008) 2 MAD LW 548, (2008) 2 CAL HN 189, 2007 (13) SCC 210, (2008) 1 ALL WC 877, (2008) 3 CIVIL COURT CASE 113, (2008) 1 KER LT 54, (2008) 1 RAJ LW 208, (2008) 70 ALL LR 311, (2008) 1 REC CIV R 507, (2008) 1 ICC 828, (2007) 14 SCALE 627, (2008) 1 ORISSA LR 166, (2008) 3 CIVILCOURTC 113, (2008) 1 ALL RENTCAS 483, (2008) 62 ALL IND CAS 176 (SC), (2008) 2 ALL MR 31 (SC), (2008) 2 ALLMR 31, (2008) 62 ALLINDCAS 176

Author: S.B. Sinha

Bench: S.B. Sinha, Harjit Singh Bedi

CASE NO.:
Appeal (civil) 5942 of 2007

PETITIONER:
Asokan

RESPONDENT:
Lakshmikutty & Ors.

DATE OF JUDGMENT: 14/12/2007

BENCH:
S.B. Sinha & Harjit Singh Bedi

JUDGMENT:

J U D G M E N T [Arising out of SLP (Civil) No. 20754 of 2003] S.B. SINHA, J :

1. Leave granted.

2. Whether an averment made in the deed of gift in regard to handing over of possession is sufficient proof of acceptance thereof by the donee is the question involved in this appeal which arises out of a judgment and order dated 9.07.2002 passed by the High Court of Kerala at Ernakulam in S.A. No. 606 of 1993.

3. Defendant Nos. 1 and 2 are the parents of the appellant herein. A deed of gift was executed by Defendant No. 2 - Respondent No. 1 (mother of the appellant) herein in favour of the appellant on or about 4.01.1984. He was said to have been put in possession of the properties covered by the deed of gift. It was a registered document. Defendant No. 1 (father of the appellant) (since deceased) also executed a registered

deed of gift dated 17.03.1984 in his favour which was marked as Exhibit A-2 before the learned Trial Judge; relevant averments wherein were:

The said 28 cents was divided into two equal portions. On the southern extreme side of the southern 14 cents after the said division there existed a kudikidappu (hut) of one Konnothu George. Three cents and the said hut was demarcated and given to the said George.

Lakshmikutty, your mother, purchased the rights of George over the said three cents and the hut thereon vide registered document No. 2214 of 1980. The said property was later gifted by her to you vide Document No. 78 of 1984. The 11 cents of land, remaining after demarcating the abovesaid three cents from the 14 cents, namely the southern one half portion of the 28 cents that originally belonged to me, is still in my possession and enjoyment with all rights. Out of my love and affection for you and in view of the fact that you are my son and successor the said property having a value of Rs. 5,500/- is gifted to you for leading a good family life. I am hereby relinquishing all my rights over the property. The possession of the property is handed over to you and you have accepted the same

4. Defendants, however, on the premise that the said gift was an onerous one and the appellant did not fulfil the conditions therefor, viz., failure to contribute a sum of Rs. 1,00,000/- at the time of marriage of his sister, cancelled the said deeds of gift by two documents executed on 15.06.1985.

5. Appellant filed a suit inter alia for a declaration that he was the absolute owner of the suit properties. Prayer for setting aside the said two deeds of cancellation was also made therein.

6. Contentions of the defendants in their written statements were that:

(i) Appellant had not been rendering any financial help to the family although he was employed in Sultanate of Oman;

(ii) Appellant had not accepted the said gifts.

7. Defendants in their evidence stated that the appellant had promised to pay Rs. 1,00,000/- to them but after returning to Oman, but he changed his mind and was not prepared to send the said sum.

8. The learned Trial Judge decreed the said suit opining that the ingredients of Sections 122 and 123 of the Transfer of Property Act had been fulfilled and, thus, the same could not have been rescinded by the mere fact that the donors feeling towards the donee underwent a change .

9. Before the learned Trial Judge, an apprehension was expressed that in the event a decree is passed, the appellant may evict his parents which was refused to be gone into on the ground that such a question might arise only in the future.

The First Appellate Court, however, reversed the said findings opining that there had been no overt act of possession on the part of the appellant as he had not paid any tax nor he got his name mutated in the revenue records. It was noticed that even the deeds of gift were produced by the defendants.

10. The High Court by reason of the impugned judgment affirmed the said view.

11. Mr. M.P. Vinod, learned counsel appearing on behalf of the appellant, submitted that the first Appellate Court as also the High Court committed a serious error in arriving at the aforementioned findings insofar as they failed to take into consideration the fact that the deeds of gift being not onerous ones and the factum of handing over of possession of the properties which were the subject matter of the gift, having been stated in the deeds of gift themselves, it was not necessary for the appellant to prove that he accepted the same. It was furthermore urged that keeping in view the provisions of Sections 91 and 92 of the Indian Evidence Act, no plea contrary to or inconsistent with the recitals made in the deeds of gift is permissible to be raised.

12. Mr. T.L.V. Iyer, learned senior counsel appearing on behalf of the respondents, on the other hand, submitted:

> (i) Acceptance of gift being a condition precedent for a valid gift and the first Appellate Court and the High Court having arrived at a finding that the same was not accepted, the impugned judgments should not be interfered with.
>
> (ii) The recitals made in the deeds of gift are not conclusive and, thus, evidence to show that the same were not correct is admissible in evidence.
>
> (iii) Sections 91 and 92 of the Indian Evidence Act control only the terms of a contract and not a recital. Even assuming that Sections 91 and 92 of the Indian Evidence Act would be applicable, by reason thereof, only the onus has shifted on the donor and as they have discharged the same, the impugned judgments are unassailable.

13. We have noticed the terms of the deeds of gift. Ex facie, they are not onerous in nature.

The definition of gift contained in Section 122 of the Transfer of Property Act provides that the essential elements thereof are:

> (i) the absence of consideration;
>
> (ii) the donor;

(iii) the donee;

(iv) the subject matter

(v) the transfer; and

(vi) 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 a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance. [See Sanjukta Ray v. Bimelendu Mohanty AIR 1997 Orissa 131, Kamakshi Ammal v. Rajalakshmi, AIR 1995 Mad 415 and Samrathi Devi v. Parsuram Pandey AIR 1975 Patna 140]

15. Concept of payment of consideration in whatever form is unknown in the case of a gift. It should be a voluntary one. It should not be subjected to any undue influence.

16. While determining the question as to whether delivery of possession would constitute acceptance of a gift or not, the relationship between the parties plays an important role. It is not a case that the appellant was not aware of the recitals contained in deeds of gift. The very fact that the defendants contend that the donee was to perform certain obligations, is itself indicative of the fact that the parties were aware thereabout. Even a silence may sometime indicate acceptance. It is not necessary to prove any overt act in respect thereof as an express acceptance is not necessary for completing the transaction of gift.

17. In Narayani Bhanumathi and another v. Karthyayani Lelitha Bhai [1973 Kerala LJ 354], a learned Single Judge of the Kerala High Court stated the law, thus:

> If the earlier settlement deed was executed on an assurance that defendants 2 and 3 will be looked after, that pre-supposes the knowledge of the gift by the donees and an understanding reached between them at the time of execution of the settlement deed which could be sufficient to support the plea of acceptance especially when there is no question of the donee getting possession of properties since there as reservation of right to enjoy the property in the doners during their life time.
>
> The evidence bearing on the question of acceptance of the gift deed will have to be appreciated in the background of the circumstance relating to the execution of such a deed. There may be cases where slightest evidence of such acceptance would be sufficient. There may be still cases where the circumstances themselves eloquently speak to such acceptance. Normally when a person gifts properties to another and it

> is not an onerous gift, one may expect the other to accept such a gift when once it comes to his knowledge, since normally, any person would be only too willing to promote his own interest. May be in particular cases there may be peculiar circumstances which may show that the donee would not have accepted the gift. But these are rather the exceptions than the rule. It is only normal to assume than the rule. It is only normal to assume that the donee would have accepted the gift deed. One would have to look into the circumstances of the case in order to see whether acceptance could be read. Mere silence may sometimes be indicative of acceptance provided it is shown that the donee knew about the gift. Essentially, this is a question of fact to be considered on the background of circumstances of each case.

18. Mr. Iyer, however, submitted that it would be open to the donors to prove that in fact no possession had been handed over. Strong reliance in this behalf has been placed on S.V.S. Muhammad Yusuf Rowther and another v. Muhammad Yusuf Rowther and other [AIR 1958 Madras 527] and Alavi v. Aminakutty & Others [1984 KLT 61 (NOC)].

19. In S.V.S. Muhammad Yusuf Rowther (supra), the Madras High Court was dealing with a case of gift under the Mohammadan Law. Therein it was opined:

> In my judgment, learned counsel for the appellants is justified in his complaint that the courts below have wrongly thrown the onus of proving that this requirement as to delivery of possession had been complied with on the contesting defendants. It is no doubt true that delivery of possession of gifted properties is an essential condition of the validity of the gift and its operative nature under the Muslim Law and it would be for the donees to establish it.

20. When a registered document is executed and the executors are aware of the terms and nature of the document, a presumption arises in regard to the correctness thereof. [See Prem Singh and Ors. v. Birbal and Ors. (2006) 5 SCC 353] When such a presumption is raised coupled with the recitals in regard to putting the donee in possession of the property, the onus should be on the donor and not on the donee.

21. In Alavi (supra), Paripoornan, J. (as His Lordship then was) held:

> It is settled law that where the deed of gift itself recites that the donor has given possession of the properties gifted to the donee, such a recital is binding on the heirs of the donor. It is an admission binding on the donor and those claiming under him. Such a recital raised a rebuttable presumption and is ordinarily sufficient to hold that there was delivery of possession. Therefore, the burden lies on those who allege or claim the contrary to prove affirmatively that in spite of the recitals in the gift deed to the effect that possession has been delivered over, in fact, the subject matter of the gift was not delivered over to the donees.

22. Section 91 of the Indian Evidence Act covers both contract as also grant and other types of disposal of property. A distinction may exist in relation to a recital and the terms of a contract but such a question does not arise herein inasmuch as the said deeds of gift were executed out of love and affection as well as on the ground that the donee is the son and successor of the donor and so as to enable him to live a good family life.

23. Could they now turn round and say that he was to fulfill a promise? The answer thereto must be rendered in the negative. It is one thing to say that the execution of the deed is based on an aspiration or belief, but it is another thing to say that the same constituted an onerous gift.

What, however, was necessary is to prove undue influence so as to bring the case within the purview of Section 16 of the Indian Contract Act. It was not done. The deeds of gift categorically state, as an ingredient for a valid transaction, that the property had been handed over to the donee and he had accepted the same. In our opinion, even assuming that the legal presumption therefore may be raised, the same is a rebuttable one but in a case of this nature, a heavy onus would lie on the donors.

24. Keeping in view the relationship of the parties and further in view of the fact that admittedly the appellant had not been residing in India for a long time, neither the possession of the document nor the payment of tax nor non-mutation of the name by itself would be sufficient to show that the execution of the deeds of gift by the defendants was not voluntary acts on their part. It can never be the intention of a son to drive away the parents from the house as soon as the deeds of gift are executed. Parents while gifting the property to a successor out of love and affection as also with a view to enable him to live a peaceful life, would not like to lose both the property as also their son.

25. Our attention has been drawn to a decision of the Privy Council in Nawab Mirza Mohammad Sadiqu Ali Khan and others v. Nawab Fakr Jahan Begam and another [AIR 1932 PC 13] wherein again while dealing with a case of gift governed by Muhammadan law, it was stated:

> The first objection being against the tenor of the deed, the burden of proof is clearly upon those who dispute the gift. No possible reason is suggested why Baqar Ali should have desired to put a portion of this property in anyone else s name except, possibly, an inherent propensity for benami or ism farzi transactions. On the other hand, the reason recited in the deed that he desired to provide his favourite wife with an alternative residence at Kairabad is to say the least of it, understandable. The portion assigned to her contained the zenana quarters, where she ordinarily put up when accompanying her husband on his apparently not infrequent visits to the kothi, and it is clear from the evidence of his other gifts to her which are now established, that he had a great desire to provide for her future comfort on a generous scale. Against this, all that can be said is that during his life time she exercised no individual acts of proprietorship over any portion of the Kairabad establishment; that in her and her husband s absence the serai was occupied by the servants of the estate; that such repairs as were necessary were done at Baqar Ali s expense, and that no mutation of names was made in the Government records. In their Lordships

> opinion these facts are not sufficient to establish that the transaction was merely colourable. The deed was handed over to the donee and remained in her possession, and their Lordships have no doubt that Baqar Ali intended to make a genuine gift of the property to her.

26. In regard to handing over of the possession, it was held:

> In the second place, the deed of gift was handed over to the donee as soon as it was registered. In the case of a gift by a husband to his wife, their Lordships do not think that Mahomedan law requires actual vacation by the husband and an actual taking of separate possession by the wife. In their opinion the declaration made by the husband, followed by the handing over of the deed are amply sufficient to establish a transfer of possession.

27. It will bear repetition to state that we are in this case concerned with the construction of recitals made in a registered document.

28. Mr. Iyer also relied upon a decision of Oudh High Court in Jhumman v. Husain and others [AIR 1931 Oudh 7] to show that a declaration that possession had been given is not conclusive. Therein again, the court was dealing with a case of gift under Mohammadan law. In that case, the gift was accepted after the death of the donor and it was in that situation that emphasis was laid on handing over of possession as a condition of valid gift.

29. In Smt. Gangabai v. Smt. Chhabubai [AIR 1982 SC 20], wherein also reliance has been placed by Mr. Iyer, it was held that the bar created under Sections 91 and 92 of the Indian Evidence Act would operate unless it comes within the purview of the exceptions specified therein. Therein the question which arose for consideration related to the nature of transaction and not the terms of the grant.

30. Mr. Iyer places reliance on Tyagaraja Mudaliyar and another v. Vedathanni [AIR 1936 PC 70] wherein again correctness or otherwise of the nature of document itself was in question and in that view of the matter adduction of oral evidence was not held to be a bar in terms of Section 91 of the Indian Evidence Act.

31. Once a gift is complete, the same cannot be rescinded. For any reason whatsoever, the subsequent conduct of a donee cannot be a ground for rescission of a valid gift.

32. For the reasons aforementioned, the impugned judgment cannot be sustained and, thus, judgments of the High Court as also the first Appellate Court are set aside and that of the Trial Court restored. The appeal is allowed. No costs.