C. R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

&

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

TUESDAY, THE 1ST DAY OF APRIL 2025 / 11TH CHAITHRA, 1947

RFA NO. 521 OF 2019

AGAINST THE JUDGMENT DATED 29.07.2019 IN OS NO.36 OF 2016 OF III ADDITIONAL SUB COURT, KOZHIKODE

APPELLANT:

MINI VINOD KUMAR,
AGED 43 YEARS,
W/O.VINOD KUMAR.V.M., FLAT NO.203, 'A' BLOCK,
N.D.OLIVA LAYOUT, SOMASUNDARAPAALAYA, BANGALURU,
HSR LAYOUT POST OFFICE, KARNATAKA-560102.

BY ADVS.
NIRMAL. S
SMT.VEENA HARI

RESPONDENTS/PLAINTIFFS:

1 **K.VIJAYALAKSHMI,**
AGED 69 YEARS
W/O.EZHUVATH RAJAN @ RAJAN MENON, 'SREE VALSAM',
RAJABHAVAN COMPLEX, M.S.BABURAJA ROAD, KALLAI.P.O.,
KOZHIKODE-673003.

2 **K.SAI RAMESH,**
AGED 33 YEARS, S/O.EZHUVATH RAJAN @ RAJAN MENON,
FLAT NO.'FOFI', 4TH FLOOR, AJANTHA MEDOWS APARTMENT,
3RD CROSS, AKSHAYA NAGAR, YELANAHALLI,
BEGUR POST OFFICE, BANGALURU-560068.

BY ADVS.
P.CHANDRASEKHAR
K.K.MOHAMED RAVUF
RANI MADHU
MANJARI G.B.
SATHEESH V.T.

THIS REGULAR FIRST APPEAL HAVING COME UP FOR HEARING ON 01.04.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C. R.

SATHISH NINAN &
SHOBA ANNAMMA EAPEN, JJ.
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R. F. A. No.521 of 2019
= = = = = = = = = = = = = = = = = = =
Dated this the 1st day of April, 2025

J U D G M E N T

Sathish Ninan, J.

The preliminary decree in a suit for partition is under challenge by the defendants.

2. The first plaintiff is the mother. The second plaintiff and the defendant are the son and the daughter born to the first plaintiff and her husband, late Rajan Menon. The issue involved in this appeal is confined to plaint schedule II item No.1 (“the property”, and hence the discussions hereunder are confined to that.

3. According to the plaintiffs the property sought to be partitioned belonged to the father and the mother (Rajan Menon and first plaintiff), under Exts.A1 and A2 Sale Deeds dated 17.12.1991 and 18.12.1991. On the death of the father, his one-half right over the property devolved on the plaintiffs and the defendant. The

plaintiff seeks for partition and separate possession of their shares. The first plaintiff claims one-half share of the property in addition to the share inherited by her from her husband(4/6 shares).

4. The defendant disputed the claim that the property belonged to the father and the mother under Exts.A1 and A2 Sale Deeds. According to her, she and her mother – first plaintiff, had obtained property under Ext.B1 Partition Deed dated 22.05.1987, executed in the family of the mother. At that time, since the defendant was a minor, she was represented in the partition through her father as guardian. Subsequently, on 14.01.1992, the said property obtained under Ext.B1 partition, was sold away under Exts.B2, B3 and B4 Sale Deeds for a total consideration of ₹ 82,500/-. At that time though the defendant had just attained 18 years of age, she was under the care and protection of the parents. Utilising the consideration under Exts.B2 to B4 Sale Deeds the property in question was purchased under

Exts.A1 and A2 Sale Deeds. The purchase is in trust for the defendant. At the relevant time, the father did not have other sources to purchase the property. Hence the defendant has one-half right over the property, is the claim.

5. The trial court held that the defendant was a major at the time of execution of Exts.B2 and B3 Sale Deeds and the burden of proof vested on her to prove that the purchase was utilising the said funds and in trust for the defendant. It was also held that the case of the plaintiff that the sale consideration obtained under Exts.B2 to B4 sale were utilised for the educational purposes of the defendant, is probable. Accordingly the claim of the defendant was negatived. It was held that the first plaintiff and her husband Rajan Menon has one-half share each over the property.

6. We have heard Sri.Nirmal.S, the learned counsel for the appellant-defendant and Sri.P.Chandrasekhar, the learned counsel for the respondents-plaintiffs.

7. The points that arise for determination are:-

(i) Does the evidence on record probabilise the defendant's contention that the acquisition of Exts.A1 and A2 Sale Deeds were utilising the consideration obtained by sale under Exts.B2 to B4?

(ii) Is the claim of the defendant that the acquisition of property under Exts.A1 and A2 is on her behalf under a trust by the parents, liable to be upheld?

(iii) Is the defendant entitled to in specie partition of the property purchased under Exts.A1 and A2 even if the acquisition thereunder was utilising the consideration obtained by sale under Exts.B2 to B4?

8. Exts.A1 and A2 Sale Deeds were on 17.12.1991 and 18.12.1991. The sale under Exts.B2 to B4 were a month later, in January, 1992. Therefore, the claim of the defendant that the purchase under Exts.A1 and A2 was utilising the sale consideration under Exts.B2 to B4 is evidently unsustainable, is the contention.

9. It is to be noticed that, the total sale consideration for Exts.B2 to B4 was ₹ 82,500/- and the purchase price under Exts.A1 and A2 was only ₹ 60,000/-. The first plaintiff mother has deposed that the sale under Exts.B2 to B4 was preceded by an agreement for

sale and that the sale was after six months from the agreement. She has also admitted that at the time of purchase under Exts.A1 and A2 she had with her the sale consideration of ₹ 82,500/- which is the consideration under Exts.B2 to B4. She also admitted that there is no material to show that her husband had any money or reserves with him. The relevant deposition reads thus :-

> "Ext.B1 പ്രകാരം എനിക്ക് കിട്ടിയ വസ്തു ഞാൻ തീറ് വിറ്റു. അത് 82,500/- രൂപയ്ക്കാണ് വിറ്റത്."
>
> .....
>
> "ടി വിൽപ്പന നടത്തിയതിന് എഗ്രിമെന്റ് ഉണ്ടായിരുന്നു. ആ എഗ്രിമെന്റ് കഴിഞ്ഞ് 6 മാസം കഴിഞ്ഞാണ് തീറ് നടന്നത്. അതിന്റെ അഡ്വാൻസ് തുക എത്രയായിരുന്നു എന്ന് ഓർത്ത് പറയാൻ പറ്റില്ല. അന്യായപട്ടിക 1-ാം നമ്പർ വസ്തു 60,000/- രൂപ തീറ് പ്രതിഫലം കൊടുത്താണ് വാങ്ങിയത്. ടി സമയത്ത് രാജൻ മേനോന്റെ കൈയ്യിൽ എന്തെങ്കിലും പണമോ നീക്കിയിരിപ്പോ ഉണ്ടായിരുന്നു എന്ന് കാണിക്കാൻ രേഖയില്ല. എന്റെ കൈയ്യിൽ വസ്തുവിറ്റ 82,500/- രൂപ ഉണ്ടായിരുന്നു."

There is a clear admission from the part of the first plaintiff that, at the time of purchase under Exts.A1 and A2 she was in possession of the sale consideration for Exts.B2 to B4. It is only probable since the sale under Exts.B2 to B4 was preceded by an agreement for

sale for a period of six months and the conveyances were executed within a period of one month thereafter. In the light of the clear admission on the part of the first plaintiff, and in the absence of any evidence to prove that the father Rajan Menon had any money with him or any source from which he had raised the money, the only probability is that the purchase under Exts.A1 and A2 was utilising the sale consideration obtained under Exts.B2 to B4. This is all the more so since PW1 has admitted that Sri.Rajan Menon did not have any avocation and that there are no documents to prove his income. She has also admitted that they eked their livelihood by dealing with their properties. Therefore, it is probable that the purchase of property under Exts.A1 and A2 was utilising the funds raised by sale under Exts.B2 to B4 Sale Deeds.

10. It is the contention of the plaintiffs that, the share of the defendant out of the sale consideration under Exts.B2 to B4 sales were utilised for her

educational purposes. The defendant refutes the contention and claimed that she had secured admission for her BDS course on merit. PW1 admitted that the defendant had secured 90% marks for pre-degree course. But for the bald claim that amounts were spent to secure admission in the management quota and for the studies of the defendant there is no evidence to substantiate the same. All that the plaintiffs have produced is Ext.A35, which is only the schedule of studies of examinations of the institution. There is nothing to show that admission was secured by paying capitation fee or otherwise. Therefore, the said contention is only to be repelled.

11. It is next contended by the learned counsel for the plaintiffs that amounts much in excess of the sale consideration under Exts.B2 to B4 was given to the defendant and her husband for purchasing and furnishing an apartment of the defendant at Bangalore. It is claimed that the gold ornaments belonging to the father

and mother was sold and amounts were sent to the defendant and her husband for the above purpose. Straight away it is to be noted that, the plaintiffs do not have a case that the sale consideration under Exts.B2 to B4 was paid off accordingly.

12. As was noticed earlier, the father and mother did not have any particular source of income. They were living on the funds raised by sale of properties and gold. As PW1 the first plaintiff has deposed "എനിക്കും ഭർത്താവിനും ജോലി ഒന്നും ഉണ്ടായിരുന്നില്ല. ..... സ്വത്തുക്കൾ നോക്കി നടത്തിയാണ് ഞങ്ങൾ ജീവിച്ചിരുന്നത് ". She has also deposed that "ബാക്കിയുള്ള 50 പവന്റെ സ്വർണ്ണം 2005 മുതൽ പല ആവശ്യങ്ങൾക്കായി വിറ്റതാണ്. അത് പലിശ അടക്കാനും ചിലവിനും മറ്റ് ആവശ്യങ്ങൾക്കായിട്ടുമാണ് വിറ്റത്". PW1 admitted that the defendant's husband had provided financial support to them. In her cross-examination she deposed "വിനോദ് ഗൾഫിൽ നിന്നും ചിലവിനായി

സംഖ്യ അയച്ച് തന്നിട്ടുണ്ട് ". To a pointed question that the defendant's husband supported Rajan Menon to purchase item no.3 property in schedule II to the plaint, was not denied. Under such circumstances when such was the financial capacity of the first plaintiff and her husband, it cannot be believed that they provided funds to the defendant for purchase of flat and for its furnishing. The defence that her gold ornaments which were entrusted with the parents were sold and amounts were sent to the plaintiff and her husband for the purpose of purchase and furnishing the apartment, is probable. When PW1 admitted that in 2005 her gold ornaments were sold for the purpose of payment of interest and expenses etc., it is quite improbable that during the said period amounts would have been provided to the defendant for furnishing her apartment. Under such circumstances, the claim of the plaintiffs that the sale consideration under Exts.B2 to B4 were paid to the

defendant in the manner as claimed, cannot be accepted.

13. At the time of execution of Exts.B2 to B4 Sale Deeds, the defendant was only 18 years of age and unmarried. She was under the care and protection of the father and the mother. The mere fact that she had attained majority cannot lead to the conclusion that she had taken her share of the money and utilised for her purpose. The consideration obtained by sale of the property under Exts.B2 to B4 was with the father and the mother. It needs no elaboration to find that they were holding the money as trustees of the defendant who was aged only 18 years. The purchase of the property was utilising such funds.

14. Now the question is whether the defendant is entitled to half rights over the property purchased under Exts.A1 and A2 utilising such money.

15. According to the learned counsel for the appellant-defendant, the acquisition of property being utilising trust fund, the beneficiary is entitled to

trace the fund and claim right over the converted property. The argument is founded on Section 63 of the Indian Trust Act ("the Act").

16. Sections 63 of the Trust Act reads thus:-

> *"**[s 63] Following trust property into the hands of the third persons**.— Where trust property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust.*
>
> *Into that into which it has been converted.— Where the trustee has disposed of trust property and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust property."*

What is relevant for us is the second paragraph of the Section. It indicates that, when the trustee has acquired another property utilising his funds along with the trust property, then, the right of the beneficiary is nearly the same as that he had over the trust property. The illustration to Section 63 make the scope very clear. It reads thus:-

Illustrations

(a) A, a trustee for B of Rs. 10,000, wrongfully invests the Rs. 10,000 in the purchase of certain land, B is entitled to the land.

(b) A, a trustee, wrongfully purchases land in his own name, partly with his own money, partly with money subject to a trust for B. B is entitled to a charge on the land for the amount of the trust money so misemployed."

In illustration (a), the trust money is utilised by 'A' for purchase of a land and 'B' is entitled for the said land. In illustration (b) the trustee utilising his own money and also the trust money purchases the property. In such case the beneficiary is only entitled for a charge on the property for the trust money. Under Section 66 of the Act when the trustee mixes the trust property with his own, the beneficiary is entitled to charge on the whole property for the trust money.

*"**[s66] Right in case of blended property**.— Where the trustee wrongfully mingles the trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him."*

The role of illustrations to Sections, as being an internal aid to interpret and understand the true scope

of a Section has been highlighted by the Apex Court in various judgments. In ***Dr. Mahesh Chand Sharma v. Raj Kumari Sharma (1996) 8 SCC 128***, the Apex Court held that illustrations help to elucidate the principle of the Section. The Privy Council in ***Mahomed Syedol Ariffin v. Yeoh Ooi Gark [1916] 2 AC 575*** made the following observations regarding the importance of illustration appended to a Section :-

> *"It is the duty of a court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the legislature as helpful in the working and application of the statute, should not be thus impaired."*

The apex court relied on the said observations of the Privy Council in ***Jumma Masjid, Mercara v. Kodimaniandra Deviah and Ors. AIR 1962 SC 847*** and observed that ***"****It is not to be readily assumed that an illustration to a section is repugnant to it and rejected.****"***

17. In ***Re Hallett's Estate, Knatchbull v. Hallett (1879) 13 Ch.D 696*** the rights of the beneficiary in case of misapplication of trust funds, was explained thus :-

> *"..... I will first of all, take his position when the purchase is clearly made with what I will call, for shortness the trust money, although it is not confined as I will show presently, to express trusts in that case, according to the now well-established doctrine of equity the beneficial owner a right to elect either to take the property purchased or to hold it as a security the amount of the purchase money laid out in the purchase; or, as we generally express it, he is entitled at his election either to take the property, or to have a charge on the property for the amount of the trust money. But in the second case, where a trustee mixed the money with his own, there is the distinction, that the cestui eue trust, or beneficial."*

The learned author N.Suryanarayana Iyer in his commentaries on the Indian Trust Act, relying on various English judgments including ***Re Hallett's Estate*** (supra) has at page 585 of the 5th edition of the book stated thus,

> ***"****"The question of identification of a particular property as representing the trust fund would present no difficulty where the trustee has utilised the trust funds exclusively for the purchase of property. Where, however, he mixed the trust moneys into his own and out of the mixed fund property is bought, the cestui que trust cannot claim the property itself as trust property. In such a case the purchase being from out of mixed funds, the*

right of the cestui que trust is only to claim a charge or lien for the amount of the trust fund on the entire property so purchased.".

The above is very much in tune with the distinction drawn under the illustrations (a) and (b) to Section 63 noted above.

18. Therefore, taking it to be that the father and mother were holding the money of the defendant as trustees, and the same along with their money was utilised for the purchase of property under Exts.A1 and A2, the defendant cannot claim proprietary right over such property but has a charge over the property, for the trust money. The sale consideration for Exts.B2 to B4 Sale Deeds was ₹ 82,500/-. The defendant was entitled to one-half right of the same viz. ₹ 41,250/-. The defendant has charge on the property purchased under Exts.A1 and A2 for such amount. However, she cannot claim right over one-half of the property.

19. Since the amounts were utilised for purchase of a property, there is no reason to decline interest on

the said amount. We are of the opinion that grant of interest at the rate of 9% per annum from the date of Exts.B2 to B4 Sale Deeds (the later of the date being 28.01.1992 will be reckoned). The amount of ₹ 41,250/- with interest thereon, will be a charge on plaint schedule II item no.1, purchased under Exts.A1 and A2 Sale Deeds. The decree and judgment of the trial court is liable to be modified accordingly.

20. The trial court has granted a decree for partitioning the liability of the father which was settled by the plaintiffs. Necessarily both the rights and liabilities of the deceased devolves on the legal heirs. Exts.A30 and 31 and 33 evidences the liabilities of late Rajan Menon and its settlement by the plaintiffs. The mere fact that she was not in receipt of any demand notice regarding the liabilities, cannot absolve her. The defendant being a legal heir is bound to share the proportionate liability in accordance with her share. The trial court was right in having reckoned

the same.

Resultantly, the appeal is allowed in part. It is declared that the defendant shall be entitled to realise an amount of ₹ 41,250/- with interest at the rate of 9% per annum from 28.01.1992 charged on plaint schedule II item No.1. The above direction shall form part of the decree. In all other respects, the decree and judgment of the trial court will stand affirmed.

Sd/-
SATHISH NINAN
JUDGE

Sd/-
SHOBA ANNAMMA EAPEN
JUDGE

kns/-

//True Copy//

P.S. To Judge