REV. FR. M.S. POULOSE

v.

VARGHESE AND ORS.

MARCH 30, 1995

[K. RAMASWAMY AND B.L. HANSARIA, JJ.]

Will—Executants giving part of land in absolute terms to beneficiary—Reserving his right in respect of rest of the property—Cancellation of deed—Held part of deed in which executant reserved his right was a will—Cancellation held valid.

I and A, having 7 acres and odd land, executed a deed on March 5, 1966 whereunder they gave 70 cents of land absolutely to S for the faithful service rendered by her. For the rest of the properties, the executants jointly reserved their right during their lifetime not only to live in the building and enjoy the entire income from the properties, but also to alienate or mortgage the properties. However, on March 11, 1968 the executants cancelled their deed. The respondents successfully challenged the cancellation before the Trial Court but on appeal Trial Court's decision was reversed. High Court held that the document was a gift deed and that therefore the donors having divested their title to the properties had no right to cancel the same. Against the decision of the High Court an appeal was preferred to this Court.

Allowing the appeal, this Court

HELD: The recitals in the deed indicate that the executants had not divested themselves from the title to the rest of the property completely, except 70 cents of the land given to the respondent S in absolute terms. The High Court, therefore, was not right in its conclusion that it was a gift deed and the donors were divested of the title on its execution. That part must be read to be a will. [127, H, 128-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4307 of 1995.

From the Judgment and Order dated 27.9.1990 of the Kerala High Court in S.A.No. 222 of 1985-B.

H.N. Salve, Ranji Thomas, B.P. Yohaman and S. Menon for the Appellant.

P.S. Poti and Ms. Malini Poduval for the Respondents.

The following Order of the Court was delivered:

Leave granted.

We have heard the counsel on both the sides. One Ithara and his wife Annam had 7 acres and odd land. During their life-time, Sosa, daughter of Mathew and her husband Verghese, the respondents herein, were looking after the old people. They executed a deed dated March 5, 1966, Ex.A-2. Thereunder they have given in consideration of the affection and the faithful service rendered by them, 70 cents of land absolutely to Sosa. For the rest of the lands, it was recited thus:

> "We reserve our right during our life time to live according to our wishes in the building described along with you and if need be we have full rights and liberty to appropriate the entire income and profits from the properties except those set part in the name of the second named amongst you. In the event during our life time it becomes necessary to mortgage or alienate the schedule property the same should be effected by you jointly with us and with the consent of all of us".

We are not concerned with rest of the terms of the document. During the life-time of the old people, they cancelled this document under Ex.A-3, dated March 11, 1968. The respondents challenged the same. In the trial court they succeeded, but on appeal it was reversed. The High Court confirmed the same. The High Court construed that the document is a gift deed and that therefore, the donors, having divested their title to the properties had no right to cancel the same subsequently.

There was a dispute with regard to the recitals among the parties. Therefore, we have got officially translated the recital as extracted herein before. It indicates that the old people, the executants, have jointly reserved the right during their lifetime not only to live in the building and enjoy the entire income from the properties, but also reserved the right to alienate or mortgage the properties. In other words, they have not divested themselves from the title to the rest of the property completely, except 70 cents

of the land given to the respondent-Sosa in absolute terms. The High Court, therefore, was not right in its conclusion that it is a gift deed and the donors were divested of the title on execution of Ex.A.2 with effect from March 25, 1966. That part must be read to be a will.

The appeal is accordingly allowed. Since the appellant is the son of Skaria, brother of Ithara, and the respondents are daughter and son-in-law of Mathew, a brother of Annam-wife of Ithara, both the parties should, according to us, make partition and enjoy the properties in equal moiety. No costs.

Appeal allowed.