

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8197 OF 2012

[Arising out of SLP (Civil) NO.13385 OF 2009]

Mathai Samuel & Ors. .. Appellant(s)

Versus

Eapen Eapen (dead) by Lrs. & Ors. .. Respondent(s)

J U D G M E N T

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 of this Court in P. K. Mohans Ram v. B. N.

Ananthachary and Others (2010) 4 SCC 161 and Rajes Kanta 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 A1 document 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 Kallooppa

Pakuthi and wife (2) Sossamma of Perumbral, Vennikkulam Muri of

Kallooppa 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

husband's 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 are retained 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 belong 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.

Schedule 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 testator's 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 property 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. Poullose 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 the Registration

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 writer's 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 Halsbury's 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 testator's 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

Malayalam 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

Malayalam 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:

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.