

Vimala Vs. Narayanaswamy

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Court : Karnataka

Decided On : Jun-29-1995

Reported in : ILR1995KAR3376

Judge : M.F. Saldanha, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 23, Rule 1; [Transfer of Property Act, 1882](#) - Sections 124

Appeal No. : R.F.As. 81 and 107 of 1983

Appellant : Vimala

Respondent : Narayanaswamy

Advocate for Def. : G. Vidhyaraj, ;Sundaraswamy, ;Ramdas and ;Anand, Advs. for R-2 and R-3 and C.M. Desai, Adv. for R-5

Advocate for Pet/Ap. : C.V. Gokavi and ;S.B. Adi, Advs.

Judgement :

Saldanha, J.

1. Certain interesting facets of the law relating to the conferring of a gift within the framework of the Transfer of Property Act have been canvassed in this pair of Appeals and require to be resolved. There is on record a document dated

26.11.1945. That was executed in relation to the property in dispute by deceased Sadamma. On the date of execution of that document, the admitted position was that all her children except two daughters by the name of Sharadamma and Rajamma had died. The document in question though it is in Kannada was admittedly executed by the deceased and is on record. It is in relation to certain clauses in this document that the entire controversy has arisen for which purpose I propose to summarise the significant provisions that were contained therein.

2. The recitals in the document are to the effect that only two of Sadamma's children namely Sharadamma and Rajamma were alive as on the date of execution of that document. No reference is made to the legal heirs of the deceased children though there is a statement to the effect that these two ladies were the only surviving children of Sadamma. The mother proceeds to state that as far as Sharadamma is concerned that she has no children and that she is residing with the mother Sadamma and looking after her. She also states that Sharadamma has no other means of livelihood. On the other hand, she states that as far as Rajamma is concerned, that she is married and residing with her husband and that she has children and she goes on to implicate that Rajamma appears to be reasonably well off in so far as she states that she has no problems of any type. Thereafter the averments are to the effect that the property in question is being gifted to Sharadamma who in turn is permitted to use one-half of the property during her lifetime and she was given the option of donating the other half of the property to a Temple or for religious purposes to an institution of her choice for the benefit of the family. The document goes on to state that the choice of the institution shall be left to Sharadamma as far as one-half of the property is concerned but it states that as far as the other half is concerned which is retained by Sharadamma, that it will go to Rajamma and her sons after Sharadamma's death. There is one more clause which states that if the option to donate half the property for religious purposes is not exercised and if Sharadamma retains the whole of the property then, that on her death the whole of it will devolve on Rajamma and her sons. Lastly, there is a general embargo both on Sharadamma and Rajamma as far as alienation of the property is concerned which appears to signify that Sadamma desired that save and except the possible donation of one-half of the property for religious purposes, that neither of her daughters were

permitted to alienate the property to a third party in so far as obviously she desired that it should stay in the family and that too with the sons of Rajamma since Sharadamma had no children.

3. It is with regard to the interpretation of these clauses and the legal effects that flow therefrom through and the restrictions if any placed by the provisions of the Transfer of Property Act that a real dispute has arisen. Sometime after the death of Sharadamma, the present plaintiff who is the daughter of the pre-deceased sister Nanjamma agitated her claim on the ground that the aforesaid document must be treated as having conferred absolute rights in respect of the whole of the property on Sharadamma and on her death, since she had no children, by operation of the provisions of Section 15 of the Hindu Succession Act that the property must devolve equally on Rajamma or her heirs and on the plaintiff who was one such heir entitled to receive the other half share. This suit which was numbered as O.S. 404/73 came to be withdrawn on 23.8.74. A submission was made at the Bar that the suit was withdrawn because Sharadamma was promised her share and since this did not materialise, that she has reinstituted the proceedings. This averment also finds place in the plaint. I have referred to this aspect of the matter because one of the contentions that was argued by the respondents' learned Advocate at the hearing is that the second suit is barred by virtue of the provisions of Order 23 Rule 1 in so far as no leave of the Court was obtained to reinstitute the proceedings if so advised at a later point of time. In support of this contention, apart from the relevant provisions of the C.P.C., the respondents learned Counsel has drawn my attention to a Decision of the Supreme Court reported in : [1967]3SCR886 Hulas Rai Baij Nath v. Firm of K.B Bass and Co.. The dispute on that occasion was slightly different namely the question as to whether the plaintiff has the unqualified right of withdrawal of the suit because it had made considerable headway and there is an observation in the Judgment to the effect that even though the plaintiff has an unqualified right of withdrawing the suit that having regard to the position of Order 23 Rule 1, if leave of the Court is not obtained to institute a fresh proceeding, that a bar would arise having regard to the aforesaid provision. Quite apart from the merits of the matter, respondents learned Advocate has submitted that having regard to this legal infirmity, this Court will have to treat the suit itself as having been still born and

consequently, record an order of dismissal on the ground that the suit itself was not maintainable.

4- As regards the preliminary objection, the appellants have contended that it is incorrect to state that the two suits are identical in so far as they point out that the earlier suit was in relation to a share claimed in Sadamma's property and the cause of action in the present suit proceeds on the footing that the plaintiff is entitled to claim one-half share in deceased Sharadamma's property. It is almost a case of virtual hair splitting because the property happens to be one and the same but since the bar that is pleaded against the plaintiff is a technical one, it is essential to examine all aspects. The second submission canvassed in reply is that the suit had not made any progress and that therefore, since it was withdrawn at the preliminary stage, no bar can be pleaded in law to the institution of another proceeding on the same cause of action.

5. I do concede that the present suit cannot effectively be termed as a refile of the earlier one in so far as the cause of action pleaded is slightly dissimilar though it is dangerously close. The mere substantial ground however is that a Court will never shut out a deserving litigant who may have withdrawn the earlier suit for a variety of reasons. The spirit behind the bar enunciated in Order 23 Rule 1 is basically to put a stop to frivolous, wanton and repeated litigations which are vexatious in character. The Case Law as far as this aspect of the matter is concerned has made a lot of headway in recent times and the principle that has effectively emerged is that a fresh proceeding on the same cause of action will be barred on the principle of constructive resjudicata provided it is demonstrated that the issue involved has effectively been agitated and decided on the earlier occasion. This has been the crystallization of the Case Law on this point and applying that principle to the present case, to my mind, it would be incorrect to hold that the suit in question was not maintainable.

6. Coming to the merits of the matter, the appellants' learned Counsel vehemently contended that the sequence of the narration in the document which according to him is nothing other than a Gift Deed is of some consequence. He lays heavy emphasis on the recital where in deceased Sadamma has stated that Rajamma is

not only residing with her husband but that she is comfortable or well provided for and has no needs of any type and the reverse statement as far as Sharadamma is concerned to the effect that on the other hand she is a widow and has no means to sustain herself. He states that the first recital in the sequence set down by Sadamma is that for the aforesaid reasons the property is being transferred or gifted to Sharadamma and that this in his submission would constitute an absolute gift in her favour. He has argued at considerable length with regard to the references to the stipulation that Sharadamma should enjoy the property during her lifetime and the references which appear more than once to the effect that regardless of whether there is an alienation for charitable purposes, that on Sharadamma's death the property either all of it or half of it must devolve on Rajamma and on her sons. The contention is that as far as the reference to Sharadamma living off the proceeds from the property are concerned that it is a declaration of intent that Sadamma desired that Sharadamma should maintain herself out of that property and nothing more than that. As far as the second head of the issue, namely the stipulation that on Sharadamma's death all that she possessed should go absolutely to Rajamma is concerned, he drew my attention to Sections 10 to 14 of the Transfer of Property Act as also to Section 124 of the Act. On the basis of the former, he submitted that it is now well settled law that when a gift is made, that the vesting is absolute and that if there are clauses that are repugnant to the absolute and beneficial enjoyment of that property that those conditions are void and that it will not affect the gift itself. In other words, the property vests dehors the restrictions. He attacked the condition requiring the property to revert to Rajamma on Sharadamma's death on the ground that there is an express bar to such a procedure by virtue of the provisions of Section 14 of the T.P. Act. He submitted that the Rule against perpetuity which is incorporated in this Section specifically voids any stipulation of this type. The subsidiary argument canvassed was that by virtue of the provisions of Section 124 of the T.P. Act, which do not permit a gift in respect of future property that vis-a-vis Rajamma to whom the gift was deferred until the death of Sharadamma, that the property must be treated as future property and that therefore, it would be hit by Section 124. As far as this last argument is concerned, to my mind there is a basic fallacy in it in so far as Section 124 debars the gift of property that is to be received or that may

come into existence at a future point of time and it therefore has no application in the case of property that is very much in existence where something is to happen at a different point of time.

7. Before dealing with the submissions canvassed on behalf of the respondents, I need to briefly record that the learned trial Judge recorded the finding that in his opinion the document in question was not a Will but that it was a Gift Deed simpliciter. He also recorded the finding that the references to the, two daughters in that document unequivocally indicated that the property was gifted to both of them and not to either of them and he draws support from the fact that the two ladies acted on this basis which explains why the property stood in their joint names and why the lease deed executed in favour of defendants 5 and 6 was executed by them jointly. The learned trial Judge proceeds to hold that as far as Sharadamma's interest in the property was concerned that it was confined to one-half share and that on her death this one-half share stood equally divided between the plaintiff and Rajamma's branch and consequently awarded the plaintiff 1/4th share. The plaintiff has appealed against this decision because it is her contention that the property vested absolutely in Sharadamma who was her maternal aunt and who died intestate and that consequently she was entitled to one-half in that property and not 1/4th share, whereas the defendants have also filed an appeal whereby they have contended that the reasoning of the learned trial Judge was erroneous, that Sharadamma only had a life interest, that the property had vested completely in Rajamma's branch of the family and that consequently, on the death of Sharadamma it was only her life interest which stood extinguished and that the plaintiff had no right to claim any share in the property even within the provisions of the Hindu Succession Act

8. The respondents' learned Advocate has interpreted the document in question very differently. There is more or less a consensus that emerges in the course of the argument of both sides that the document was in fact a Gift Deed. The respondents' learned Advocate who is also the appellant in the next Appeal contended that the aforesaid interpretation is absolutely erroneous. He relies on the references made by Sadamma to the effect that Sharadamma was a widow and also that she had no children. He also places very strong emphasis on the

clear cut statement in the document that Sharadamma was to maintain herself out of that property during her lifetime. He thereafter proceeds to point out that the deceased had not once but twice in the subsequent recitals indicated that the property was to go to Rajamma and her sons on the death of Sharadamma and this is further reiterated by repeating that even if one-half of the property is donated for religious purposes, that the other half was to go to Rajamma and to her children. He also points out to me that there is a clear embargo on either Sharadamma or Rajamma alienating the property and he submits that the cumulative effect, rather the intention of Sadamma which has to be gathered from the document itself was definite and most certainly was that the property has to go to Rajamma and her sons absolutely and that it was only a life interest created in favour of Sharadamma. It is his contention that none of the clauses are repugnant to the beneficial enjoyment because if the intention of Sadamma was that the property must vest absolutely in Rajamma's family, then those stipulations were necessary and understandable. He also submitted that the creation of a life interest is in no way repugnant to Rajamma's branch enjoying the property because once Sharadamma has died, they beneficially enjoy the whole of the property without any encumbrance. It is his further submission that even if by operation of law one were to discard the stipulation regarding the bar of alienation on the basis of the doctrine against perpetuity enunciated in Section 14 of the T.P. Act, that this would in no way come in the way of the property vesting in Rajamma's branch of the family.

9. The respondents' learned advocate has drawn my attention to a Decision of the Supreme Court reported in : AIR 1985 SC1359 A Sreenivasa Pai and Anr. v. Saraswathi Ammal @ G. Kamala Bai where in the course of a Settlement Deed, a life interest was created in favour of the mother-in-law and the Supreme Court upheld the validity of such an arrangement. It was therefore submitted that it is well within the framework of law to enter into such an arrangement. This Decision was sought to be distinguished by the appellants' learned Advocate who submitted that the subsequent restrictions that apply to a gift are far more rigorous and that the references and observations in the aforesaid Decision would not assist the respondents because in that case it was a settlement and not a gift. In support of his submission, the respondents' learned Advocate relied on the definition of the

term 'settlement' as it appears in Section 2 of the Stamp Act and he also drew my attention to Clauses 392 & 393 of Mulla's Hindu Law where in the learned author has on the basis of a long line of Decisions held that any clause or condition which accompanies a gift, that would make an absolute and beneficial enjoyment by the receiver repugnant, must be treated as void and that the gift takes effect dehors these limitations. Reliance was also sought to be placed by the appellants' learned Advocate on the definition of gift as it appears in the Law Lexicon where in, the learned Author has defined a gift being a transfer without consideration. Lastly, he has relied on the well known Decision reported in A.I.R. 1929 Privy Council 283 Raghunath Prasad Singh and Anr. v. Deputy Commissioner, Partapgarh and Ors.. In that Decision which was a fore-runner to several similar ones, the Privy Council enunciated that limitations or clauses that were repugnant to the absolute and beneficial enjoyment of a gift are required to be ignored.

10. The respondents' learned Advocate has placed reliance on another Decision of the Supreme Court reported in A.I.R. 1955 S.C. 376 Jugalkishor Saraf v. Raw Cotton Co. Ltd., the relevant passage being at paragraph 398 which was basically in answer to the contention regarding Section 124 of the T.P. Act and submitted that the conveyance in question is in relation to the time when it takes place and not in relation to future property and he submitted on the basis of this Decision that as indicated by Sadamma the transaction in question has taken effect at that point of time itself. He reiterated the position that the vesting of the property as per the intention of Sadamma was in her younger daughter Rajamma except for the fact that the beneficial enjoyment of the property until the death of Sharadamma was to be permitted to her through the creation of a life interest.

11. On the question of life interest, the respondents' learned Advocate has drawn my attention in the first instance to a Decision reported in : AIR1952 Mad166 Ammireddi Sooranna v. Ammireddi Venkataratnam where in he points out that an arrangement whereby life interest is created in one person and an absolute interest in another person thereafter is not only common but that the Madras High Court in a considered Judgment has held that it is perfectly valid and within the framework of law. The learned Advocate has also reinforced his argument on the basis of another Decision of the Supreme Court reported in : [1953]4SCR232 Raj

Bajrang Bahadur Singh v. Thakurain Bhaktraj Kuer, where in the Apex Court had occasion to examine the nature of interest it is permissible to create and to hold conclusively that a life interest can be created in these circumstances. In sum and substance, it was therefore submitted that the arrangement of creating a life interest first in Sharadamma and then an absolute interest in Rajamma's branch of the family is not only justified but that it passes legal scrutiny. Respondents' learned Advocate submitted that consequently, the original plaintiff's claim would have to be negatived completely. As far as his submission on the question of creation of life interest is concerned, the law does accept such a position and it does pass the test of legal scrutiny and merely because a life interest is created in a person other than one to whom the ultimate gift or request is made would not necessarily void or vitiate the condition. To my mind, after a careful scrutiny and virtually a repeated scrutiny of not only the document executed by Sharadamma but also the supportive evidence and the submissions, the position that emerges is as follows. The document in question that was executed as early as 26.11.1945 by the deceased Sadamma was made by her for the reasons that are set out therein. It was made at a point of time when all her other children except Sharadamma and Rajamma had died and Sadamma has indicated certain reasons for what she intended doing. First of all, the fact that she desired to alienate the property during her lifetime indicates that this document was not to be construed as a Will because she has mentioned clearly that it has to take immediate effect. It is therefore very clearly a Gift Deed about which there can be no ambiguity. If it is a Gift Deed, it would be subject to the provisions of law as enunciated in the T.P. Act, viz. the relevant provisions of the T.P. Act coupled with the principles of Hindu Law. The first ingredient that one needs to take cognizance of while construing a Gift is the fact that the vesting has to be complete and absolute. Sadamma has stated very clearly the reason why she has gifted the property to Sharadamma and even at the cost of repetition it needs to be recorded that this was because Rajamma was well provided for whereas Sharadamma was definitely in need of provision for her maintenance. The reference therefore to Sharadamma living off that property during her lifetime will have to be read in this context. The question arises as to whether in this background the contention raised on behalf of the respondents that the transfer was effectively to Rajamma's branch and that only a life interest was

created in Sharadamma having regard to the various references in the document can be upheld. Normally, after considering and reconsidering the document, I would have no hesitation whatsoever in straightaway accepting the submission of the respondents' learned Advocate that the transfer or the vesting has taken place vis-a-vis Rajamma and that only a life interest was created in favour of Sharadamma. There are however two more material aspects that arise which require the Court to take a different view.

12. The first of these is the fact that admittedly the transfer in the first instance was to Sharadamma. That transfer in law must be an absolute transfer. If that is so, there is no residuary interest left with the retransfer considering the law that is applicable to a gift. More importantly, the most vital aspect of the matter is that the document itself conferred on Sharadamma the absolute right to alienate one-half of that property which means that she could sell or legally transfer that half provided it was done for religious purposes. This power that was vested in Sharadamma indicates two legal implications, the first of them being that she could only execute such a transfer of half the property provided she was the rightful holder of that property and not otherwise and secondly if the intention was to create only a life interest in her, that then she could not have been vested with the power of transfer. The power of transfer is not confined to a particular half of the property. There is a reference that in her discretion she could transfer any or either half of that property. This presupposes the fact that it has vested in her absolutely and it was left to her to decide which part of the property was to be transferred. This could not ever have been done by a life interest holder and Sadamma could not have conferred this power on Sharadamma if her intention was only to create a life interest. Another aspect of the matter and perhaps the safer method of testing the real intention of Sadamma and the position in law would emerge from a scrutiny of the manner in which the alienation of that half of the property for charitable purposes was to be done in the event of its taking place. Had Sadamma's intention

been that the property must vest in Rajamma's branch absolutely, then the document would have stipulated that if at all such alienation is to be done, that it would have to be done with the joint consent of Rajamma and Sharadamma and

not by the latter alone. Viewed at from any angle therefore this aspect of the case which has been unfortunately overlooked by the learned trial Judge will unequivocally indicate that the transfer was an absolute gift in favour of Sharadamma. The question arises as to what is the effect of the subsequent provisions with regard to the property vesting in Rajamma's branch of the family after Sharadamma's death. It is unnecessary for me to really examine that aspect of the matter but I need to observe that it can be construed as nothing more than a desire on the part of Sadamma, being conscious of the fact that Sharadamma had no children, that after her death the property should be left to Rajamma's branch but those stipulations in the document will have to be ignored for the reason that once it is held that the property was vested in Sharadamma, it would act as a restrictive clause, vis-a-vis her absolute and beneficial enjoyment. Therefore, the bar on alienation and the requirement that the property must go to Rajamma's branch of the family would have to be ignored.

13. It is in the light of this position that to my mind is the only correct manner in which the document in question can be interpreted, that the decree passed by the learned trial Judge would require some modification. Having regard to the fact that Sharadamma died intestate, her property would devolve equally one-half going to the plaintiff and one-half to Rajamma's branch of the family. The property is in the possession of the latter, and the decree passed by the learned trial Judge where in he has awarded the plaintiff a 1/4th share would stand modified to the extent that the plaintiff would be entitled to one-half share in the property in question. The necessary modification in the decree will accordingly have to be effected by the office.

13. In the light of the above findings, RFA 81/83 succeeds and the same is allowed to the extent as indicated above. The connected RFA 107/83 fails and stands dismissed. In the circumstances of the case, there shall be no order as to costs.

14. It is pointed out by the learned Advocates that by the interim order, the rents that were being deposited in Court were being withdrawn by the appellant in RFA 81/83 to the extent of 1/4th share. This appellant will be entitled to receive the

balance 1/4th share of those rents. As far as the property is concerned, the half share that is conferred on Rajamma's branch would go to respondents 2 and 3 in RFA 81/83. The office shall permit the respective parties to withdraw the amount lying in Court immediately.

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