

A. Krishnaraya Kodgi Vs. A. Sarvothama Kodgi and anr.

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Court : Chennai

Decided On : Feb-04-1949

Reported in : (1949)2MLJ459

Appellant : A. Krishnaraya Kodgi

Respondent : A. Sarvothama Kodgi and anr.

Judgement :

Raghava Rao, J.

1. The question for decision in this second appeal is one of construction of a deed of gift, Ex. P-2, executed on 20th March, 1918, by the first defendant, appellant before me, in favour of the second defendant, the Indian section of the Theosophical Society, Benares, represented by its General Secretary at the time, for the use and benefit of the local lodge at Coondapur. On 6th October, 1942, finding the suit property no longer required for the use and benefit of the local lodge which apparently had by that time ceased to exist and basing itself on the clause of reverter contained in Ex. P-2 the second defendant by its General Secretary at the time executed a deed of sale of the suit property in favour of the first defendant. The plaintiff, the first respondent before me, sued in the Court of the District Munsiff of Coondapur for recovery of possession of the entire subject-matter of the gift deed but succeeded in obtaining a decree for only a half which was later confirmed on appeal by the learned Subordinate Judge of South Kanara.

2. The first defendant appeals to this Court against the appellate decision, urging- as he did in the courts below, firstly that the suit must be regarded as in effect one for enforcing a right of pre-emption and as not brought in time, i.e., within one year from the date of the taking of possession by the first defendant as prescribed by Article 49 of the Indian Limitation Act; and secondly that the clause of reverter contained in Ex. P-2 must be regarded as altogether invalid in law and that Ex. D-1 executed pursuant to such a clause could not operate to clothe the plaintiff with any title whatsoever.

3. Before I deal with the contentions of Mr. Krishna Rao, the learned advocate for the appellant it is as well that I set forth in extenso the document, Ex. P-2, on the terms of which the validity of the contentions necessarily depends:

This day the twentieth of March 1918, the deed of gift executed to the registered Indian section of the Theosophical Society having its headquarters at Benares, and now represented by its -present general secretary T. Ramachandra Rao, Retired Subordinate Judge, Benares, by Mr. Krishna Rao Kodgi, son of Govindarao Kodgi, landlord, Brahmin, aged 25, living at Amavasubail, Coondapur taluk, witnesseth:

Whereas the undermentioned land forming a portion of the whole land Survey No. 67 sub. 8 was inherited by me from my deceased grandfather Krishna Rao, Yediala and of which I am in possession as the managing member of the family consisting of myself and my brother Sarvothama Rao Kodgi and whereas I am desirous of perpetuating the memory of my abovesaid maternal grandfather and of imparting to him spiritual benefit thereby, I do hereby execute this day this deed of gift and convey absolutely with all rights to the abovementioned general secretary, Benares, for the use and benefit of the local lodge of the Coondapur Theosophical Society the undermentioned land together with all trees, etc., thereon besides the incomplete building erected thereon by the Theosophical Society and have handed over the possession of site, etc., to K. Narayanaswami Aiyar on behalf of the abovesaid General Secretary. In the event of the site and building aforesaid not being required for the above purpose, the property shall revert to me on the condition of my paying to the said Indian section of the Theosophical Society the

then estimated value of the building alone. In proof whereof, I have this day affixed my signature to this deed of gift.

Now, to take up the first of the contentions of the appellant, I am of opinion that the courts below are perfectly correct in their view of the matter. No doubt the plaintiff does employ the term ' pre-emption ' in his plaint; but it is not pretended that the plaintiff is asserting a right of 'pre-emption' in priority to the first defendant purchaser. What he is doing in fact and in truth is to claim that the purchase by the first defendant enures to his benefit also under the reverter clause in Ex. P-2 to the extent of a moiety. The plaintiff says that although the second defendant alone executed Ex. P-2 he did so as manager of the joint family so that if the clause of reverter could and did operate, it would operate to his benefit as well as that of the first defendant. With this view of the construction of Ex. P-2, which the Courts below adopted I agree. I accordingly repel the first of the contentions of Mr. Krishna Rao.

4. But it is said--and this is the second contention of Mr. Krishna Rao--that the clause of reverter is itself inoperative (a) either because it is repugnant to the absolute estate created by Ex. P-2 in favour of the second defendant, or (b) because it is a clause of defeasance by way of an executory gift over which, to be valid, must not violate the rule against perpetuity laid down in Section 14 of the Transfer of Property Act. In the latter case it is further urged that it is immaterial that in fact a re-conveyance did come into being during the lifetime of the donor. So far as the first ground of the second contention is concerned, I am of opinion on a careful construction of the deed that the clause in question is not at all one of repugnancy to the absolute estate created by the deed but is, if at all, only one of defeasance. The distinction between the two classes of clauses which is, however subtle, quite real is well brought out in the following observations made by Sundaram Chetti, J., in *Govindamja Pillai v. Mangalam Pillai* : AIR1933 Mad80 . with which I respectfully agree:

The distinction between a repugnant provision and a defeasance provision is sometimes subtle, but the general principle of law seems to be, that where the intention of the donor is to maintain the absolute estate conferred on the donee but

he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore void; but where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative.

As regards the second ground the argument ignores the words ' to me ' underlined (italicised) by me in setting forth the gift deed above. The clause does not run in terms of reverter to the donee and his heirs. The decision of the Judicial Committee of the Privy Council in *Sarajubala Debi v. Jyotirmoyee Debi* (1931) 61 M.L.J. 501 : L.R. 58 IndAp 270 : I.L.R. 59 Cal. 143 (P.C.) does not accordingly apply to the case on hand.

5. In fact, I am inclined to think that the clause in question is not a clause of reverter equivalent to defeasance by way of an executory gift over. It is, in my judgment, a covenant between the donor and the donee that the latter should re-convey to the former in a certain contingency. That the rule against perpetuity does not in this country apply to agreements is fairly well established by decisions of this Court of which I need only refer to *Munuswami Naidu v. Sagalaguna Naidu* (1925) 51 M.L.J. 299 : I.L.R. 49 Mad 387. and to the Full Bench decision of the Calcutta High Court reported in *Moulvi Ali Hossain Mian v. Rqjkumar Halidar* : AIR1943 Cal417 which reversed the earlier decisions of that Court to the contrary.

6. The two contentions of the appellant therefore failing, the second appeal fails and is dismissed with costs.

No leave.