

Sarba Mohan Banerjee Vs. Manmohan Banerjee and ors.

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Court : Kolkata

Decided On : Jun-07-1932

Reported in : AIR1933Cal488

Appellant : Sarba Mohan Banerjee

Respondent : Manmohan Banerjee and ors.

Judgement :

1. In this appeal which the plaintiff has preferred from a decree and decision by which the Additional Subordinate Judge of Dacca has almost entirely dismissed his suit, two questions have been raised. The plaintiff is the eldest son of one Haramohan Banerji by his predeceased wife. Defendants 1 to 3 are Haramohan's sons by his second wife Kulakmini who is defendant 4. The plaintiff prayed for partition of certain immovable properties, to wit, two houses and some moveables of the value of Rs. 696. The Subordinate Judge held that the two houses had been made a gift of by Haramohan in favour of his wife defendant 4, and that as regards the moveables the plaintiff had failed to make out his case. He accordingly dismissed the suit for partition and gave a decree to the plaintiff for Rs. 10-8-0 on the defendants' admission that there was an old iron safe of the value of Rs. 42 in existence as the only item of joint family moveable property. The two questions raised relate to: 1st the validity of the gift; and 2nd the existence of the moveables.

2. The gift is evidenced by a deed written in its entirety by Haramohan himself, and he personally took it to the Registration Office and had it registered there. The

validity of the deed has been questioned upon several grounds, with which we now propose to deal. The first ground urged is that Haramohan was not of sufficient mental capacity or at any rate was the subject of undue influence. Haramohan was a teacher by occupation. The plaintiff put down his age at 85 or 86 years; he himself being, as he says, 50 years of age. Though this may not be absolutely correct Haramohan undoubtedly was an old man. The evidence nevertheless is that he was working as a private tutor in certain families. The deed was executed on 14th January 1924 and was registered on the next day. The postcards Ex. A series were admittedly written by Haramohan in December 1923-February 1924 and that clearly show that he was in a normal state of mind even after more than a month of the transaction. He died on 25th March 1924. The oral evidence about the state of his mental capacity at and about the time of the transaction is clear and positive. A faint attempt has been made by the plaintiff through his witness P.W. 2 Prafulla to make out that Haramohan had lost his memory, but temporary forgetfulness of the kind spoken to by that witness is not sufficiently indicative of want of mental capacity. So far as undue influence is concerned there is no suggestion in the evidence, far less any proof, excepting a story which P.W. 2, Prafulla has given, but which we cannot accept as true. (The judgment here considered the evidence regarding attestation of the deed and held that there was requisite attestation.) The next contention is that there was no acceptance of the gift by Kulakamini such as is necessary under the law. The argument is based upon the fact that Kulakamini's name was not registered in Municipal records or landlord's Shirista till after Haramohan's death, and also upon a statement to be found in the deposition of Kulakamini herself to which reference will presently be made. Haramohan lived only two months and a half after the deed and the omission to mutate the names within that short period does not signify much. The statement in her deposition is that she knew nothing about the condition which is to be found in the deed that she would have to pay Rs. 5 as maintenance allowance to Haramohan so long as he lived. It has been argued that when she did not know about this condition there was no valid acceptance by her. This argument has, in our opinion, no force.

3. After execution Haramohan himself made over the deed to her and told her that he had made the gift to her and if she received the document knowing that it was a

deed of gift and never thought of doing anything contrary to its terms that was more than enough to constitute acceptance. In English Law assent by a donee is presumed until and unless he disclaims *Xenos v. Wickham* (1863) 2 HL 296; *London and County Bank v. London and River Plate Bank* (1888) 21 QBD 535 and the same principle is extended even to onerous gifts *Siggers v. Evans* (1855) 5 E & B 367. And in the case of *Standing v. Bowring* (1885) 31 Ch D 282 at p. 288, Cotton, L.J. observed.

Now I take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some obligation which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, 'I will not take it. When informed of it he may repudiate it, it vests in him until he repudiates it.

4. Whatever difference the wording of Section 122, T.P. Act may make in the matter, there is no authority for the view, which to us seems most unreasonable, that for an acceptance of an onerous gift, acceptance of the gift itself is not sufficient, but an acceptance of the onerous condition also at the same time is necessary. Moreover the onerous condition in the present case is one of a trifling character which evidently was not intended to be thought of or enforced. We must accordingly overrule this contention. Lastly, it has been said that the deed created not a gift but a sale or a lease and that as no consideration passed the transaction was invalid. This contention must be rejected. So far as the gift is concerned, we are in entire agreement with the Judge of the Court below that it is unassailable. The other question namely as regards the moveables is one about which we have some doubts. We are not satisfied that the defendants' case is literally true. But here again it was for the plaintiff to prove his case. And the plaintiff has only to thank himself if on his evidence the Court does not feel safe to proceed, for he has professed ignorance even about his father's handwriting and signature. That there is an almirah in the house is not denied by the defendants but their case is that it belonged to Kulakamini's mother and she had given it to her. Bankim says,

The almirah has been in existence from before my birth These (the moveables) in the house were all acquired by us except the iron safe and the almirah.

5. Kulakamini and Monmohan say that the almirah belonged to Kulakamini's mother who had given it to her, but no independent witnesses have been called to prove this gift. The plaintiff's case is and that case has been supported by his sister Sashimukhi that the almirah belonged to her mother (Haramohan's predeceased wife). But in his plaint the plaintiff has claimed only a fourth share in the almirah which is contrary to his present case. In these circumstances we think we must hold that he has failed to make out his case. The result is that in our judgment this appeal fails and must be dismissed with costs, hearing-fee three gold mohurs.

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