

Sarbamohan Banerjee Vs. Monomohan Banerjee and ors.

Sarbamohan Banerjee Vs. Monomohan Banerjee and ors.

SooperKanoon Citation : sooperkanoon.com/882035

Court : Kolkata

Decided On : Jun-07-1932

Reported in : 143Ind.Cas.757

Judge : Mukerji and; Bartley, JJ.

Appellant : Sarbamohan Banerjee

Respondent : Monomohan Banerjee and ors.

Judgement :

1. In this appeal which the plaintiff has preferred from a decree and a 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 Hara Mohan Banerjee by his predeceased wife. The defendants Nos. 1 to 3 are Hara Mohan's sons by Kulakamini (second wife) who is defendant No. 4. The plaintiff prayed for partition of certain immovable properties, to wit, two houses and some movables of the value of Rs. 5,695. The Subordinate Judge held that the two houses had been made a gift of by Hara Mohan in favour of his wife, defendant No. 4 and that as regards the movables 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 only 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 movable property. The two questions raised relate to its the validity of the gift and 2nd the existence of the movables.

2. The gift is evidenced by a deed written in its entirety by Hara Mohan 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.

3. The first ground urged is that Hara Mohan was not of sufficient mental capacity or a Any rate was subject to undue influence. Hara Mohan was a teacher by occupation. The plaintiff put down his age at 85 or 88 years, he himself, being as he says, 50 years of age. Though this may be absolutely correct Hara Mohan 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 the 14th January, 1924, and was registered on the next day. The post cards Ex. A series were admittedly written by Hara Mohan in December, 1923-February, 1924, and they clearly show that he was in a normal state of mind even after more than a month of the transaction. He died on the 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 final attempt has been made by the plaintiff through his witness P.W. No. 2 Prafulla to make out that Hara Mohan had lost his memory, but temporary forgetful-ness of the mind 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. No. 2. Prafulla has given, but which we cannot accept as true.

4. The second ground is that there was no proper attestation of the deed. This argument is sought to be supported by certain admissions and contradictions which are alleged to be found in the evidence but also upon a very curious ground. It is said that it would appear from a will (Ex. E) which Hara Mohan executed in 1912 that he never intended to give his properties absolutely to Kulakamini and that it would also appear from certain drafts of a deed of gift made by him in 1921 and 1922 (Ex. D series) that he was hesitating as to what he should do and that, therefore, it should be held that when he executed the deed of gift in question he took the precaution of leaving some loopholes so that the attestation, may not be proper. This theory in our opinion is so grotesque in its character. The will (Ex. E) whatever the legal effects of the words used in it may be, shows a clear intention

on the part of Hara Mohan to cut off the plaintiff altogether: no words can be more forceful or plain than what the deed contains. The drafts (Ex. D series) are all directed to the same object. In them, only small variations are noticeable as regard a point of detail regarding the amount which Kulakmini would have to pay to Hara Mohan so long as he was alive. The fact that the drafts were not completed and the deed was not executed only shows that the old man was putting off the unpleasant business till the last moment giving the plaintiff every chance to make up, a conduct quite in keeping with that of an aggrieved but affectionate father. It has also been argued that Hara Mohan never intended the deed to be operative and went through a sham process only to please his younger wife and her sons. This is a theory which is entirely conjectural and there is really no reason to suppose that when he ultimately executed the deed he intentionally did so in such a way as not to make it effective. It is said that if he intended the document to be an operative one, he would have informed his son Bankim in letters to whom he never mentioned about the gift at all. We see no force in this contention; the deed had been made over to Kulakamini herself and one of her sons Monomohan was one of the attesting witnesses to it. To turn now to the evidence relating to the attestation. There are five witnesses to the deed. Of these, the first two Revati B. Basak and Sudanya Chandra De were cited but not called. The other three are the son Monmohan, a Pleader Nibaran Chandra Guha and one Rajendra K. Chatterji.

5. The story is that Haramohan, Monomohan and others went to the house of the Pleader in the early morning of the 14th January, 1924, and there the deed was written out by Hara Mohan himself and the execution and attestation by some of the witnesses also took place there and that subsequently Haramohan himself took the deed to 'the witness Rajendra Kumar who attested it on Haramohan's admission of execution. The evidence which the last, mentioned witnesses have given has been subjected to a scathing criticism. We, however, see no reason at all to disbelieve the last mentioned two witnesses. Their evidence, notwithstanding all that has been said against it is, in our opinion, perfectly reliable. On that evidence we have no hesitation in holding that there was the requisite attestation. In fairness to the appellant however, we may say that we are not satisfied that Revati and Sudhanya signed as witnesses under circumstances which may constitute valid attestation, so far as Monomohan is concerned: if the Pleader

witness is believed and we see no ground to disbelieve him he too had properly attested the deed. As against the Pleader witness Nibaran Chandra Guha who is an old man of 68, all that has been said is that he is not well off, does not pay income-tax and has no register clerk, But he is a likely person off have been asked to help in the execution of the deed, because his house is 10 or 15 minutes walk from Haramohan's house, of aramohan was a tutor to his boys for 15 or 16 years and he was his Pleader. So far as the witness Rajendra is concerned it has been said that there was no necessity for asking him to be a witness at all: but the witness is a Road-Cess clerk of the Dacca Collectorate and not unnaturally would be regarded as a desirable person to be a witness. Some alleged discrepancies have been pointed out to us to make out that the story of the execution and attestation is a myth, but we are not prepared to come to any such conclusion. 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 the Municipal records or in landlord's Sherista till after Hara mohan's death and also upon a statement to be found in the deposition of Kulakemini 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 name 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. 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.

6. In English law assent by a donee is presumed until and unless he disclaims: *Xenos v. Wickham* (1866) 2 H.L.C. 296 : 36 L.J.C.P 313 : 16 L.T. (N.S.) 800 : 149 R.R. 467; *London and County Banking Company v. London and River Plate Bank* (1888) 21 Q.B.D. 535 : 57 L.J.Q.B. 601 : 61 L.T. 37 W.R. 89 and the same principle is extended even to onerous gifts: *Siggers v. Evans* (1855) 5 El & Bl 367 : 3 C.L.R. 1209 : 24 L.J.Q.B. 305 : 1 Jur (N.S.) 851 : 103 R.R. 521 and in the case

of *Standing v. Bowring* (1886) 31 Ch. D. 282 : 55 L.J. Ch. 248 : 54 L.T. 191 : 34 W.R. 404 Cotton, L.J. observed: 'Now I take the law to be that where there is a transfer of property to a person, even though 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.' Whatever difference the wording of Section 122, Transfer of Property 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 the contention.

7. 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.

8. So far as the gift is concerned, we are in entire agreement with the Judge of the court below that it is unusable.

9. The other question, namely, as regards the movables is one about which we have some doubts. We are not satisfied that the defendant's 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 movables) in the house were all acquired by us except the iron safe and the almirah.' Kulakmini and Monomohan 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.

10. The result is that, in our judgment, this appeal fails and must be dismissed with costs. Hearing fee; three gold mohurs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com