

Mt. Sewti Vs. Rattan

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Court : Himachal Pradesh

Decided On : Apr-07-1951

Reported in : AIR1951HP54

Judge : Chowdhry, C.J.

Acts : [Transfer of Property Act, 1882](#) - Section 126; ;[Contract Act, 1872](#) - Sections 16, 19 and 19A; ;Limitation Act, 1908 - Schedule - Articles 91 and 120; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Section 11 - Order 10, Rule 2

Appeal No. : Civil Revn. No. 30 of 1950

Appellant : Mt. Sewti

Respondent : Rattan

Advocate for Def. : Amar Chand Hoshiarpuri, Adv.

Advocate for Pet/Ap. : Tek Chand, Adv.

Disposition : Revision allowed

Judgement :

ORDER

Chowdhry, J.

1. This is an appln. in revn. by Mt. Sewati, whose suit for cancellation of a gift-deed dated 14-2-2000B. in favour of the deft-resp. Rattan was decreed by the Subordinate Judge, Kumharsain, but dismissed on appeal by the Senior Subordinate Judge, Kasumpti.

2. The trial Ct. decreed the suit on the ground that the gift had been obtained by fraud. The appellate Ct. revsd. this finding, & it also held that the suit was time barred & barred by res judicata, Both these latter pleaa had been taken by the deft. but the trial Ct had neither framed issues nor recorded findings on them.

3. The points urged in revn. before me are that the decree of the trial Ct. should be restored because the gift had in fact been obtained by fraud & because the suit was barred neither by time nor by res yudicata.

4. The appct. is an old illiterate woman & the resp. is in relation her nephew It appears that in the year 1991 B. the appct.'s husband Dharmu executed a deed of adoption in favour of the resp., but that before the deed could be regd. Dharmu died. About eight years later, an appln. purports to have been made on 22 10 1999 B. to the Ruler Ct. Kumharsain on behalf of the appct. for leave to execute a deed of adoption in favour of the resp., which was granted on 13-2-2000B. & the very next day the gift-deed in question was executed & regd. Under this deed the resp. purports not only to have been appointed son & heir to the appct. but to have been declared the owner & possessor of all the movable & immovable property of the appct. since the date of the deed. The apput.'s allegation in this suit was that this deed was obtained from her by the resp. giving it out to her that she waa executing a deed of management in his favour, & that she never intended to make any gift in his favour.

5. Now, there is no doubt that the appct is an old illiterate woman, & that the resp., her only living relation, has been living with her since the life time of her husband. It is clear therefore that the appct. was completely in the hands of the resp. The relationship existing between the parties was therefore sufficient to raise the presumption that the deed in question had been obtained through undue influence, which rendered the fraud possible. Inche Noriah v. Shaik Allie, A. I. R. (16) 1929 P. C. 3. This presumption is strengthened all the more by the fact that the gift

covers the entire property belonging to the appct. That being so, it was incumbent upon the resp. to provb, in the words of the aforesaid ruling, that the gift was the spontaneous act of the donor acting under circumstances which enabled her to exercise an independent will. This onus the resp. has failed to discharge. (After discussion of the evidence with regard to execution of the deed the judgment proceeds :--]

6. Much was sought to be made of the fact that the appct. did not come into the witness-box. It has however been seen that the onus of proving the genuineness of the gift-deed lay upon the deft. resp., & that instead of discharging that onus the evidence produced on his behalf has only confirmed the presumption that he had obtained the deed by misrepresentation. In the circumstance, the fact that the appct. did not produce herself as a witness cannot go against her. I hold, agreeing with the trial Ct. that the gift deed in question had been obtained by the deft- resp. from the pltf.-appct. by fraud.

7. As regards the question of limitation, it has already been held above that the gift-deed in question had been obtained by misrepresentation. It was therefore void. The appct. need not have prayed for its cancellation. It follows therefore that Article 91, Limitation Act, has no application in the present case. *Petherpermal Chetty v. Muniandi Servai*, 35 I. A. 98; *Beni Prasad Koeri v. Dudh Nath Roy*, 26 I. A. 216; *Narasagauda v. Chawagauda*, 42 Bom. 638. All these were cases in which possession of the property was sought to be recovered, & it was held that a relief for cancellation of the deed was unnecessary & Article 91, Limitation Act, did not apply. In the present case also the appct. besides praying for cancellation of the gift deed, also prayed for recovery of possession of the property. Subsequently, however, she made a statement under Order 10 Rule 2, Civil P. C. that she withdrew her relief for possession as she was already in possession of the property. As the suit is framed, therefore, the only relief that remains is the relief for cancellation of the gift-deed. The question is whether Article 91 must be applied in this case simply because the relief appears in terms to be one for cancellation of the gift-deed, although she need not have prayed for any such relief in view of the deed being void ab initio. In view of the facts of the case, the relief for cancellation should be construed as a relief for a declaration that the

right, title & interest of the appct. in the property in suit is not affected by the deed in question, on the principle that a party should be granted the relief to which he is found to be entitled irrespective of the terms in which it has been claimed. Construing the relief as one for declaration, therefore, the proper Article that is applicable to this case would be Article 120, Limitation Act. Chooramani Dasi v. Baidya Nath Naik, 32 Cal. 423, is a case in which a declaratory suit in respect of a deed of gift which was void ab initio was held to be governed by Article 120. Under that Article the suit is clearly within time, as it was filed within six years of the execution of the gift deed.

8. The only question that remains to be decided is whether the suit was barred by res judicata. There is on record a copy of the judgment of the Subordinate Judge of Kumarsain dated 6-2-2004, which shows that the present appct. sued the present resp. for recovery of possession of a part of the property which was the subject-matter of the gift-deed in question, i.e. two houses. The pleadings of that case are not on the record, but it appears from a perusal of the judgment that that suit for recovery of the two houses was filed on the ground that the deft, was residing therein by the leave & licence of the pltf. The deft, set up his title to the houses on foot of the gift-deed, & the Ct. dismissed the suit holding that the deft. had acquired title to the houses under the gift-deed. It was therefore argued that the validity of the gift deed has already been decided in that case & the present appct. is now debarred in this suit! from impugning it. This argument ignores the provisions of Explan. III to Section 11, Civil P. C., under which the matter must in the former suit have been alleged by one party & either denied or admitted, expressly or impliedly, by the other. The pltf. in that suit never alleged that she founded her claim on the gift-deed. It is immaterial, therefore, that the deft, set up that deed. Nor does it make the least difference that the Ct. in that case recorded a finding in favour of the validity of the gift-deed, for it was not at all necessary for it to do so. All that the Ct. was called upon to decide was whether the licence set up by the pltf. had been proved. That being so, the finding of that Ct. about the validity of the gift-deed did not amount to the decision of an issue, but to merely the expression of an opinion, & does not operate as res judicata in the present suit : Narendranath v. Ananda Chandra, 60 Cal. 1307.

9. It was next argued that the said decision bars the present suit by res judicata under Explan, IV be Section 11, Civil P. C. because the present appct. might & ought to have made it a ground of attack in that suit that the gift had been obtained from her by fraud & that as she failed to do as, it will be deemed that the matter was directly & substantially in issue in that suit & was decided against her. This argument, however, ignores an important ingredient of Section 11, namely, that the parties should have been litigating under the same title in both the suits. It has therefore been held that where a suit for recovery of possession of property based on a lease fails, a Subsequent suit to recover the same property on the strength of general title is not barred by res judicata : *Zamorin v. Narayanan*, 22 Mad. 323 & *Kutti Ali v. Chindan*, 23 Mad. 629. The same principle is applicable in the present case inasmuch as the first suit was based on a licence, but the present suit was filed on the strength of the appct's general title. It was not necessary therefore for the pltf. to ask for recovery of possession of the two houses on the ground that the gift-deed in question had been obtained from her by fraud. I therefore hold that the present suit is not barred by res judicata.

10. In the result therefore, the revn. petn. is allowed with costs throughout, the judgment & decree of the lower appellate Ct. are set aside & the pltf-appct. is hereby granted a declaration that her right, title & interest in the property in suit are not affected by the deed dated 14-2-2000 B. purporting to be a gift-deed by her in favour of the resp.