

(1971) 07 GUJ CK 0001
In the Gujarat High Court
Case No : Second Appeal No. 271 of 1965

Amarsing Ratansing and Another

APPELLANT

Vs

Gosai Mohangir Somvargir and Others

RESPONDENT

Date of Decision : 08-07-1971

Acts Referred:

Evidence Act, 1872 — Section 68
Transfer of Property Act, 1882 — Section 122, 3

Citation : AIR 1972 Guj 74

Hon'ble Judges : B.K. Mehta, J

Bench : Single Bench

Advocate : Mangaldas M. Shah, for the Appellant; R.N. Purandare, for N.V. Karlekar, for the Respondent

Judgement

1. In this appeal two questions arise, namely, the document, Ex. 45, under which the plaintiffs who are respondents No. 1 to 3 before me claimed possession of the property from the defendants who are appellants. Nos. 1 and 2 and respondent No. 3 before me, was in the nature of a gift deed or a will and, secondly, if it was a gift deed whether it was legally and validly attested. The said question arise in the following circumstances.

The plaintiffs filed a suit in the Court of Third Joint Civil Judge (J. D.) at Baroda being Regular Civil Suit No. 691 of 1961 for recovery of the possession of a residential building bearing census No. Ba/4,409 situated at Siyabaug, Babajipura. Baroda from the defendants. They were claiming the title of the property under the deed of gift. Ex. 45, executed by one Bai Andar the widow of Rama Rayji executed on September 2, 1946. By the said gift the said Bai Andar gifted all her properties to the plaintiff No. 3 Bai Chanchal who happened to be her niece, being husband's brother's daughter, out of natural love and affection. It was, however, admitted in the said gift deed that the said Bai Andar shall have a life interest in the suit building and on her demise the property was to be mutated in record of rights and all the Municipal and other taxes were to be paid

by the plaintiff No.3 who was authorised and directed to collect documents constituting title deeds to the property after the demise of the said Bai Andar. On May 2, 1961, the said Bai Andar expired, after her death the plaintiff No.3 sold the suit Property to plaintiffs Nos. 1 and 2 on May 16, 1961 for a consideration of Rs. 1999/- and thus the plaintiffs Nos. 1 and 2 became owners of the suit properties. It was the case of the plaintiffs that the defendants Nos. 1 and 2 were distant relatives of said Bai Andar and they entered upon the suit premises on the pretext of performing funeral rights and obsequies after the death of Bai Andar. It was further alleged that the defendants Nos. 1 and 2 picked up quarrel with plaintiffs No. 3 and were trying to drive her out of the suit building. As the defendants continued to remain in wrongful possession of the suit property and as the defendant No. 3 was the tenant of one of the rooms of the said property, who were not willing to hand over the possession to the plaintiffs, a suit was filed for possession of property from the defendants and for mesne profits for the period of wrongful occupation of the property. The defendants Nos. 1 and 2 resisted the suit contending, inter alia, that the said Bai Andar had executed the last will and testament on April 7, 1961, by which she revoked her all previous wills and bequeathed the suit property to defendants Nos. 1 and 2. It was specifically contended by the defendants that Ex. 45 though ostensibly a gift deed was in effect and substance a will which was, therefore, revoked by the last will and testament dated April 7, 1961 by the said Bai Andar. As the defendants Nos. 1 and 2 had become the owners under the said will, the plaintiff No. 3 had no right to sell the property to plaintiffs Nos. 1 and 2 and, therefore, they were not entitled to the relief for possession. On these pleadings the learned trial Judge raised issues and found that the plaintiffs No. 2. Had become absolute owner of the suit property under the gift deed of September 2, 1946; and that the defendants have failed to prove that the said deceased Bai Andar had executed a last will and testament on April 7, 1961, bequeathing the said property to the defendants Nos. 1 and 2, and therefore, the plaintiffs were not entitled to recover the possession of the property. The defendants, therefore being aggrieved with the said judgment and decree of the learned Civil Judge (J. D.) went in appeal before the learned District Judge. Baroda by their Civil Appeal No. 345 of 1963 which was also dismissed by him. The learned District Judge found that document, Ex. 45 was a deed of gift and not a testamentary instrument and as regards the document, Ex. 49 which was alleged to be the last will of Bai Andar said to have been executed by her on April 7, 1961, the learned District Judge found that Bai Andar had not executed the said instrument by her free will and consent and in her sound disposing state of mind and the proof tendered by the defendants to prove the will was far from satisfactory and did not appeal to the conscience of the Court. In his view of the evidence, therefore, the learned District Judge found that the will was not proved to the satisfaction of the Court. He, however, held that as the document, Ex 45 was a deed of gift and not a will the title had also passed to the plaintiff No. 3 who in term transferred the property by sale to plaintiffs Nos. 1 and 2, therefore, the appeal was dismissed. Being aggrieved with the said Judgment and decree, the

defendants have come to this Court by way of second appeal.

2. At the time of hearing of this appeal, Mr. M. M. Shah the learned advocate, appearing on behalf of the appellants has raised two contentions, namely, (1) on the true construction and effect of document. Ex. 45, it was in nature of a testamentary instrument and that it was not a deed of gift, and (2) if it is found by the Court that the real nature of transaction was that of a gift deed, it was not legally and validly attested, Mr. Shah the learned advocate for the appellants has submitted that by the document, Ex. 45, the transaction was not to be effective "in present", but was to take effect on the demise of said Bai Andar as it was clear from three speaking circumstances, viz, (a) reservation of life interest of Bai Andar in the said property, (b) right of use and enjoyment of the property by plaintiff No.3 only after the demise of Bai Andar, and (c) the mutation in city survey registers, payment of taxes by plaintiff No. 3 and handing over of documents constituting title only after the demise of Bai Andar. Now, it is settled position of law that in order to determine the real nature of transaction we have to look to the document itself and attendant circumstances to the said document, if there are any. Whether an instrument is a testamentary instrument or a non-testamentary one will depend on the two well known tests, whether by the said instrument disposition takes effect during the life time of the executant of the instrument or whether it takes effect after his demise, and consequently whether it is revocable or not. In this connection, the Court has not to consider merely the form of document but had to ascertain the real intention of the parties which is to be gathered from the words used in the document itself. The High Court of Bombay in the matter of Khushalchand Bhagchand Vs. Trimbak Ramchandra and Others, , laid down certain basic tests to be applied in order to determine the nature of instrument; whether it is will or a deed of gift. In paragraph 3 of the said decision it is observed:--

"The question whether a certain document is a gift or a will depends not merely upon the form of the document, but upon the intention gathered from the words used in the document itself. The usual tests are the name by which the document is styled, the registration of it, the reservation of the power of revocation and the use of the present or future tense. All these are indications to fine out the intention, taken singly or cumulatively. The mere reservation of a life estate does not necessarily indicate that the document is testamentary and that, therefore, the grant is revocable. Nor does the fact that the donor revoked it within a few months indicate that his intention was to make a will and not a gift. In construing a document the conduct of the parties subsequent to its execution should not be taken into consideration when there is no ambiguity in the words and expressions used in the document. In the present case the document is styled "a deed of gift" and was executed and registered as such. It conferred on the donee, Ramchandra a complete and immediate title to the property subject to the right of the donor Chintaman to enjoy it during his lifetime. No power of revocation was expressly reserved. The very fact that Chintaman preferred to execute a deed of gift rather than a will, which would have been easier and less

expensive, indicates that his intention was to debar himself from revoking it in case he were to change his mind in future. He did not want to postpone the ownership of Ramchandra till his death, though he wanted to provide for his own maintenance during his lifetime. Thus his obvious intention was to transfer to Ramchandra immediate ownership of the entire property subject to his own life estate. Thus the document clearly to use the words of Lord Moulton in(1913) 40 Ind App 161 (p. 167):

"Speaks from the date at which it was written, and not from a future date namely, the death of the writer."

3. In paragraph 5 of the said decision it has been observed as under:-

"If the ownership is intended to be forth with transferred, then the reservation of a life estate does not prevent the passing of the title immediately. Hence the ownership of the land vested in Ramchandra immediately on the execution of the deed, though he could get possession of it only on Chintaman's death, Having regard to all the circumstances I hold that the document was a deed of gift and not a will and that u/s 126, T. P. Act, it could not be revoked by Chintaman. It follows that the revocation of the gift by Chintaman in 1928 was ultra vires and ineffectual 1 in 1932 could not enure for her benefit after his death"

4. In Ramautar Singh Vs. Sm. Ramsundari Kur and Others, , it has been held by the High Court of Patna while considering the real nature of a document where on side was claiming it as a will and the another side was claiming as composite document as a deed of gift and will. The Court observed in paragraph 18 as under :-

"The word "will" is widely known and used and it has a well understood significance as meaning a deposition which is to take effect on the death of a person. "Will" has been defined in Section 2(h) of the Succession Act to mean the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. A will therefore, is dependent upon the testator's death for its vigour and effect. The principal test to be applied is whether the deposition takes effect during the life time of the executant of the deed, or, whether it takes effect after his demise. There is no objection to one part of an instrument operating in present as a deed and another in future as a will. u/s 62 of the Succession Act a will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will, A testamentary intention, therefore, is ambulatory till death and a will is in its nature a revocable instrument. The making of a will is but the inception of it, and it does not take any effect till the death of the devisor. The two characteristics of a will, therefore, are: (i) that it must be intended to come into effect after the death of the testator; and (ii) that it must be revocable."

5. The position that emerges, therefore, is, that a document which is mainly intended to be operative immediately and to be final and irrevocable is a non-

testamentary instrument (as held by Calcutta High Court in *Promode Kumar Roy Vs. Sephalika Dutta*, .

6. Applying the twin tests to the document Ex. 45, what we find is that the said document is engrossed on a stamp-paper of the erstwhile State of Baroda and it was registered with the Registrar of document, the suit property was given in gift to the plaintiff No. 3, but the said deceased Bai Andar reserved a right to reside in the said property till her lifetime. It was, therefore, further directed that the plaintiff No. 3 and his heirs or assignees were entitled to use and enjoy and to transfer the same by mortgage, sale, gift or otherwise after her death and at that time the other heirs of the executant would have no relation or concern with it. The plaintiff No. 3 further directed to mutate the suit property in the Municipals office after her death and the plaintiff No. 2 should pay the taxes thereafter. On these conditions the suit property was given in gift to the plaintiff No. 3 and in spit of this document, if any heir or person claiming interest caused any obstruction or raise any objection, the executant would at her cost and expense remove the said objection or obstruction. It was further directed that the documents constituting title in respect of the said property were to be collected by the plaintiff No. 3 after the death of Bai Andar. On considering the above gist of the document, it is very clear that the deceased Bai Andar intended to convey and confer the title on plaintiff No. 3 immediately subject to her right of residence for the lifetime. It was, therefore, nothing more than reservation of life interest in the property. The mere fact of reservation of life interest in property would not convert a deed of gift into a testamentary instrument. The other test. Viz, there is any right of reservation, impliedly or expressly, for revocation of an instrument, I have been able to find none and Mr. Shah has not been able to point out any relevant provision in the document, Ex. 45, from which it could be suggested, remotely, that there was an intention to reserve the right of revocation. It was, however, contended by Mr. Shah that if it is held that this is a sill, then right of revocation is implicit in it. I am of the opinion that the last contention does not reserve any consideration because in order to determine that the instrument is a testamentary instrument, the various tests as suggested by the High Court of Bombay. *Khushalchand Bhagchand Vs. Trimbak Ramchandra and Others*, , should be satisfied and the two main tests were, whether the arrangement was to be effective in praesenti and whether there is any right of revocation express or implied. On both these tests Mr. Shah has not been able to satisfy me that the document. Ex. 45, was in nature of a will I am therefore, of opinion that both the learned Judges were right in holding that the document, Ex. 45, was not a will but a deed of gift.

7. The second contention of Mr. Shah that even if it is assumed that Ex. 45 is a deed of gift, it was not validly and legally attested also should be rejected. In the first place, in the written statement the defendants have not raised this plea of want of proper and legal attestation of the document in question. No issue has been raised by the trial Court, secondly no material has been brought out in cross-examination of the attesting witness which would show that the attestation

was not legal and proper, I have been taken through the evidence of attesting witness and I have not been able to find any material from which it could be said that the attestation by the witnesses was not made as required by Section 3 of the Transfer of Property Act. On the contrary the evidence of the attesting witness Chandulal Bapalal, Ex. 41, shows that the persons signing on behalf of the executant as well as the other attesting witness, viz. Chimanlal Shyamlal, had put their signatures in his presence. The other attesting witness Chimanlal Shyamlal has died and therefore, it was not possible for the plaintiffs to examine him. In the cross-examination nothing has been brought out which would show that the attestation was not according to the law. Both the Courts below have also found that the document was attested and executed. The learned trial Judge has further found from the evidence that the defendant No. 1 has admitted in his cross-examination that he knew that Bai Andar had made a will in favour of plaintiff No. 3 and, therefore, apart from the question; whether the nature of document was a gift or a will, it was found by the Court that the deceased Bai Andar had executed the document. According to Section 68 of the Evidence Act the necessity of examining an attesting witness would arise only when a document which is required by law to be attested is sought to be used in evidence and the execution thereof is questioned. Here, it has been found by the learned trial Judge that the defendant No. 3 and had admitted that such a document was in fact executed in favour of plaintiff No. 3. In that view of the matter, therefore, the second contention of Mr. Shah should fail.

8. The result is, that this appeal fails and should be dismissed with costs.

9. Appeal dismissed.