
(1921) 07 BOM CK 0015

In the Bombay High Court

Case No : Second Appeal No. 794 of 1920

Basappa Dodfakirapa Hebbaliyavar

APPELLANT

Vs

Fakirappa Shenkrappa Hebbaliyavar

RESPONDENT

Date of Decision : 05-07-1921

Acts Referred:

Transfer of Property Act, 1882 — Section 53

Citation : (1921) 23 BOMLR 1040

Hon'ble Judges : Shah, J; Norman Macleod, J

Bench : Division Bench

Judgement

Norman Macleod, Kt., C.J.—The plaintiff sued to recover possession of the land and house specified in the plaint. He alleged that he had two brothers Ghatigeppa and Basappa who were divided in interest; that Ghatigeppa died leaving behind him defendant No. 1, his grandson, and defendants Nos. 2 and 3 his sons; that Basappa had a wife Mallava and a son Dodyella; that the father predeceased his son, and that subsequently the son Dodyella also died without any heirs except his own mother who also died about three months before suit after enjoying the plaint property. The plaintiff further alleged that he was the sole heir after Mallava's death and that the defendants had been, without any right, holding the property. The defendants pleaded that Mallava and plaintiff had passed the plaint property by gift, on the 14th February 1917, by executing a duly registered instrument, in favour of the first defendant. The plaintiff in his reply denied having passed a deed of gift along with Mallava and contended that Mallava was incompetent to give away the property, and to alienate the same to a person who was not the next reversioner, and that the deed referred to by the defendants in their written statement was executed in the circumstances set forth at para 2 of Exh. 16, under misrepresentation without knowing its contents.

2. The learned trial Judge found that the gift passed by the plaintiff and Mallava in defendant No. 18 favour was not passed without the plaintiff's understanding the contents thereof; that it was binding on the plaintiff; that the gift was valid

under Hindu law; and accordingly rejected the plaintiff's claim. The learned Judge said :

Thus being a consenting party to the deed, plaintiff is not at all justified and Competent fro revoke or resume the gift capriciously as he now attempts to do. Plaintiff cannot be allowed to take advantage of his own wrong or mistake as he says, and it any consideration for the transfer of interest were really needed to complete the essentials of Section 43 of the Transfer of Property Act, it is the natural affection which is also referred to in the deed, Exhibit 61. Plaintiff is thus estopped from contesting the validity of the gift and from contending that the deed is not binding upon him and he is incompetent to repudiate the gift and resume the property.

3. In appeal the learned Assistant Judge, relying on the decision in Bai Parvati v. Dayabhai (1919) 22 Bom. L.R. 704 reversed the lower Court's decree and awarded the plaintiff's claim. Now, the case of Bai Parvati v. Dayahhai was a case in which the widow together with one of her daughters passed a joint deed of gift of the suit property in favour of the children of a deceased daughter's sons The case was argued on the footing that the deed of gift conveyed the entire property to the done. But the appellant's counsel contended that as the persons who executed the deed of gift were not entitled between them to the whole estate, Bai Parvati having only a contingent interest in it which she could not convey, the deed was valid only with regard to the life-estate of the widow. Respondent's counsel did not contend that it was a case in which an alienation was made by a widow with the consent of the next reversioner, but maintained that the widow and the next reversioner wore competent to convey an absolute estate. With the case presented to the Court in that way, the Court came to the conclusion that there could not be a transfer of a contingent interest, and that the plaintiff was not stopped from raising the question of law that the Transfer of Property Act did not permit of the conveyance or transfer of a spes successionis. The question whether the next reversioner was estopped from contesting the validity of the gift by the widow owing to has having consented to it was not argued.

4. The cases, which we have now been referred to, decided by the Privy Council, viz., Rangasami Gounden v. Nachiappa Gounden (1918) L.R. 46 IndAp : 21 BOM.L.R. 640 and Bajrangi Singh v. Manokarnika Balchsh Singh (1907) L.R. 35 IndAp I; 9 Bom. L.R. 1348 were not cited in the court of the argument. In the first case heir Lordships laid down that the widow can surrender her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation, but the surrender must be bona fide and not a device to divide the estate with the reversioner. In those circumstances the question of necessity does not arise. Nor could it arise in the case of a gift by a widow to an outsider. Secondly, when an alienation of the whole or part of the estate is to be supported on the ground of necessity, then if such necessity is not proved aliunde and the alienee does not prove inquiry on his part and honest

belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to dispute the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one.

5. In *Bajrangi Singh v. Monokarnika Baksh Singh* this decision was discussed and explained, and it would appear that their Lordships would have approved of the proposition that if all the reversioners in being consent to an alienation by the widow, they will be bound by their own consent, and the post-nati will be held to claim through those that are bound. Their Lordships also pointed out that if the deed of transfer by the widow and the next reversioner be looked upon as a transfer of their respective interests, then it would not transfer the whole estate.

6. If, therefore, the case is treated as an alienation by the widow with the consent of the next reversioner, then that dictum of their Lordships of the Privy Council would apply, and the plaintiff in this case would be bound by the consent which was implied by his being a party to the deed of gift in favour of Basappa. It seems to me, therefore, that the decision of the trial Court in the facts of the case was right. The appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

Shah, J.

7. I agree. The question of law in this second appeal is whether a gift made by a Hindu widow in favour of her deceased husband's brother's grandson with the consent of the next reversioner, who in this case was a brother of her deceased husband, is valid. I state the question in this form, though in the present case the next reversioner Fakirappa really joined in the deed of gift in conveying the property to his brother's grandson. No doubt his interest in the property then was contingent and he could not convey such interest to his brother's grandson. But the fact of his having joined the widow in making this gift in favour of the donee necessarily implies his consent to the act of the widow in making the gift. Therefore it must be treated, in spite of the argument to the contrary urged by Mr. Jathar, as a case of an alienation by way of gift by a Hindu widow with the consent of the next reversioner. It is the very reversioner who now seeks to establish that the gift is not valid; and the question is whether he is bound by the consent which he undoubtedly gave during the life-time of the widow to the gift in question.

8. The property given by way of gift is not shown to be the whole of the widow's estate, and there is no scope for the application of the doctrine of acceleration by surrender of the estate on the part of the widow.

9. It is not necessary to examine all the cases which have been referred to in the course of the argument. But referring to the case of *Rangasami Gounden v. Nachiappa Gounden* (1918) L.R. 16 IndAp 72; 21 Bom. L.R. 640 where the earlier decision of the Privy Council in *Bajrangi Singh v. Manokarnika Bakhsh Singh* (1907) L.R. 35 IndAp I; 9 Bom. L.R. 1348 has been fully considered it

seems that as regards the plea of estoppel their Lordships of the Privy Council distinguished Bajrangi Singh's case on the ground that in that case all the reversioners in being had consented to the alienations, and that they were bound by their own consent, and that the post-nati were held to claim through those that were bound.

10. In the present case the consenting reversioner himself contests the alienation. It is quite true that in the present case the" alienation purports to be a gift. It is pointed out by their Lordships in the earlier part of the judgment in Rangasami's case that being a deed of gift, it cannot possibly be held to be evidence of alienation for value for purposes of legal necessity. In *Pilu v. Babaji* I.L.R (1900) Bom. 165; 11 Bom. L.R. 1291 it has been stated that ordinarily the consent of the next reversioners would not be sufficient to validate a gift by a Hindu widow, as in the case of a deed of gift there can be no necessity. But in that particular case the question as to whether the consenting reversioner to the gift could question the validity of that gift after the death of the widow did not arise; and in the case of *Abhesang Tirabhai Vs. Raisang Fatesang*, . Mr. Justice Batchelor, who was one of the Judges who decided *Pilu v. Babaji*, has distinctly emphasized the consideration that the observations made in that case must be read with reference to the facts of that case.

11. In *Bai Parvati v. Dayabhai* (1919) 22 Bom. L.R. 704 no doubt the reversioner contesting the validity of the alienation had consented to the alienation, The consenting reversioner in that case was a female. I do not think, however, that, that circumstance can afford any basis for distinguishing the case, so far as the point under consideration is concerned. But, as pointed out by the learned Chief Justice, the case was really decided not on a consideration of the plea of estoppel based on consent, but on the ground whether it was competent to the next reversioner in that case to convey her contingent interest during the life-time of the widow. It is clear that so far there could be no question that the reversioner could not convey such interest. But apparently the point that we have to decide was not considered, though no doubt the case affords an instance in which the con-senting reversioner was held to be not bound by the alienation Beyond this case not a single decision, in which the alienation without any legal necessity to which the next reversioner has consented has been held not to be binding upon that reversioner after the death of the widow, has been cited to us. Having regard to the observations as to Bajrangi Singh's case in *Rangasami Oounden v. Nachiappa Oonnden* at p. 86 of the report, it seems to me that it is open to this Court to hold that the consenting reversioner is estopped from contesting the validity of the gift by the: widow to which he has consented.

12. So far as the consenting reveraioner is concerned, I see no substantial difference between a gift and an alienation by way of sale when the legal necessity is negatived on the evidence apart from the consent. In *Vinayak v. Govind* (1990) 25 Bom. 129; 2 Bom. L.R. 820 though the plea of legal necessity was negatived the alienation of two plots by the widow was upheld on the ground

of Venkatesh's consent. In both the judgments delivered in that case, it has been pointed out that if Venkatesh had survived the widow, he would undoubtedly have been bound by his own consent: and on the facts of that case the Court held that Venkatesh's consent was sufficient to validate the sale as against the reversioner who was Venkatesh's son.

13. Apart from the decisions, it seems to me that where, as in the present case, we have a gift by a Hindu widow in favour of the grandson of her deceased husband's brother for whom she would naturally have affection, and where that gift is consented to by the next reversioner, there is no reason why at least the consenting reversioner should not be held bound by his consent, and why he should not be estopped from questioning the validity of such a gift. Both on general considerations, as also on the decided cases, it seems to me that in spite of the general paucity of reported cases where a gift by a Hindu widow consented to by the next reversioner has been called in question by that very reversioner, I think that the gift ought to be upheld as against the particular reversioner who has consented to the gift by the widow during her life-time.