
(1936) 06 BOM CK 0002
In the Bombay High Court
Case No : First Appeal No. 23 of 1930

Gundayya Hanmant Naik

APPELLANT

Vs

Shriniwas Narayan Naik

RESPONDENT

Date of Decision : 17-06-1936

Acts Referred:

Citation : AIR 1937 Bom 51 : (1936) 38 BOMLR 1095 : 166 Ind. Cas. 883

Hon'ble Judges : S.S. Rangnekar, Acting C.J.; Tyabji, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Rangnekar, Ag. C.J.

1. [His Lordship, after dealing with the construction of the deed, exhibit 70, called swalantra mukhtyarnama, proceeded as follows :-]

This brings me to the second contention of the appellant. It is argued that exhibit 70 was merely a deed of gift, and as the family was joint, the gift is bad. A short answer to that contention is that it was not a mere gift. The deed read as a whole shows that there was a proposal made by the plaintiff which was accepted by Durgaya, in other words, the deed was the result of an agreement between the parties, and there was consideration for it. By the arrangement or agreement one party agreed to undertake certain liabilities and in consideration of it the other party transferred his interest in the joint property to him. No authority is cited to show that such an agreement is not allowed by Hindu law. It is well-settled in this Presidency that a coparcener can sell, mortgage or otherwise alienate his interest in the coparcenary property for value. It is said that the plaintiff was to carry out the liabilities out of the property given to him. This strictly is not correct. It does not apply to the payment of the; debts of Durgaya if our reading of the deed is correct. Then there are some other liabilities which the plaintiff was to discharge at his expense. This is clear from the very last clause beginning with "You should not only perform at your own expense..." at

pp. 79 and 80, read as a whole. Apart from this, however, the fact remains that the plaintiff had undertaken to carry out several duties and this undertaking itself would be sufficient to support the agreement.

2. But assuming that this was not a transfer for value, what is the position ? I shall first summarize the appellant's contentions. He says that there was no severance in the four branches until three years prior to the partition-deed, and therefore in 1920 when exhibit 70 came to be made the family was joint, and that being so, the gift is bad. Alternately the appellant contends that in any event the plaintiff and Durgaya were as between them joint at: the date of exhibit 70, and so the gift is bad.

3. First as to the question of fact. It is true that the partition-deed on the face of it shows that the members of this family had severed in interest some-three years prior to it. The "learned Judge on a careful consideration of the evidence has held that no particular importance be attached to the mention of the period of three years in the deed, and I agree with him, and for this reason that this particular period of three years finds a place even in the earlier document of 1920, so that the mention of the period of three years, as the learned Judge has held, and rightly in our opinion, is merely approximate. The earlier document of 1920 shows that the members of the family-were living separately, moveable property was divided and the members of the family were dividing the income of the Immovable property among themselves. There is other evidence on the record to show that since 1916-1917 there were dissensions going on between the members of the family, and most of them were living separately and dealing with their share of the income separately. It is clear on the authorities that all that is necessary under Hindu law to effect a partition is an unequivocal declaration by a coparcener of his intention to separate and enjoy his share in severalty. In the present case the parties have gone much beyond a mere declaration. We agree, therefore, with the lower Court in holding that the family had severed in interest before 1920 but that the plaintiff and Durgaya as between them continued joint. Therefore the only question is whether it was open to Durgaya to make a gift of his share in the joint property belonging to him and the plaintiff to the latter, and which the latter accepted. The evidence shows that upon execution of exhibit 70 the deed was handed over to the plaintiff and accepted by him. It remained with him until he gave it to Durgaya on certain representations to which it is unnecessary to refer.

4. Speaking for myself I see no principle of Hindu law which could be invoked to invalidate such a gift. So far back as in *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (1872) 9 Beng. L.R. 377, the Privy Council clearly indicated the principle underlying the law of gift under Hindu law. Their Lordships say (p. 396) :-

The law of gifts during life is of the simplest character. As to ancestral estate, it is said to be improper that it should be aliened by the holder without the concurrence of those who are interested in the succession;.. ..

The disability on the part of a coparcener to gift away his undivided interest depends upon the principle that it is subversive of the right of partition which is inherent in a coparcener, and, secondly, it is not possible for a coparcener until partition to say that he is entitled to any particular share.]n my opinion the true principle is that a coparcener cannot do any act which is to the prejudice of his other coparceners, or which infringes their rights over the common property, except with their consent, express or implied. In our Presidency, however, the law has much mitigated the rigour of this strict principle of Hindu law. I am, therefore, unable to see why if two coparceners between themselves are entitled to the whole property, it is not open to one of them with mutual concurrence to gift his share in the undivided property to the other. This view derives support from the observations of the Privy Council in *Lakshmi Chand v. Anandi* (1926) L.R. 53 I. A. 123 : 28 Bom. L.R. 910 to which the learned Judge has referred.

6. One other answer made by the respondent has been accepted by the learned Judge of the Court below. It is that the deed exhibit 70 evidences a family arrangement and as such it is valid in law. The recitals support the view and we agree with it, in the result the appeal will be dismissed with costs.

Tyabji, J.

7. I agree. The transfer in question was for consideration, made by Durgaya in favour of his nephew the plaintiff. Among other things it was agreed between them that the nephew should succeed to the property on Durgaya's death, and that Durgaya himself should not deal with the property in favour of any other person. Subsequently in contravention of this agreement Durgaya purported to transfer the property to defendant No. 1, a distant relative. It seems to me that he was not authorised to do so; and the second transfer must give way to the earlier transaction which was fo consideration having already been received to a great extent by the transferor. For this and other reasons given in the judgment just delivered I think the appeal must be dismissed with costs.