
(1939) 08 BOM CK 0005
In the Bombay High Court
Case No : First Appeal No. 200 of 1937

Harilal Nathalal Talati

APPELLANT

Vs

Bhailal Pranalal Shah

RESPONDENT

Date of Decision : 15-08-1939

Acts Referred:

Registration Act, 1908 — Section 17(1)(b), 17(2)(v)
Transfer of Property Act, 1882 — Section 6(dd)

Citation : AIR 1940 Bom 148 : (1940) 42 BOMLR 165

Hon'ble Judges : Indarnarayan, J;Broomfield, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Indarnarayan, J.—This is an appeal from the decision of the First Class Subordinate Judge at Nadiad dismissing the plaintiff's suit in which the plaintiff prayed (a) for a declaration that he is entitled to a half share in the joint family property which would come to the share of the defendant after the date of the award, (b) for a permanent injunction restraining the defendant from disposing of any property of his share either by sale, mortgage, gift, will, or otherwise, (c) for an order directing the defendant to pay to him Rs. 40 per year in future out of the sum of Rs. 900 which the defendant has been getting every year by virtue of the award, and (d) for recovery from the defendant of Rs. 80 for a period of two years from January 24, 1931, to January 24, 1933.

2. The facts giving rise to this case are that one Pranalal, who had inherited property from his father Premchand, died leaving three sons : Bhailal the defendant in this case a son by his first wife, the other two being Natvarlal and Sumantlal a minor aged two years at the date of his father's death on January 18, 1929. After the death of Pranalal the property was being managed by Kamala his widow, the present defendant's step-mother, and his maternal uncle Maneklal Chhotalal. After some time the defendant appears to have written a letter to his uncle asking him to cease managing the property and to give him his

share. As this, it is, alleged, met with no response, legal proceedings were threatened. The plaintiff in this case persuaded the defendant to enter into an agreement on October 5, 1930, which is exhibit 2/1 wherein the defendant recites :

Whereas I have no money or means to bring) a suit with regard to the said property I pass this karar to you. (1) That I pass this agreement to give you eight annas share from my share in return for bringing a suit with regard to the moveable and Immovable property of my said father and my ancestors and for all the trouble you may undergo and for all the expenses you may incur in filing and conducting the suit. (2) You have to incur all the expenses for fighting out the suit and I have to give you a share stated above out of the property which I might get either by a private settlement or by the decision¹ of the Court. (3) Even if I have not to file a suit or if I go over to and ally myself with them from to-day or if there is a private settlement or if there is no partition at all I shall give you according to the terms of this karar from the share that I might receive from the moveable and Immovable property of my father and ancestors... I bind myself to pass a pacca karar on a stamp paper about this matter. This karar shall be considered to take effect from to-day. Dated October 5, 1930. If I ally myself with any one else or in Court all my contentions shall be null and void.

3. In pursuance of the agreement herein to pass a pacca kararnama the defendant executed exhibit 31/1 on a stamp paper on November 3, 1930. The contents of the second agreement are more or less on the same lines as the first kaccha karar, the effect being that the defendant promised to give a half share to the plaintiff from such property as he might get whether by a suit, by private settlement or in any other manner from his step-mother and brothers.

4. On October 13, 1930, i.e. only eight days later, a reference paper was signed by all the parties referring all disputes to the sole arbitration of Mr. M. M. Bhatt a retired Judge who heard the case at Thasra on December 21, 1930, and published his award on January 20, 1931. This award was subsequently filed in Court and a decree was passed thereon on January 24, 1931. The arbitrator has been examined in this case and has stated in his evidence that he does not know the plaintiff at all and that it was defendant's uncle Maneklal and defendant who came to ask him to take up the arbitration. The evidence thus shows that the arbitration was not brought about by the plaintiff. In his award, which is exhibit 10, the defendant is referred to as " a good man ", but " he is a man of vacillating mind and soft heart. His health also is not such as it should be. He has neither received sufficient education. So he does not understand either the extent of his estate or how to take care of it," The award decided that the family property should remain joint and undivided under any circumstances for at least fifteen years from the date of the award and the arbitrator further stated therein " As it is not proposed to make a partition to-day, I do not determine the parties' respective shares. After the abovementioned period (fifteen years) is over, if the parties desire, the property may be divided according to law." Certain restrictions

were also placed on Bhailal's (defendant's) share in the property in case he had a son living at the time. The defendant Bhailal was, however, directed to be given Rs. 900 per annum (Rs. 75 per month) for his ordinary expenses which amount was, however, debitable to his account to be adjusted at the time of distribution after calculating upon it interest at annas four per cent. per month.

5. The plaint in this case alleges that this arbitration was brought about by the efforts of the plaintiff in this case in pursuance of the karars executed by the defendant in his favour and that his cause of action arose on January 24, 1931, as the judgment on, the award decree was delivered on that day. The plaintiff claims a money decree for Rs. 80 at Rs. 40 per year for the past two years out of the Rs. 450 to which he would have been entitled strictly under the terms of his karar. He seeks a declaration that it should be declared that he is entitled to a half share in the property which the defendant might get as a result of the arbitration award and that the plaintiff should get Rs. 40 a year from the allowance of Rs. 75 a month which the defendant would get as a result of that award.

6. The agreement on which the plaintiff's suit is based shows per se that it was an unconscionable and extortionate bargain. The family property is, it is mentioned, of the value of five to six lakhs of rupees. The plaintiff in his plaint assesses the amount of the claim at Rs. 30,000 for purposes of jurisdiction. In the written statement it is pointed out that this is an undervaluation, that the amount would be at least Rs. 62,000. The defendant in his written statement further denies executing these two documents and alleges that blank signed papers were taken from him by "deceit and undue influence by the plaintiff and these two documents seem to have been subsequently made up on those papers. It is further denied that there was any denial of the defendant's rights in the joint family property by his stepmother or his uncle and it is further pleaded that the plaintiff taking advantage of the weak condition of the defendant's mind and with a view to snatch away portion of the joint family property by making the family members quarrel instigated the plaintiff to ask for partition. It is further denied that the plaintiff took any part in getting the arbitrator appointed or in having the award decree passed or that he had incurred any expenses for this purpose. It is further pleaded that the agreements are invalid by reason of being champertous and against public policy.

7. The learned trial Judge raised a number of issues and tried the case on the preliminary points of law holding that the second karar in pursuance of the agreement to pass a stamped karar as mentioned in the document of October 5 required registration compulsorily and that hence it was inadmissible in evidence u/s 49 of the Indian Registration Act by reason of the want of registration as the 1st karar created a right in favour of the plaintiff in Immovable property. He further held that the agreement was not entered into with the bona fide object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but it was obtained for improper objects and was contrary to public

policy. He held that the suit was not barred u/s 42 of the Specific Relief Act but that the plaintiff had no cause of action, as the plaintiff had not given any date on which the performance was refused by the defendant. He further held that the claim as to Rs. 40 per year related to the allowance of Rs. 75 a month which was by way of maintenance and that such a right could not be transferred u/s 6 (dd) of the Transfer of Property Act (a view with which we do not agree) and hence assuming that under the karar such a right is transferred the transfer is invalid under that Section . The suit was therefore ordered to be dismissed with costs and hence this appeal.

8. It was held in *Indar Singh v. Munshi* ILR (1919) Lah. 124 that an agreement to transfer rights in property which could only come into existence after the death of a person was not compulsorily registrable under the Indian Registration Act. It was also held that the English law of champerty is not in force in India and that fair agreements to share property in litigation with others in consideration of their supplying the] funds for carrying on suits are not opposed to public policy and that such agreements should receive effect except when extortionate or inequitable.

9. In *Valluri Ramanamma Vs. Marina Viranna*, , decided by the Privy Council, it is laid down that in India agreements to finance litigation in consideration of having a share of the property if recovered are not per se opposed to public policy. They may be so if the object of the agreement is an improper one, such as abetting or encouraging unrighteous suits, or gambling in litigation ; or if their enforcement against a party may be contrary to the principles of equity and good conscience, as unconscionable and extortionate bargains.

10. As instances of what have been considered as unconscionable bargains of a similar nature may be mentioned first the case of *Chunni Kuar v. Rup Singh* ILR (1888) 11 All. 57, where a dictum similar to the one just cited from *Ramanamma v. Viramna* is mentioned. The facts of that case were that for the purposes of meeting the expenses of an appeal to the High Court, the appellant, on the advice of his legal advisers, executed a bond for Rs. 25,000 in consideration of the obligee agreeing to defray such expenses. The obligor agreed to pay the Rs. 25,000 within one year from his recovering possession of the property in suit; and, at the request of the obligor's pleader, the obligee advanced Rs. 3,700, which was applied to the expenses of the appeal. The High Court dismissed the appeal; and in a deed executed by the obligor in favour of the obligee and others for the purpose of defraying the expenses of a further appeal to the Privy Council, he admitted his liability under the former bond. The Privy Council decreed his appeal, and he obtained possession of the property in suit, but declined to pay the Rs. 25,000, upon which the obligee sued upon the bond. It was found that, apart from the moneys borrowed by the obligor from time to time, he was without even the means of subsistence ; that he executed the bond with his eyes open and perfectly understood his position and the effect of both the instruments executed by him ; that no fraud or improper pressure appeared

to have been applied to him; that his legal advisers had acted honestly and to the best of their ability in his interests ; that there was nothing to show that, having regard to the risks of the litigation, he could have obtained the assistance necessary for the prosecution of his appeal on better terms than those contained in the bond ; that without such assistance he could not have appealed to the High Court ; and that the obligee gave him such assistance upon his application. It was held that although there was nothing to show that the obligor could have obtained an advance on terms more advantageous to himself, it was for the obligee to establish to the Court's satisfaction, without reasonable doubt, that he could not have done so ; and that, this not having been established, and the reasonableness and fairness of the bargain not being proved by showing that there had been difficulties in negotiating it, or that others had refused it as not sufficiently advantageous to them, the Court should hold the bargain to be a hard and unconscionable one, which should not be enforced. It was further held that the bond was a gambling in litigation and it would be contrary to public policy to enforce it. The Court, however, allowed the plaintiff a decree for Rs. 3,7100 actually advanced with simple interest at twenty per cent.

11. In the same volume is reported a case of Lake Indar Singh v. Rup Singh ILR (1888) All. 118, where, for the purpose of meeting the expenses of an appeal to the Privy Council from concurrent decrees of the Subordinate Judge and the High Court, the plaintiffs-appellants executed a deed of sale of certain property worth over Rs. 50,000 in consideration of the vendees providing the necessary security and moneys. The plaintiffs experienced considerable difficulty in procuring the means to appeal and without any fraud or deception on the part of the vendees an agreement was arrived at. Under the deed the plaintiffs were liable to furnish security to the extent of Rs. 4,000 and to advance Rs. 8,500 for other necessary expenses, and they did in fact furnish such security, and advanced sums aggregating Rs. 7,542. The appeal was successful. The appellants having failed to put the vendees in possession of the property conveyed by the deed, and recovered by them under the Privy Council's decree, the vendees sued them for possession of the property and mesne profits. It was held that although the case was different from cases in which persons interfered for their own benefit in litigation not their own the contract could not be enforced in its terms.

12. In the case of Husam Bakhsh v. Rahmat Husain ILR (1888) All. 128 the facts were : For the purpose of meeting the expenses of a suit for possession of Immovable property, the plaintiff, who was in straitened circumstances, agreed with the defendant that the latter, in consideration of paying such expenses from the Court of first instance up to the High Court, should have half the property and half the mesne profits, with all his costs, in the event of success. The suit was brought and was conducted by the plaintiff and the defendant jointly, and was decreed by the High Court on appeal, and the defendant obtained possession of half the property. The plaintiff sued to recover possession of the half, on the ground that the agreement was illegal and void. It appeared that the amount actually spent by the defendant in the former litigation was Rs. 368, and

that, if that suit had failed, he would have lost about Rs. 600. It was found that the value of the half share of the property was about Rs. 1,000. It was held that the agreement was unfair, unreasonable, extortionate and contrary to public policy, within the meaning of Section 23 of the Indian Contract Act, and that the plaintiff was entitled to recover possession of the land in suit on payment of compensation for the advances made by the defendants in the former litigation, with interest at twelve per cent, per annum.

13. The above quoted cases amply show that even where fairly substantial sums were spent by the party getting agreements of a similar character in his favour, yet considering the disproportionate character of the property which it was intended to recover under the agreement, such agreements were held to be against public policy. In the present case the plaintiff has annexed a statement to his plaint showing the amount of money spent by him. This has not been proved as no evidence was taken. But taking it at its face value it shows that Rs. 301-4-0 are debited by the plaintiff in his account books to himself for moneys taken by him for going to Ahmedabad which visit he alleges was for the purposes of this family dispute. There are other minor items, two of them being for the stamp charges and for the expenses incurred in the attempt to register the pacca kararnama of November 3, 1930. The very next day after the kararnama was passed the plaintiff appears to have lodged it for registration with the Sub-Registrar who refused to register it evidently on the ground that the defendant was of weak mind. I mention this point only because I think it shows that the plaintiff at one stage having an uneasy conscience wanted to make his position as strong as he could by having this document registered. It is now sought to be argued on his behalf that the learned trial Judge was wrong in his conclusion that this document required compulsory registration. We are of opinion that the karar does not contain any language which could be said to create any present or future transfer of interest in Immovable property. Even if the agreement had to be put through eventually other writings would have been necessitated for the purpose of transferring ownership to plaintiffs in the properties sought to be transferred to him in pursuance of this agreement and we are hence of opinion that the document does not require compulsory registration [see. Section 17(2) (v) of the Indian Registration Act]. The case of 24 CWN 177 (Privy Council) was a case which involved no transfer of property (there the agreement being only one to grant a lease) and hence no-question u/s 54 of the Transfer of Property Act could have arisen there. The remarks in that case are therefore more in the nature of obiter dicta. Even if the contrary view were held to prevail, the recent amendment of Section 49 of the Indian Registration Act which added a proviso to that Section in 1929 would enable agreements of this character to be received in evidence in a suit for specific performance.

14. We are of opinion that this is substantially a suit for specific performance as is evidenced by the fact that such portion of it as could be specifically performed at the date of the suit, viz. payment of a half share in the allowance of Rs. 75 a month, is claimed by way of specific relief.

15. As there was a demand by the plaintiff and a denial of his right by the defendant we are of opinion that there was a cause of action for which the plaintiff could have filed a suit and we do not agree with the conclusions of the learned trial Judge on this point. This is, however, not of much importance in the view of the case that we take on the main issue as we find that this agreement is an extortionate and unconscionable one and opposed to public policy. The appeal will therefore be dismissed with costs.

Broomfield, J.—I agree. On a reasonable construction of these two agreements it does not appear that they create or declare any right or interest in Immovable property, either in the present or the future. If they did, a suit to recover possession of the Immovable property could be founded upon them, supposing it were in the defendant's possession. But the learned advocate for the appellant seems to be right in his contention that no such suit could be based on the agreements alone [see in that connection *Ranee Ranee Bhobosoonduree Dossee v. Jssur Chunder Dutt* (1872) 18 W.R. 140]. All that the appellant could do would be to sue to enforce the agreements. Transfer of the property could only be effected by a further instrument. The case therefore is covered not by Section 17(1) (b) but by Section 17(2) (v) of the Indian Registration Act.

2. The only authority which has been cited in support of the view taken by the trial Judge on this point is the obiter dictum of their Lordships, of the Privy Council in 24 CWN 177 (Privy Council) . That was a case of an agreement to grant a lease which was contained in a compromise decree. As decrees were at that time exempt from registration, the question whether the agreement would otherwise have required registration did not need to be decided. Their Lordships, however, expressed the view that the agreement purported to create a contingent right or interest in Immovable property and therefore would come within the scope of Section 17 (1) (b). No reference was made to Section 17(2) (v). No reference was made, naturally, to Section 54 of the Transfer of Property Act as that Section has no application to agreements to lease. But that Section, which expressly provides that a contract for the sale of Immovable property does not of itself create any interest in or charge on such property, is the main obstacle to holding that the agreements with which we are concerned required registration. Therefore this Privy Council case can hardly be regarded as any authority on the question of the necessity or otherwise of registration in the present case.

3. The trial Court is therefore wrong in holding that the agreements required registration, and in any case in view of the proviso to Section 49 there would be no objection to the receipt of the documents in evidence in what; is substantially a suit for specific performance of the agreement, so far as it is enforceable at present. The trial Court is also wrong in holding that the agreements are obnoxious to Section 6 (dd) of the Transfer of Property Act. The money which is being paid to the defendant is not maintenance but a reservation out of the income. That is clear if the terms of the award at pages 22 and 26 of the paper

book are read together. In this connection reference may be made to Raja of Ramnad v. Subramaniam Chettiar ILR (1928) Mad. 465.

4. However, the plaintiff's suit must fail all the same because the agreements can only be regarded as an extortionate and unconscionable bargain. The case is stronger than in Chunni Kuar v. Rup Singh ILR (1888) All. 57, where Rs. 25,000 was the consideration for an advance of Rs. 3,700, stronger than Lake Indar Singh v. Rup Singh ILR (1888) All. 118, where property worth Rs. 50,000 was the consideration for giving security for Rs. 4,000 and an advance of Rs. 7,500, much stronger than Husain Bakhsh v. Rahmat Husain ILR (1888) All. 128, where Rs. 368 were spent on litigation and Rs. 600 would have been spent if the suit had failed and the consideration for the agreement was property worth Rs. 1,000. In the present case the consideration for the agreement was property valued by plaintiff himself at Rs. 30,000 and it was provided that he was to get this property in any event whether a suit had to be filed or whether the disputes between the defendant and his relations were settled amicably. As it was, the disputes, if they really existed, were settled amicably and very simply and expeditiously by arbitration. It is argued that that might not " have been so and that if a suit had been necessary the expenses) would have been heavy. But the fact that in the event of this simple solution (which cannot have been unforeseen since there could be no difficult or complicated legal points involved in the defendant's claim to a share in his father's estate) the plaintiff was to have as much as one-half of that share renders the agreement altogether unconscionable.

5. There is a further circumstance which was not present in the Allahabad cases, viz. that the defendant was a young man who was pretty obviously incapable of looking after his own interests. No evidence has been recorded on the second issue in the case, viz. as to whether the agreement was brought about by coercion, duress, fraud or undue advantage as alleged. But we do know as a fact that the Sub-Registrar refused to register the agreement on the ground, as stated in his order, that the executant was of weak mind and an idiot.

6. In the three Allahabad cases although the agreements were set aside the Court ordered re-payment of the moneys which had been advanced. But in each of those cases a suit had to be brought and there had been substantial expenditure by one party by which the other party had benefited. There is no reason to suppose that that was so in the present case. The plaintiff has given no particulars of his expenditure in the plaint. He merely says that he had undergone a lot of trouble and spent a considerable sum of money. A statement of his expenditure was attached to the plaint, but this is a very unsatisfactory document. The total expenditure here shown only amounts to about Rs. 325 and this is mainly made up of an item of Rs. 300 " paid in cash as a loan to self for going to Ahmedabad ". In view of what happened it is difficult to see what occasion there can have been for any expenditure. The arbitrator Mr. M.M. Bhatt gave evidence on commission and he deposed that he did not know the plaintiff at all and had never seen him, which makes it pretty clear that he had nothing to

do with the arbitration proceedings. It is clear therefore not only that the agreements cannot be upheld but that the plaintiff is not entitled to any compensation.