
(1927) 12 BOM CK 0021
In the Bombay High Court
Case No : Second Appeal No. 390 of 1926

Hiralal Chimanlal

APPELLANT

Vs

Gavrishankar Ambashankar

RESPONDENT

Date of Decision : 08-12-1927

Acts Referred:

Transfer of Property Act, 1882 — Section 122, 123

Citation : AIR 1928 Bom 250 : (1928) 30 BOMLR 451

Hon'ble Judges : Patkar, J;Madgavkar, J

Bench : Division Bench

Judgement

Madgavkar, J.—The question in this appeal relates to the validity of the transfer of a house and twelve bighas of land of the deceased Ishvarlal Girdharlal, brother of the plaintiff-appellant, in favour of the defendant-respondent Gavrishankar. Both the lower Courts have upheld the respondent's title on the ground that as the deceased had transferred possession of the property prior to the document Exhibit 26, the latter did not require registration u/s 9 of the Transfer of Property Act, being made not as a deed of gift without consideration, but there being consideration in the shape of services rendered by the respondent to the deceased during his illness.

2. For the purposes of this second appeal, we accept the facts as found above by the lower Courts, The deceased was suffering from consumption. During his last illness he was attended upon by the respondent Brahmin and his family. He transferred possession of the house in May 1922 and of the lands early in August 1922. He passed the document, Exhibit 26, which he himself calls a deed of gift, on August 10, 1922, made a will, Exhibit 21, on October 20, 1922, and died on November 11. Under the will he leaves the property to his brother, the plaintiff-appellant, and orders :?

Brahmin Gavrisbankar Atnbaram of Tham has attended upon and served me very well. Therefore I direct my aforesaid brother Hiralal that he shall make a gift of twenty five bighas of land to the said Gavrishankar when he gets possession of

the property.

3. The trial in the lower Courts proceeded in the main on the question whether the transfer of title and of ownership was complete before and apart from the document, Exhibit 28, and whether the document did or did not require registration. It is argued for the appellant that the document, Exhibit 26, was a deed of gift u/s 122, and required registration u/s 123, of the Transfer of Property Act. For the respondents it is contended that it was not a transfer without consideration but the consideration consisted of the services rendered by the respondent to the deceased during his illness so as to be good consideration u/s 2, Clause (d), and validates the contract u/s 25 of the Indian Contract Act, and that in any case, under the principle laid down in the Full Bench case of *Bapu Apaji v. Kashinath Sadoba* I.L.R. (1916) Bom. 434, s. c. 19 Bom. L.R. 100 . the respondent, being a person in possession with an agreement, was entitled to resist the claim of the appellant.

4. The only oral evidence in the case was that of the respondent. Reading that evidence carefully, we find no allegation even by the respondent that at the time when he was attending on the deceased, there was any promise or agreement of payment, much less of payment by transfer of land. On the contrary, he admits in cross-examination: "My pay was not settled. There was no contract that he should give so much land to me. It was his pleasure to give or not to give land to me. I served him with a hope to get compensation." These admissions make it abundantly clear, in our opinion, that while there was hope on the part of the respondent, there was no promise, agreement or contract on the part of the deceased. If so, the case is clearly distinguishable from the case of *Sindha Shri Ganpatsingji v. Abraham alias Vajir* ILR (1895) Bom. 755, where Farran C.J., at page 757, observed : "...it was not intended by the parties that the plaintiff's services should be rendered gratuitously. They were intended to be recompensed ". The present case, in our opinion, falls rather within the scope of the reasoning of Chandavarkar J. in the case of *Madhavrao v. Kashibai* (1909) 12 Bom. L.R. 9. The deed, Exhibit 6, itself is styled at the head as a deed of gift (sic) and the word "gift" (sic) occurs in no less than five places. The single fact that actual transfer of possession had taken place eight days before the document does not make the gift complete in law, or the document the less a deed of gift. And in fact, it is clear both from the written statement and the evidence of the defendant-respondent that a registered deed was in contemplation but was not completed for reasons which can only be a matter of surmise, such as the death of the deceased or possibly the provision in the will. However that may be, we do not agree with the view of the lower Courts that the services during the illness were the consideration of the deed and not merely the motive as, in our opinion, they were. The deed, therefore, falls, not u/s 9 but u/s 122; and u/s 123 of the Transfer of Property Act a transfer of the property would not be complete without a registered document which Exhibit 26 is not.

5. As regards the defence of possession with an agreement, an agreement to will

is capable of specific performance. Therefore, the equitable doctrine of part-performance has application in cases such as the Full Bench case of Bapu Apaji v. Kashinath Sadoba ILR (1916) Bom. 438, s.c. 19 Bom. L.R. 100 This is an agreement to make a gift not capable of specific performance and the doctrine of part-performance has no application and cannot, therefore, help the respondent.

6. For these reasons, the appeals are allowed, the decrees of the lower Courts in both the suits are set aside, and the plaintiff-appellant's suit decreed with costs throughout against the defendant-respondent.