(1928) 03 PRI CK 0007

In the Privy Council

Case No : Privy Council Appeal No. 86 of 1926

Hitendra Singh and others APPELLANT

Vs

Maharajadhiraj Sir Rameshwar Singh Bahadur and another RESPONDENT

Date of Decision : 08-03-1928

Acts Referred:

Citation : (1928) AIR(PC) 112

Hon'ble Judges : Ameer Ali, Blanesburgh, Phillimore, JJ.

Advocate : Pugh and Co., Watkins and Hunter, B. Dube, W. H. Upjohn, G. D. McNair, G. R. Lowndes, for the Appearing Parties.

Judgement

Mr. Ameer Ali, J.

Their Lordships do not consider it necessary to call upon the respondents in this case, as the question for determination lies within a small compass and they have no doubt on the answer. The facts which have given rise to this litigation are fully stated in the judgments of the Courts in India; but a short resume is necessary to elucidate how the question has arisen in this case.

It appears that one Durga Dutt Singh, who owned 7? annas share of the village of Laheri which he held under a babuana grant in the district of Darbhanga found himself considerably involved in debt in 1876; and his property was threatened with sale in execution of decrees against him. In order to pay off the debt which amounted to over Rs. 41,000, he professed to transfer to his wife Anurgin Bahuasin the property in suit for a consideration of Rs. 41,000. The transaction between husband and wife is, in these proceedings, called a hiba-bil-ewaz, and the question for determination turns upon the construction of this document.

The debt for which the transfer was ostensibly executed was discharged with the money Durga Dutt Singh obtained under it. Their Lordships purposely use the word "ostensibly" in order to leave their decision until later in the course of the judgment.

On the 15th December 1890, Durga Dutt Singh and his wife, the Bahuasin, executed a deed of mortgage to the Maharaja of Darbhanga, now represented by the defendant, in order to satisfy certain decrees which were in execution against them; and as security for the principal and interest mentioned in the bond, they hypothecated the same share in taluka Laheri. This mortgage-deed was signed by plaintiff 2 on behalf of his mother Anurgin Bahuasin and was attested by plaintiffs 1 and 3.

On the 5th April 1897, the Maharaja of Darbhanga obtained a decree for the sale of the mortgage properties against both Durga Dutt Singh and his wife. In execution of the above decree the mortgage-properties were put up for sale on the 21st May 1902, and purchased by the decree-holder with the permission of the Court. The application for setting aside the sale was preferred by both Durga Dutt Singh and his wife, and various grounds were alleged. Whilst this application was pending in Court the Bahuasin died (on 1st February 1904), and the plaintiffs-appellants were substituted in her place.

The Subordinate Judge of Muzaffarpur, within whose jurisdiction the village in suit lay, on 20th June 1904, overruled the objections and confirmed the sale. His decision was affirmed on appeal by the High Court of Calcutta on 16th June 1906.

The present appellants had in the interval brought a suit on 23rd February 1906, against the defendant in the Court of the Subordinate Judge of Muzaffarpur, making Durga Dutt Singh, their father, a defendant in the suit. Various allegations were put forward in the plaint ; but no ground as is now made that the Bahuasin, the plaintiffs'' mother, had not a transferable estate under the deed of gift of 1876 was put forward. The appellants did not proceed with the case ; they applied to the Court for permission to withdraw it on certain grounds, to which their Lordships do not consider it necessary to refer. In spite of the objections of the defendant the Court allowed it to be withdrawn with liberty to bring a fresh suit. This order is dated 16th March 1907.

The plaintiffs took no action in respect of the property or the transaction under which it was purported to be transferred to the lady by Durga Dutt Singh, until 1918. The present suit was brought on the 24th July of that year in the Court of the Subordinate Judge of Darbhanga.

In their plaint they allege that their mother, the Bahuasin, was the owner of 7 annas and odd shares in taluka Laheri under the terms of the document of the 17th April 1876, executed by their father ; that the latter owed a sum of nearly two lakhs of rupees to the Maharaja of Dirbhanga, and that his wife was in no respect responsible for the debt, and that

Durga Dutt Singh, taking advantage of his position of authority and influence over his wife, mortgaged the property, and that

she was induced to become a party thereunder by a misrepresentation that the husband''s debts were binding on the wife.

The Subordinate Judge framed a number of issues relating to title of the plaintiffs, and without trying the facts he held on the legal objections of the defendants that the suit was not maintainable. He accordingly dismissed the action. The case came up on appeal to the High Court of Patna, and the learned Judges, being of opinion that it was necessary that the facts should be tried, set aside the order of the Subordinate Judge and remanded the case for a trial on its merits.

The Subordinate Judge then took evidence and gave judgment. He held that the transfer by the husband to the wife in 1876 was a bona fide and not a nominal or illusory transaction. He held further that Durga Datt Singh made over possession of the property to his wife in pursuance of the hiba-bil-ewaz.

One point arose in the argument before the Subordinate Judge in connexion with the transfer of 1876, which it is admitted had never been previously raised in any proceeding. It related, in fact, to the point which their Lordships have to decide now, namely, whether under the hiba-bil-ewaz, the mother of the plaintiff''s, took an absolute title which entitled her to alienate the property conveyed to her. It was contended by the plaintiffs in the course of the argument that she had no right to mortgage the property in 1890. This view has been accepted by Mr. Justice Das, one of the learned Judges before whom the appeal came for hearing after the remand. Mr. Justice Das held that as Durga Dutt was ''a'' Mithila Brahmin governed by the Mithila law, the gift that he made to his wife did not convey to her an absolute title giving her the power of alienation and that, therefore, the transaction was ineffective. Mr. Justice Poster has taken a different view. On account of this difference of opinion the case went before the Chief Justice, Sir Dawson Miller, who has agreed with Mr. Justice Poster, and has held that on a proper construction of the document of 1876 full rights were conveyed to the Bahuasin by Durga Dutt Singh, and she had an absolute title in the property. He agreed with Mr. Justice Poster and accordingly dismissed the suit.

The hiba-bil-ewaz of 17th April 1876 begins with describing Durga Dutt Singh as the absolute proprietor of seven annas eight gandas of the property. It then recites that there was a decree against Durga Dutt for Rs. 41,000 odd. It was under exception in the Court of the District Judge. The debtor further states in the hiba-bil-ewaz that he was unable to procure money for the payment of the decretal amount, and then the document proceeds as follows :

As a sale (of the property) will entail loss of the said two milkiat properties on sale, belonging to me, the executant, I, of my own free will and accord, have out of the said two mauzas on sale made a gift for consideration (hiba-bil-awaz of seven annas eight and threefourth gandas share, etc., together with fruit-bearing and non-fruit bearing trees, ahars, pokhars, reservoirs, tanks, pucca and kucha wells, sair, salt sairs, occupied and unoccupied houses of tenants, all zamindari rights, which I have in my possession up to this time, without participation of anyone, to my wife Mt. Anuragin Bahuasin on receiving from her Rs. 41,532 as. 6 p. 8 k. 16 m. 16 in cash and having paid therewith the decretal amount due to the said decree-holder got the properties released from sale and put the said

Musammat in possession of the gift properties. The said Musammat should have and hold possession of the gift properties and enjoy the produce thereof generation after generation, and I, the executant and my heirs and representatives neither have nor shall have any demand or dispute with respect to the gift properties or the consideration thereof as against the said Musammat, her heirs and representatives. Should I, the executant, my heirs and representatives make any claim or put forward any demand in respect of the gift properties or the consideration thereof the same shall be deemed null and void.

Their Lordships have no doubt that it was not a gift pure and simple. Upon the findings of fact arrived at by the Courts in India the transfer was for consideration. The consideration was not illusory ; it was substantial. Under the Mahommedan law a transfer by way of a hiba-bil-ewaz is treated as a sale and not as a gift. The limitation imposed by the Mithila law, which declares that gifts by husbands will only convey a life interest to the wife, applies exclusively to pure simple gifts, and not to a gift for consideration such as in the present case. It is unnecessary in this view to refer to the decisions cited on behalf of the appellants. It may be desirable, however, to draw attention to S. 8, T. P. Act (4 of 1882), which declares as follows :

Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferrer is then capable of passing in the property, and in the legal incidents thereof.

In Surajmani v. Rabi Nath Ojha 1908 30 All. 84 : 35 I.A. 17 : 5 A. I. J. 67 P.C.), the question turned on the word "malik" used in the transfer to the donee. This Board held that full rights of ownership were transferred to the donee in that case. Lord Buckmaster, in Ramachandra Rao v. Ramachandra Rao A.I.R. 1922 P.C. 80 : 45 Mad. 320 : 19 I.A. 129 (P.C.), broadly laid down the principle as follows :

Their Lordships do not, therefore, propose to embark upon the consideration of what the effect of the deed of gift in favour of Thulja Boyee might be correctly determined to be, but as some misapprehension appears to exist as to the effect of certain decisions of the Board, and notably Surajmani v. RabiNath Ojha 1908 30 All. 84 : 35 I.A. 17 : 5 A. I. J. 67 P.C.), their Lordships think it desirable to remove this doubt, lest error should creep into the administration of the law in India with regard to the rights of a Hindu widow. In the case referred to, when originally heard before the High Court, it had been stated that under the Hindu law in the case of a gift of immovable property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of this Board did not more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate, which the High Court had thought required to be added by express declaration.

In this view of the case it is unnecessary to discuss whether the suit was barred under the Statute of Limitation, or whether it was maintainable having regard to the fact that the cancellation of the documents was not asked for in the plaint. Assuming that the plaintiff''s are right in their contention, that the suit is not barred, nor are they precluded from claiming the property in suit, their Lordships are clearly of opinion that the terms of the transfer conveyed to the transferee full rights of ownership. As they understand the Mithila law a simple and pure gift by the husband to the wife does not convey to her absolute ownership. She takes it only for her life without any right of alienation unless power of alienation is expressly conferred on her. In this case it is clear that all the rights of ownership are actually conveyed to the wife. Their Lordships have no doubt either in principle or upon precedent that the Bahuasin took the property in full right of ownership.

That being their Lordships'' opinion the appeal fails and they will humbly recommend to His Majesty that the appeal should be dismissed with costs.