

(1912) 04 CAL CK 0041
In the Calcutta High Court

Kamini Dasee

APPELLANT

Vs

Krishna Chandra Mukerjee

RESPONDENT

Date of Decision : 23-04-1912

Acts Referred:

Transfer of Property Act, 1882 — Section 126

Citation : (1912) ILR (Cal) 933

Hon'ble Judges : Chandhuri, J

Bench : Single Bench

Judgement

Chandhuri, J.—This is a suit brought by a Hindu purdanashin lady to set aside a voluntary deed of gift in respect of 13 Mullanga Lane, which she had executed on the 15th July 1908 in favour of the defendant. The case made by her in the plaint is that the defendant "taking advantage of her age and infirmity and helpless condition, obtained from her this deed of gift which she executed without any independent advice, being fully dominated by the defendant and in violation of the trust and confidence reposed in him."

2. The defendant is the son of her husband's priest, and he has also been her priest since his father's death. The defendant accepted the position that the onus lay upon him to show the entire bond fides of the transaction, it being conceded by him that there was fiduciary relationship between himself and the plaintiff. The plaintiff's husband, Durga Charan Soor, died in June or July 1906. This property did not come to her through her husband, but it had been given to her by her father's sister from her own moneys, the property being purchased in the plaintiff's name. This house was, therefore, her stridhan property, and she held it in her own right. There is no question that she had a right of gift, if she chose to exercise it. Her husband had left him surviving some nephews, brother's sons who did not live in Calcutta, except one of them who stayed in the house of the plaintiff and another. Who used to come there from time to time. These persons were not her heirs. There has been a suggestion that the husband had desired the plaintiff to provide that after her death the property

should go to the nephews, but that the plaintiff had declined to make any such provision. She however says that she intended to make this property debutter, and her husband's nephews were to be shebait after her death and she was to be the "shebait or malik" during her life time.

3. At the time of her husband's death, her mother was alive. The mother lived with the plaintiff, and it is said that it was her wish that the plaintiff should make a gift of the house to the defendant. The defendant says that he had been told by the plaintiff that her mother had taken her to the Jagganath Temple at Puri and made her swear in the temple that, the property was to be made a gift of to the defendant. This story, however, the plaintiff denies. Her version is that he had on one occasion after the death of her husband, and also some little time before the execution of the deed, taken her to a room in her own house in Mullanga Lane where she used to keep a Lachmi Thakurani and made her swear that this property was to be given to the defendant. There is direct contradiction with regard to this matter, and it is difficult to decide which of the two versions, or if either of them, is true. It may however be inferred from what has been said by them that she considered it would be a meritorious or religious act to give the property to her priest. She had been so told by the witness Khettra Mohan Bhattacharjee, to whom I shall have to refer later.

4. The plaintiff's mother died on the 15th April 1908, shortly before the execution of the deed. That the plaintiff was in mental distress at the time is quite certain, and it also appears that she was not in good health. Her age was then about 60 years and she had two great bereavements within two years. It was after the death of her mother that she made up her mind to make a gift of this property to the defendant, first, because it is said she did not desire that the property should be touched by her husband's nephews, and, secondly, because she herself was anxious to go away to a holy place and live on such small resources as she had, settling this property permanently upon the defendant and seeing it secure in his possession and his "ownership of it made pucca." It is also alleged that the defendant was the bhikshaputra of the plaintiff.

5. The defendant says that when he was spoken to by the plaintiff with regard to this matter, he desired that she should send for a friend of the family, one Khettra Mohan Bhattacharjee, who has been examined as a witness in this case. Khettra Mohan says that he was consulted by the plaintiff, and pointed out to her that she had not very much to live upon, and if she made over this property to the defendant he might turn her out, and she had no other place of residence; but she insisted upon making the gift, and he there upon took the title deeds from the plaintiff to the attorney, Dwijendra Mohan Ghose. This happened on or about the 1st July 1908. The attorney has been examined in this case, as also the attesting witnesses, with the exception of one Ashutosh Banerjee who is dead and also one Harinath Banerjee who identified this lady at the Registration office. The document is in the English language, which neither the plaintiff nor the defendant understands; but we have the evidence of the attorney that he

explained this document to the lady at the time of the execution, and that before the execution he had read over the draft and explained it to her. He says he also told her that by making the gift she would "no longer have any interest in the property," but that it would become the defendant's. This the lady denies. The lady is hard of hearing, and it may be that she did not understand, but I certainly give credence to the evidence of the attorney in this matter. He has given his evidence in the fairest possible manner. There is nothing to be said against him so far as the actual explanation of the document is concerned. But it is not possible to dispose of this case upon that alone. That evidence is not sufficient to discharge the onus which is upon the defendant.

6. Now, this gift is undoubtedly of a highly improvident character. It must be held upon the evidence that the lady has very little property, except this house. It is her only valuable property. It afforded her shelter and brought her also an income. The evidence of the defendant on this point is, that he had understood from her that, apart from the house, she "had kept Rs. 1,200" with a tenant of hers of the name of Srikrishna Mukherjee, that she had also some other money, but that he did not know the amount, and that she had also some gold ornaments, of what value he had no precise knowledge or information. Except what the lady had herself stated, he had no personal knowledge of her exact financial position. I do not think he has been candid in his statements, and it seemed to me that he attempted to exaggerate what the lady had. He admitted that the lady had given his wife a portion of her gold ornaments. He said he did not know how the *sradh* expenses of her husband and mother were met. His witness, Kheitra Mohan Bhattacharjee, says that he came to know from the lady that she had a sum of Rs. 1,200 in deposit with Srikrishna Mukherjee, and that she had also some other money and ornaments. He was inclined to exaggerate the value of the ornaments; he first used the expression *bahumulya*, meaning "of great value," but subsequently stated that the value was about Rs. 2,000. Even taking the whole of this evidence as true, it shows that the resources of the lady are very limited, and the substantial property she has is the house. It has also been proved that the lady has parted with some of her ornaments; she made a gift of some of them to the defendant's wife and she seems also to have sold a portion for defraying the *sradh* expenses. Both she and Srikrishna Mukherjee deny that the sum of Rs. 1,200 is in deposit with him. The house was for her very valuable, as she lived in it and also because it brought her an income of Rs. 19 a month. She had not to pay house-rent, and from the income derived from it she could manage to live. To make a free gift of this house, which left her without a roof over her head and deprived her of a permanent source of income, must be called improvident. A gift of this character, specially for an old lady who has nobody to look after her, must be called extremely improvident.

7. The case, therefore, is that of an old *purdanashin* lady with very slender means making an improvident gift to a person who was her priest and in a fiduciary relationship to her. To uphold a gift, of this character would require strong evidence, showing that the whole of the circumstances were present to

her mind, that the intention to give was really her own voluntary act. I need only refer to one or two cases which enunciate the principle, that it must be shown by the donee that the donor was in such a position as would enable her to form an absolutely free and unfettered judgment, and in particular that she had independent and competent professional advice. Dwijendra Babu's services as an attorney were secured, but it is difficult to say what his position was in this matter. Was he the attorney for the lady, or was he the attorney for both? No other attorney seems to have acted for the defendant. The instructions had originally come from Khettra Mohan Bhattacharjee, said to be a friend of the plaintiff husband, but he was the teacher of the defendant had himself officiated as the plaintiff's priest in absence of the defendant, or his father. I do not think it would be an unjustifiable assumption that Dwijendra Babu acted for both the parties. If he did so act, he placed himself in a false position, because the interests of the two persons were adverse; and although I entertain great respect for him, yet it seems to me to be difficult for any one to do his duty by two such parties in a transaction of this character. The position of an attorney under these circumstances is very clearly set out in *Powell v. Powell* [1900] 1 Ch. 243. Farwell J. in that case says "a solicitor who accepts such a post, puts himself in a false position if he acts for both. He owes a duty to both to do the best he can for both." But the Court requires that the donor should be placed in as good a position as if he were in face emancipated. The solicitor, therefore, must be independent of the donee in fact and not merely in name, and this he cannot be if he is a solicitor for both." But I am unwilling definitely to hold that Babu Dwijendra Mohan Ghose was acting for both the parties, and prefer to treat him as acting only for this lady. In that position, let me see, what his duties were to this lady in this transaction. I refer again to the observations of the learned Judge in *Powell v. Powell* [1900] 1 Ch. 243. "A solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out a particular transaction! He must also satisfy himself that the gift is one that is right and proper for the donor to make under all the circumstances, and if he is not so satisfied, his duty is to advise his client not to go on with the transaction and to refuse to act further for him if he persists." Now, let us see what Dwijendra Babu himself says he did in this matter. He was asked if he had enquired if the donee, her priest, had exercised any influence on her and what her means were. He said: "No, I was not told if she had any income, or what income, or if she had any other place of residence." If that is so, it seems to me that he had not placed himself in a position to advise the lady. It was not enough to prepare the document and explain it to the lady. Here the draft was prepared according to the instructions of Khettra Mohan Bhattacharjee. It was not enough to get her approval of the draft. The attorney should have enquired about her means, and tried to ascertain how her desire to give had been caused, or had arisen, what was leading her to give up her most valuable property. I do not think the attorney would not have enquired into these matters, if they had been present to his mind. He did not entertain any suspicion. He did not know this lady, or her family, or any circumstances relating to her life. He accepted what

had been said to him by Khettra Mohan Bhattacharjee that she desired to give this house to the defendant if she could legally make a gift. He did not apply his mind to other matters, this being his first transaction of this nature. Nothing was said to him no circumstances. Were made known to him by which he could have helped this lady. I think, however, there is a clear duty in cases like these, so far as the attorney is concerned, to try and protect the lady against herself. She was an old purdanashin lady and suffering from a recent bereavement, who had been ill and was in poor circumstances. It has been contended on behalf of the defendant that the duty cast upon an attorney was merely to see that the client understood the nature and effect of the deed, and nothing more, and my attention has been called to the case of *Coomber v. Coomber* [1911] 1 Ch. 723 and the following passage from, the observations of Fletcher Moulton L.J. was cited: "Again and again we have had it said the lady did not have competent and independent advice, and it seems to me to be based on the fact that the solicitor did not say to her "I advise you to do it, or I would not advise you to do it." In my opinion that is not by any means necessary for the purpose of the advice. I think that a solicitor best gives advice when he takes care that the client understands fully the nature of the act, and the consequence of that act. He is not bound to say: "I will advise you to do it, or if I were you I would not do it. Nothing of that kind is necessary for competent and independent advice. All that is necessary is that some independent persons free from any taint of relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and consequence of the act." But it will be seen from the latter portion of that paragraph that the learned Judge was of opinion that the duty became more onerous in certain cases. He says: "When a man takes upon himself the responsibility of advising those who are not adults, who are not persons capable of managing their own affairs in the broadest sense of the word, other conditions may arise." Now these Courts have-always held that a purdanashin lady is not in the position of an adult male person, or an adult who is capable of managing his own affairs in the broad sense of the word. I need not refer to the rulings on the point. Her position is well-known. She is entitled to the protection which always extends to the weak, ignorant and infirm.

8. The observations made by the learned Judge and relied upon by the defendant had reference to the facts of the case before him. In it there was no question of fiduciary relationship. It was a gift from mother to son. The attorney who had acted was the attorney for the father, and in making a deed of settlement the lady had taken into consideration the wishes of the father. All the circumstances were known to all the parties. The matter had been duly deliberated upon by the grantor who knew her position and perfectly understood what she was doing. No new principle seems to have been enunciated in that case. All the decisions beginning from a very early period have been that independent advice is absolutely necessary in such cases, and such advice is to be given at arm's length: see Mr. Justice Phear's observations in *Kanai Lal Jowhari v. Kamini Debi*

(1867) 1 B.L.R. (O.C) 31 n. With regard to the duty of the solicitor to enquire into the pecuniary means of his client, I will refer to Wright v. Carter [1903] 1 Ch. 27, 51 where it is pointed out that "it is the duty of a solicitor who is advising an intending donor or settlor under such circumstances to inform himself of the pecuniary means and prospects of his client with a view to advising him as to the expediency or otherwise of the proposed gift or settlement." This clearly the attorney in the present case did not do. He had not placed himself in a position to do it. I find, therefore, that the gift was an improvident one, and that the donor did not receive such advice as is required in such a case.

9. I however, find the following facts in favour of the defendant, namely, that the draft was explained to this lady. She was told what the effect of the deed was, and its nature. I accept the evidence of Harinath Banerjee, who says that the Registrar asked her if she had executed the deed of gift and that she answered in the affirmative. I also find the account given by this lady in the witness-box unsatisfactory. Her evidence has evidently been shaped according to what she has, I believe, been told to be necessary to prove, and she has not hesitated to tell untruths. Her story that she was not told that she was being taken to an attorney to have the document prepared, and that she did not know that she was going to the Registration office, which she called a garden house, are untrue. I do not believe her when she says that the document was not explained to her. But however much I disbelieve her story in the witness-box, I have to see if the defendant has properly discharged the onus. In Lyon v. Home (1868) L.R. 6 Eq. 655. I find the learned Judge distrusted the plaintiff's story as to how she had been induced to make the gift.

10. I must also allude to the production of an account book by this lady, and an entry in it, which she said she had made in it showing that the sum of Rs. 186 had been paid by her to the defendant for the purpose of making "a will." She admitted in cross-examination that the entry was made only three or four months ago. The entry itself shows interpolations. It was evidently made for purposes of this case. This book shows that the lady can read and write a little and she can also add. This according to the defendant proved that she was not ignorant, and the fact that she kept an account showed her business capacity. I am unable to draw the same inference. The accounts are kept in a very unbusinesslike way, and her knowledge of Bengali seems to be of a very elementary character. The book also shows that she lends out small sums of money on interest which when collected helps to maintain her, and support a cow which, she keeps. Her average expenses came up to about Rs. 50 a month, and some portion of it she probably derived from the sums she had lent out. The fact, however, remains that the house is her most valuable property and the only source of a permanent income. She has examined one witness, her tenant named Srikrishna Mukerjee, but I am unable to rely upon his testimony. As he said little of importance, I do not think it necessary to deal with his evidence any further. He pretended ignorance of several matters, specially about the institution of this suit which rather tended to show that he knew all about it, and that be

was responsible for the absurd story told by the lady in the witness-box.

11. In this connection, I may refer to an incident which occurred during the trial of this case. It was stated one morning that the case had been settled, and a document written in Bengali with the signature of this lady was produced. That document showed that the lady could not have understood her position when she signed it. It authorised her attorney to sell the house at a figure mentioned in it, and the proceeds of the sale were to be disposed of in paying the costs of both parties, the amount to be paid to the defendant being specifically mentioned. I enquired what the probable costs of the plaintiff were, and found that hardly anything was left for her at all. She said she had not realised that fact and had not been told. If she had understood the result of the settlement, she would not have consented. Counsel on both sides agreed that no effect should be given to such a settlement; and although the defendant had given instructions to consent to the terms which had been formally proposed and accepted by him, his counsel refused to take any advantage of the circumstance. In this, counsel upheld the best traditions of the Bar.

12. I am referring to this incident to show how easily purdanashin ladies in the position of the plaintiff can be led to sign away their rights, even in matters of vital interest to them. It illustrates to my mind how easily they can be led or misled into such transactions. Everything was formally perfect, and yet it was conclusively shown that the plaintiff had not understood the effect of the proposed settlement. It also seemed to me that the price fixed for the sale of house in the document was for the benefit of Srikrishna Mukherjee. It is all important in these cases therefore to ascertain how the intention to give was created, and if the donor had exercised a free and unfettered judgment and realised the consequence of her act: see *Huguenin v. Baseley* (1807) 14 Ves. 273 : 1 Wh. And Tud. 7th Ed. 247 also *Hall v. Hall* (1873) L.R. 8 Ch. App. 430, 440. The same principle has been accepted and acted upon in our Courts. I have no doubt in my mind that her intention was created by the defendant and his friends working upon her religious feelings, and at a time when she was in great mental distress and had also been ill.

13. A story that the defendant was the plaintiff's bhikshaputra has been put forward. It is mentioned in the deed of gift. The lady denies that he was her bhikshaputra. The defendant gives one version of the matter which differs entirely from that of Khettra Mohan Bhattacharjee. Learned Counsel for the defendant conceded that the evidence about this was contradictory and unacceptable. It is impossible to attach weight to such evidence and to hold that the young-man was taken as the bhikshaputra of the plaintiff. That the statement was introduced into the document shows that some weight was sought to be attached to it in justification of the gift, perhaps to show that the intention to give some valuable property to such a person had been entertained by the plaintiff for a long time. It is clear from her letters that this lady during her absence from Calcutta relied upon the defendant to make realizations for her

and to send her moneys. The letters also showed that she was in great distress. They are addressed to the defendant in language which shows the respect which is due to a priest. The style is hardly that of one who had taken the defendant as her bhikshaputra. I, therefore, reject this part of the defendant's story.

14. The defendant states that he never intended to turn out this lady from the house, that she was to be in possession of the house as long as she lived, and it was not his intention to interfere with her collection of the rent. This he has repeated through his counsel. It is in evidence that even after the execution of the deed of gift the lady remained in possession, realized the rents, paid Collectorate and Municipal taxes and paid the expenses of repairs of a substantial character. If it was not the intention of the defendant "to turn her out," why does not the deed provide for it? The attorney was not told of such an intention, or of any tacit understanding between the parties that she was to be in possession during her lifetime. The provisions of Section 126 of the Transfer of Property Act could have been availed of to secure the lady's position, and although I am not prepared to go to the extent contended for on behalf of the plaintiff that the absence of a power of revocation is enough to show that the document is invalid, I attach some importance to the fact of its absence. That I think is the result of the cases on this point: see *Hall v. Hall* (1873) L.R. 8 Ch. App. The attorney had not thought about the matter, and the provisions of the section were not present to his mind. I also attach much weight to the fact that in one matter at least, of great importance, the document does not express the intention of one of the parties, namely, that of the acceptor. He has never treated himself as, or done any act to show that he was the owner. Long after the deed, he came to live in it for a few days only, and left it without demur, because the lady insisted upon his leaving it, even at a time when her feeling was ceasing to be friendly.

15. Under all these circumstances, I hold that the defendant has failed to discharge the onus; he has failed to show that the lady had exercised, or was in a position to exercise her free and unfettered judgment, and clearly understood what she was doing. The suit therefore succeeds, and I hold that the lady is entitled to the relief she has asked for, namely, that the document is to be set aside. Inasmuch as I disbelieve the evidence she has given, I disallow her the costs of the days taken up by such evidence, allowing her only two days' costs of the hearing.