
(1931) 04 BOM CK 0006
In the Bombay High Court

Manmohan Das

APPELLANT

Vs

Ramdei

RESPONDENT

Date of Decision : 16-04-1931

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 10 Rule 2

Citation : (1931) 33 BOMLR 1251

Hon'ble Judges : Macmillan, J;Lancelot Sanderson, J;George Lowndes, J;Dinshah Mulla, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Macmillan, J.—This is an appeal against a decree of the High Court of Allahabad reversing a decree of the Additional Subordinate Judge of Allahabad.

2. The question at issue is whether a deed of gift dated August 2, 1919, and executed by Behari Lal, respondent No. 2, in favor of his wife, Musammat Eamdei, respondent No. 1, represented a genuine transaction or was fictitious and benami. The Subordinate Judge found that the transaction was benami. The High Court held that it was genuine. Their Lordships have now to determine which of these two decisions was right.

3. The circumstances which have given rise to the action may be briefly summarised. It appears that the respondent Behari Lal and his brother Lala Gaza Prasad at one time owned in its entirety a house, No. 15, situated in Chowk, Allahabad. Some time previous to the date of the deed of gift under challenge the eight annas share of Lala Gaza Prasad was purchased by the plaintiffs, Lala Madho Prasad and his son Lala Manmohan Das alias Bachchaji, whom it will be convenient to call "the appellants," although Lala Madho Prasad has died and is represented in the appeal by his heirs. On August 1, 1919, Behari Lal sold four annas of his eight annas share to the appellants, who thereupon became the owners of a twelve annas share in the property. On August 2, 1919, Behari Lal executed a deed of gift of his remaining four annas share in favour of his wife,

whom he had married in the preceding May and who was then a minor. Notwithstanding that he had executed this deed of gift, Behari Lal on April 28, 1923, sold to the appellants at the price of Rs.15,000 the four annas share which was the subject-matter of the gift to his wife. The appellants in the present suit pray to be put in possession of their purchase and allege that the deed of gift which stands in their way is fictitious and invalid. The learned Subordinate Judge formulated a series of issues, but it is now necessary to consider only the first, viz:--

Is the deed of gift dated August 2, 1919, a farzi, collusive and fictitious transaction, or was it executed out of natural love and affection, and what is its effect?

4. If the deed of gift is upheld there is an end of the case, as in that event Behari Lal had plainly no title to sell the four annas share in question to the appellants.

5. Before considering the case on its merits their Lordships desire to draw attention to the procedure which has been adopted in the taking of the evidence. At the trial before the Subordinate Judge the evidence first recorded is that of the defendant, Behari Lal, who is described as a "Court witness" and appears to have been called into the witness box by the Judge himself, The record before their Lordships discloses no justification for this unusual proceeding. No doubt under Order X, Rule 2, any party present in Court may be examined orally by the Court at any stage of the hearing, and the Court may if it thinks fit put in the course of such examination questions suggested by either party, But this power is intended to be used by the Judge only when he finds it necessary to obtain from such party information on any material questions relating to the suit and ought not to be employed so as to supersede the ordinary procedure at trial as prescribed in Order XVIII. Here the burden on the plaintiffs was to prove their case in ordinary course, yet the proceedings at the trial open by the Court calling on one of the defendants to give evidence not on any specific points, but on the whole case, and the witness is then cross-examined at length, not through the Court, but by the other parties themselves. Doubtless Behari Lal, who was deeply implicated in the remarkable transactions which the Court had to investigate, knew most about the whole affair, and the Judge may have thought it useful to hear at the outset his account of the matter, but in the absence of some more cogent reason their Lordships cannot approve of such a deviation from normal and proper procedure.

6. From the evidence adduced before the Subordinate Judge it appeared that Mr. A. P. Dube, a barrister of the District Court, had been much involved in the transactions under examination. He was not called as a witness by either party, and the Subordinate Judge indicated in his judgment that his conduct required explanation. When the case came before the High Court on appeal the High Court, apparently on their own initiative, called Mr. Dube as a "witness for the Court," and he was examined and cross-examined at length. In the judgment of the High Court there occurs the following passage:--

Mr. Dube had not been examined in the Court of the Subordinate Judge, who remarks in his judgment that he ought to have been produced as a witness for the defence. We agree that it was desirable to have the evidence of Mr. Dube, and we think the Subordinate Judge might very well have done what we have done, namely, send for Mr. Dube and examine him as a Court witness.

7. Now it is provided by Order XLI, Rule 27, as follows:--" (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if...(6) the Appellate Court requires...any witness to be examined to enable it to pronounce judgment, or for any substantial cause, the Appellate Court may allow such...witness to be examined. (2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission," Bale 29 prescribes that "Where additional evidence is directed or allowed to be taken, the Appellate. Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified."

8. The examination of Mr. Dube in the High Court seems to have taken place with complete disregard of these requirements, so carefully framed to ensure that such exceptional procedure shall be resorted to only in special circumstances and with adequate safeguards, Their Lordships have before them no order or pronouncement requiring Mr. Dube's examination; there is no record of the reason for the admission of his evidence other than the passage just quoted from the judgment of the High Court, nor is there any specification of the points to which his evidence was to be confined or any record in the proceedings of the points so specified. Moreover, Mr. Dube appears to have been called as a witness at the outset of the hearing in the High Court and not after the Court had satisfied itself on examining the evidence taken below that there were matters on which his evidence was essential to enable them to do justice between the parties.

9. In these circumstances their Lordships cannot regard the introduction of Mr. Dube's evidence otherwise than as highly irregular, and in their opinion it must be entirely discarded. As it appears that the judgment of the High Court was materially influenced by this incompetent testimony, their Lordships have found it necessary to consider the case for themselves on the evidence laid before the Subordinate Judge, apart altogether from Mr. Dube's contribution.

10. In order to determine the question of the validity or invalidity of the deed of gift in question it is of assistance to consider "the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct" 12 CWN 609 (Privy Council) always remembering that the onus of proof rests upon the party impeaching the deed.

11. The terms of the deed itself are not suggestive of a merely colourable document. After reciting the fact of his recent marriage, the minority of his wife,

the advice of his relations and his own desire to make arrangements for his wife's maintenance, Behari Lal gives the property in question to his wife, under his sister-in-law's guardianship, for her life interest, subject to an elaborate series of conditions, which include inter alia a prohibition against alienation, a provision for the reversion of the property to himself should his wife die without male issue, and a forfeiture clause in the event of his wife ceasing to live with him. It may be asked why the grantor should have taken all this trouble if he merely desired to interpose a sham disposition of the property between himself and his creditors. A much simpler document would have served the purpose. The anxious precautions in which the deed abounds strongly suggest that it was intended to be operative.

12. The situation of the parties at the time of the execution of the deed renders it probable that it was intended to be a genuine transaction. Behari Lal had just recently married and the property in question was his solo remaining asset. It was not unnatural that his family, knowing his habits of extravagance, should have urged him to salve this last fragment of his wrecked fortunes, and a sense of responsibility towards his newly-wed wife, as well as the expediency of having her provided for, may have moved him to comply. The learned Subordinate Judge came to the conclusion that the deed was "a farzi transaction entered into to save the property from his creditors," but although Behari Lal had had a sufficiently chequered financial career, in which a conveniently shifting date of majority played a large part, he does not appear to have been at the time of the execution of the deed under any pressure of debt.

13. The deed of gift was duly registered and the name of the donee entered in the municipal records. There is some evidence of the receipt of rents and other acts of ownership by the wife's guardian on her behalf, and down to the time of the transactions which brought the appellants on the scene there appears to have been no suggestion on the part of anyone that the deed of gift was not what it purported to be, a valid and effectual instrument.

14. Then in 1922 Behari Lal conceived the scheme which has given rise to the present dispute. He evidently desired to raise some money and approached the appellants through a broker with a proposal to sell to them the property which he had gifted to his wife. The appellants, who were aware that Behari Lal had given the four annas share in question to his wife, would at first have nothing to do with the proposal, but various arguments were urged to induce them to consider it, and in particular it was represented to them that the deed was a, fictitious one and of no binding effect. It is sufficient to state that after much coming and going the appellants, who were naturally disposed, if they could legally do so, to acquire the four annas share, which would give them the property of the entire house, agreed to purchase the share at the price of Es. 15,000 and paid Rs.600 as earnest money to Behari Lal on the terms contained in a document executed by Behari Lal, dated August 22, 1922. The document referred to a suit which Behari Lal had filed in the local Court on August 2 to have the deed of gift

declared null and void and provided that after it was cancelled by the Court and the decree had become absolute he would sell the four annas share to the appellants and execute a sale-deed, but if the case should be decided against him the sale should be off and the earnest money should be returned.

15. In the suit which Behari Lal had instituted to have the deed of gift set aside he described it as having been granted with the advice of his evil companions and through fear of creditors and as being entirely fictitious, Somewhat inconsistently he also alleged that the property had reverted to him under the terms of the deed owing to his wife having ceased to live with him. The defendants were his wife and her guardian, but neither of them appeared and the suit was decreed ex parts on April 13, 1923. On April 28, 1923, Behari Lal executed and delivered a sale-deed in favour of the appellants and received payment of the purchase price. The appellants acted somewhat precipitately in paying over their money and accepting the deed of transfer, as they found to their cost, for the next move in the game was an application by Behari Lal's wife and her guardian on May 14, 1928, to have the exparte decree set aside, and after some procedure, highly suggestive of collusion, the exparts decree was on July 7, 1923, set aside and the suit itself was subsequently on October 1, 1923, dismissed for default of parties. The episode of the suit had served its purpose. Behari Lal had secured the price of the property, while the deed of gift, which debarred him from conveying it to the appellants, remained unaffected. To complete the story, Behari Lal was declared insolvent on September 26, 1921, after the present suit had been instituted by the appellants on August 25, 1921.

16. Their Lordships on a consideration of the whole circumstances, of which they have set out the salient incidents, are satisfied that the appellants have failed to discharge the burden incumbent upon them of proving that the deed of gift was fictitious. Apart from general suspicion of Behari Lal, on whose acting as little reliance can be placed as on his word, and who was naturally willing, when it suited his purpose, to falsify the facts, there is really no evidence of such a character as would entitle a Court to take the serious step of setting aside the deed of gift and depriving the innocent minor respondent of the provision-reasonably made for her.

17. The result is that the appellants' claim to the possession of the subject of suit fails, for their vendor had no title to sell to them. The High Court, in dismissing the suit, gave decree apparently of their own motion, against Behari Lal for repayment to the appellants of the Rs. 15,000 of purchase-money with interest. The appellants have informed their Lordships that they would prefer to retain such contingent reversionary rights as they may possess under the sale-deed in their favour rather than to have a problematical claim for Rs. 15,000 in Behari Lal's bankruptcy. Their Lordships will accordingly humbly advise His Majesty that the decree of the High Court of November 21, 1927, be affirmed subject to the deletion there from of the decree for Rs. 15,000 and interest against Behari Lal in favour of the appellants, and that the appeal be dismissed.

As the respondents have not appeared in the appeal there will be no order as to costs.