

(1913) 04 MAD CK 0030
In the Madras High Court

Narasamma Hegadthi

APPELLANT

Vs

Billa Kesu Pujari and Others

RESPONDENT

Date of Decision : 02-04-1913

Acts Referred:

Citation : 31 Ind. Cas. 543 : (1913) 25 MLJ 637

Hon'ble Judges : Sundara Aiyar, J;Ralph Benson, J

Bench : Division Bench

Judgement

1. The principal question in this case relates to the construction of the document Exhibit A in the case. It was executed by one Mainda Hegade in favour of his wife, Ummakke, in 1864. It purported to be a deed of sale. But both the Courts have found that it was in reality a deed of gift, and that finding is binding upon us. In fact the finding has not been impeached by either party in this Court. In 1903 Ummakke executed a deed of gift (Exhibit B) of the properties comprised in Exhibit A in favour of the plaintiff. This suit by the plaintiff is to recover the property leased to defendants Nos. 1 and 2 on chalgeni lease by Ummakke. The contention of the tenants, defendants Nos. 1 and 2, is that they surrendered possession to the 3rd defendant, a son of Ummakke, and that the rent sued for was also paid to him. The plaintiff's answer to this contention is that the property in question belongs to herself alone under Exhibit B, and that she is entitled to recover it from defendants Nos. 1 and 2 with the arrears of rent, and that any payment made to the 3rd defendant could not be set up, in answer to her claim. The other children of Ummakke including the 3rd defendant were made parties to this suit, and they pleaded that the deed of gift, Exhibit B, was obtained by the plaintiff from Ummakke by undue influence and that in any event, the deed was invalid because under the deed Exhibit A, the right to the property vested not in Ummakke alone, but in herself and in her children subject to the incidents of Alyasantana Law. The District Munsif found that the defendants had failed to prove that Exhibit B was brought about by any undue influence; but he was of opinion that Ummakke was not the sole owner of the property under Exhibit A, The Appellate Court agreed with the Court of first

instance with regard to the construction of Exhibit A, and held further that undue influence was exerted on Ummakke to make her execute Exhibit B. In second appeal it is contended that there is absolutely no legal evidence in support of the Appellate Court's finding on the question of undue influence, and that with respect to the construction of Exhibit A, both Courts are wrong. We may first deal with the question of undue influence inasmuch as, if we are able to confirm, the finding on that point, it would be unnecessary to go into the construction of Exhibit A. We feel constrained to uphold the contention of the appellant that there is no legal evidence to support the finding. The evidence referred to by the Appellate Court consists of the statements of the plaintiff's 2nd witness and of the 3rd defendant. Both of them speak to statements made by Ummakke, that she did not know the nature of the contents of Exhibit B when she executed it. No pressure is spoken to by either of them. All that is stated is that Ummakke said that she was asked to execute the document and that she did so. This fact, assuming the evidence to be relevant, is no evidence of, undue influence at all. There was nothing wrong in the plaintiff asking her mother to make a gift of the property to herself alone, and, if the mother was willing to do so, there would be nothing improper in her taking it. We are, however, of opinion that the evidence of the 3rd defendant and of the plaintiff's 2nd witness, of statements made to them by Ummakke is not in the circumstances of this case admissible at all to prove the facts alleged to have been stated by Ummakke. Her statement was admittedly made after her return from the house of the plaintiff's husband, where she had gone on a visit. According to the evidence of the witnesses mentioned above, she) stayed two or three months in that house. Ummakke's statements did not accompany any conduct on her part, nor were they made at the time when the document Exhibit B was executed. Evidence regarding the statements made by her would not come within the purview of either section or Section 21 of the Evidence Act. A statement made by a person as to the circumstances under which he executes a document a considerable time after the execution, cannot be admitted to prove the facts stated by him. If we reject the statements, as we hold we are bound, to do, there is absolutely no evidence in support of the plea of undue influence. We must, therefore, set aside the finding of the lower Appellate Court on that question.

2. It is then necessary to decide what right Ummakke obtained under Exhibit A. The terms of the document seem to us to be quite unambiguous. Mainda Hegade delivers the property absolutely to his wife and says that she is to enjoy the property from generation to generation. These are words appropriate for the creation of an absolute interest, and they are not consistent with any limitation of the right of the donee. It may be, as urged by the learned Vakil for the respondent, that the donor wished by the gift to benefit not only his wife but also his children. But the question is, what is the correct interpretation to be placed upon the words of the document. On that matter, we have no doubt that it creates an absolute interest in favour of the wife. The donor may have hoped that his wife would transmit his estate to all his children and was content to rely

on her doing so, but whatever his idea may have been, the document is perfectly clear and we cannot hold that it confers on Ummakke any other than an absolute estate. The case is not similar to *Kunhacha Umma v. Kutti Mammi Hajee* 16 M.p 201 : 2 M.L.J. 226 where the gift was to a woman and her children. The lower Appellate Court refers in support of its construction to two documents, Exhibits XIV and XV, which came into existence two years before the date of Exhibit A. They were apparently prepared by Mainda Hegade for the purpose of being executed. These documents are of no use in construing Exhibit A, which is in our opinion unambiguous. It may be that the donor changed his mind. He certainly did so as to the language in which he should express his wishes. But whether he had any different intentions at the time of Exhibit A from those he had at the time when Exhibits XIV and XV were prepared, or not, the construction of Exhibit A cannot be controlled by anything to be found in Exhibits XIV and XV. For the same reason we must also hold that the subsequent documents which were put in. to show the conduct of Ummakke as to what she thought was the correct construction of Exhibit A, are also useless. It is settled law that except in the case of ancient documents, the construction of a document whose terms are clear cannot be controlled by the subsequent conduct of the parties. In reality those subsequent documents do not afford much help in the construction of Exhibit A. In 1882 it appears that Ummakke sued a tenant for rent in conjunction with one of her sons. This was 18 years after Exhibit A was executed; but it appears also that in 1892 she instituted another suit against a tenant by herself. The only other document relied on as evidence of her conduct is a petition by her son, Chandayya, for pattah for a land adjoining one of the items included in Exhibit A. The petition stated that Muli No. 18 included in Exhibit A was in the possession of the applicant Chandayya; but the Revenue Authorities in their order recognised the possession only of Ummakke and granted a cowl in favour of Chandayya on the ground that Ummakke consented to it. These detached documents, even if admissible, would afford no safe guide in the construction of Exhibit A, especially when we find that Ummakke did not always act in conjunction with her sons in matters connected with the administration of the property. Mr. Naraina Row has tried to support the judgment of the lower Appellate Court on two grounds, neither of which was raised till now. The first ground is that there was a secret trust at the time of the execution of Exhibit A in favour of the children of Ummakke. No such trust was pleaded by the defendants. The question whether there was a secret trust or not is one of fact. We cannot allow it to be raised in second appeal. The District Munsif, no doubt, says that "whatever the outward form which the transaction eventually took, the real nature of the transaction is disclosed by Exhibits XV and XIV and Ummakke took the property burdened with the trust in favour of herself and her children contained in Exhibits XV and XIV." We do not think that the District Munsif in this passage is really speaking of any secret trust accepted by Ummakke. The documents are apparently referred to by him as. throwing light on the intention both of the donor and of Ummakke. There is absolutely no evidence that Exhibits XIV and XV were brought to the knowledge of Ummakke and that she consented

to accept the property on any trust.

3. The second contention is that, whatever the original character of the gift under Exhibit A may be, Ummakke threw the properties comprised in it into the common stock by incorporating it with other properties belonging to the family. Here again no issue was raised to try the question; and the question being one of fact, we must decline to allow it to be raised here. It would have to be shown that the property was continuously enjoyed by Ummakke and her children together. The documents referred to by the lower Courts do not bear out any such theory of continuous enjoyment by the whole family. We must disallow this contention also. The result is that the decrees of the lower Courts must be reversed, and the plaintiff must be given a decree for the possession of the property.