
(1911) 12 CAL CK 0032
In the Calcutta High Court

Rahimjan Bibi and on her death, Osman Taluqdar and Others	APPELLANT
Vs	
Imanjan Bibi	RESPONDENT

Date of Decision : 20-12-1911

Acts Referred:

Transfer of Property Act, 1882 — Section 129, 54

Citation : 15 Ind. Cas. 698

Hon'ble Judges : Mookerjee, J;Carnduff, J

Bench : Division Bench

Judgement

1. This is an appeal on behalf of the plaintiff in a suit for declaration of title to Immovable property and for recovery of possession thereof. The properties in dispute admittedly belonged to one Dapu, the father of the plaintiff and of the defendant. On the 7th September 1907 Dapu. executed a hiba-bil-iwaz in favour of the defendant and had the document registered seven days later. He died shortly after on the 23rd November 907. The case for the plaintiff is that this hiba-bil-iwaz is inoperative and did not create any valid title in the defendant. The validity of the instrument was attacked explicitly on the ground that it had been obtained by undue influence; it was also described somewhat vaguely as illegal and inoperative.

2. In this Court, as in the Courts below, the document has been assailed on two grounds, namely, first, that, as there is no proof of payment of the consideration mentioned in the deed, it cannot take effect as a hiba-bil-iwaz, and secondly, that if it be treated as a deed of gift without consideration, it cannot take effect, as there is no evidence that the properties covered thereby were delivered to the donee. The Courts below have found concurrently that the case of undue influence has completely failed: but upon the two other grounds upon which the deed is assailed, the Courts below have taken divergent views. The primary Court help- that as there was no proof of payment of the consideration mentioned in the deed, it was inoperative as a hiba bil-iwaz, nor could it take effect as a deed of gift as there was no evidence of delivery of possession to the

donee. The Subordinate Judge, on the one hand, has held that those questions ought not to be allowed to be raised inasmuch as they are not explicitly mentioned in the pleadings and are not covered by any of the issues as framed. He has, however, discussed both the questions and has held with regard to the first that the burden of proof was upon the plaintiff to establish that there was no consideration for the hiba-bil-iwaz; and with regard to the second, that as the defendant is now in possession of the properties covered -by the instrument and was also practically in possession thereof during the life-time of his father, the gift was operative under the provisions of the Muhammadan Law

3. On behalf of the plaintiff, the decision of the Subordinate Judge has been challenged principally on two grounds, first, that the burden of proof of the payment of consideration for the hiba-bil-iwaz was upon the defendant who relies upon it as the foundation of his title and that as he has failed to prove that the consideration passed as alleged, the deed ought to be deemed inoperative; and secondly, that treated as a deed of gift with-out consideration, it is equally ineffectual, because there is no proof that there was any delivery either of the title-deed or of the property to the donee. The decision of the Subordinate Judge has been assailed also on two subordinate grounds; namely, first, that even if the hiba-bil-iwaz be treated as a valid document, it did not vest in the donee a good title; and secondly, that it was not effectual to vest any title in the raiyati-holdings which are not transferable by custom or local usage. These subordinate questions require consideration only if the substantial points in the appeal are decided against the appellant, for if the deed is found to be inoperative, it does not take effect as to any of the properties covered by the instrument, inclusive of the huts and the holding.

4. In so far as the first ground, upon which the hiba-bil-iwaz is attacked, is concerned, it is urged that payment of the consideration mentioned in the deed has not been proved. In our opinion, there is no room for controversy, in view of the decisions of their Lordships of the Judicial Committee in the cases of *Khajooroonissa v. Roushan Jahan* 2 C. 184 : 3 I.A. 291 : 26 W.R. 36 and *Choudhri Mehdi Hasan v. Muhammad Hasan* 28 A. 439 : 4 C.L.J. 295 : 10 C.W.N. 706 : 3 A.L.J. 405 : 8 Bom.L.R. 387 : 9 O.C. 106 : 1 M.L.T. 106 : 33 I.A. 68, that the burden of proof was clearly upon the defendant to establish that the consideration for the hiba-bil iwaz was paid as described in the instrument In the case last mentioned, their Lordships observed that by the Muhammadan Law, a holder of property may in his life-time give away the whole or a part of his property, if he complies with certain forms; but it is incumbent upon those, who seek to set up such a transaction, to show very clearly that those forms have been complied with. It may be by a deed of gift simply or by a deed of gift coupled with consideration. If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is in-valid. If the latter (in which case delivery of possession is not necessary), actual payment of the consideration must be proved, and the bona fide intention of the donor to divest himself in present of the property and to confer it upon the donee must also be

proved. The learned Vakil for the respondent has argued that the deed in question ought not to be treated as a hiba bil-iwaz but as a deed of sale, and that, consequently, notwithstanding the provisions of Section 129 of the Transfer of Property Act, the validity of the instrument ought to be tested with reference to the provisions of Section 54 of the Transfer of Property Act which provides that there may be a valid sale by delivery of the property. In our opinion, there is no force in this contention. The document in this case cannot be treated as a deed of sale. The case of *Abbas Ali Shikdar v. Karim Baksh Shikdar* 13 C.W.N. 160 : 4 Ind. Cas. 466, where the transfer was for a substantial consideration, was a case of sale. Here the transaction was intended to be a gift for consideration. If it were treated as a sale for consideration, the question would at once arise, in view of the assertion of the plaintiff that the transaction was obtained by undue influence, whether the consideration was adequate. In fact, the inadequacy of the consideration, if the instrument is treated as a deed of sale, would be a very* important element affecting its Validity. We must, therefore, treat the document as a hiba- bil-iwaz; in fact, regard it as an instrument clothed with the character it professes. The burden, therefore, was upon the defendant to prove the payment of consideration mentioned in the deed. The first ground upon which the validity of the deed is assailed must, in this view, succeed.

5. We may add that it has been faintly suggested by the learned Vakil for the respondent that the recital of the payment of consideration in the deed was good evidence against the plaintiff, and that the burden was thus thrown upon the plaintiff to prove that the recital was false. In support of this view, reliance has been placed upon the decision of the Judicial Committee in the case of *Kaleepershad Tewaree v. Rajah Sahib Pershad Sein* 12 M.I.A. 282 : 2 B.L.R. 111 (P.C.) : 12 W.R. 6(P.C.). That case, however, as also the subsequent decision of the Judicial Committee in the case of *Ali Khan Bahadur v. Indar Pershad* 20 C. 950 : 23 I.A. 92, is clearly distinguishable because in each of those cases, the accuracy of the recital was challenged by the maker of the deed and the burden was rightly thrown upon him to explain how that false recital came to be inserted in the document executed by him. On the other hand, the decisions in the cases of *Brajeshware v. Bulhantiddi* 6 C. 268 : 7 C.L.R. 6 and *Bisheswar v. Harbans* 6 C.L.J. 659 : 3 M.L.T. 38 show that the recital is not evidence as against a stranger to the document. The burden, therefore, must be thrown on the defendant to establish strictly that the consideration was paid as mentioned in the deed.

6. In so far as the second ground is concerned, it has been argued by the learned Vakil for the respondent, upon the authority of the cases of *Shaik Ibrahim v. Shaik Suleman* 9 B. 146; *Bibi Khaver v. Bibi Rukkia* 29 B. 468 : 7 Bom.L.R. 443; *Humera Bibi v. Nojmunissa Bibi* 28 A. 147 (1905) A.W.N. 222 : 2 A.L.J. 778; *Danoo Darjee v. Mom-tajaddi Bhuiya* 2 Ind. Cas. 846, that there was sufficient delivery of possession, inasmuch as the deed was registered and delivered to the donee. Reference has also been made to the cases of *Alabi Koya v. Mussa Koya* 24 M. 513 : 11 M.L.J. 227; *Hassarat Bibi v. Golam Jaffar* 3 C.W.N.

57 and *Kandath v. Musaliam* 30 M. 305 : 2 M.L.T. 180 to show that registration has sometimes been regarded as equivalent to delivery. But, as pointed out in *Ismal v. Ramji* 23 B. 682, mere registration is not equivalent to possession. It is essential that the donor should give either actual or constructive possession of the property to the donee; As observed by Baillie in his *Treatise on the Muhammadan Law* (page 514) "being enabled to take possession is like taking it and that if the donee has been placed in a position which enables him to take effective possession of the property, the gift must be treated as valid". See also the authorities mentioned in *Jahed-un-nessa Bibi v. Najibul Islam* 15 C.W.N. 328 : 3 Ind. Cas. 38. Here, however, the facts found do not show that the deed was delivered to the donee. It is clear from the endorsements on the deed that up to the time of presentation for registration, it was in the custody of the donor. There is no evidence to show when it came into the possession of the donee. It has been suggested that possession of the deed was obtained by him immediately after the registration. On the other hand, possession might possibly have been obtained by the defendant after the death of his father. No evidence has been directed to this point, and in view of this fact, it is impossible for us to hold that there was sufficient delivery either of the deed or of the properties covered by the deed to the donee so as to effectuate the transfer. The second ground on which the deed is assailed must, therefore, succeed.

7. The question next arises, what course should be pursued at this stage. The learned Vakil for the appellant asks that the deed of gift should be treated as inoperative and the decree of the primary Court restored. But we are of opinion that the ends of justice require that the case should be further investigated. No doubt, the fourth issue was framed in very general terms; but it is clear from the proceedings in the Court of first instance that its scope was narrowed down by the allegations in the fourth paragraph of the plaint. We are satisfied that the question of the invalidity of the deed on the two grounds mentioned in this Court was not considered at the trial in the primary Court; it was possibly raised for the first time in the course of argument in that Court; it was plainly considered by the lower Appellate Court. Under these circumstances, we are of opinion that this appeal should be allowed, the decree of the Court below set aside and the case remitted to the Court of first instance in order that the question of the invalidity of the deed on the two grounds mentioned may be considered on evidence to be adduced by the parties. The parties will be at liberty to adduce evidence to show when and how the defendant obtained possession of the deed and of the properties covered thereby. If it is held upon the evidence that the deed is inoperative either as a *hiba-bil-iwaz* or as a deed of gift, the two subordinate questions argued on behalf of the appellant will require consideration. The first of these, as we have already explained, relates to huts with regard to which it has been contended that even if the deed be treated as operative, the title thereto was not transferred to the donee. The Subordinate Judge has decided this point in favour of the plaintiff; but he has not referred to any-specific clause in the deed to support his conclusion. We are, therefore, of opinion that this question)

must be left open for consideration after the main point has been decided. As regards the second subordinate point, we are of opinion that there is no substance in the contention of the appellant. The appellant as well as the respondent both claim under the original owner, one by right of inheritance, the other under a deed of transfer. It is not open to the plaintiff to contend that if the deed was operative in law, it did not take effect in respect of the occupancy-holding because they were not transferable by custom. That is a question which the landlord or his representative-in-interest is competent to raise.

8. The costs of this litigation incurred up to the present stage will abide the result.