
(1911) 11 BOM CK 0011
In the Bombay High Court
Case No : Suit No. 893 of 1909

Rajaram Rajaram

APPELLANT

Vs

Khandu Balu

RESPONDENT

Date of Decision : 25-11-1911

Acts Referred:

Transfer of Property Act, 1882 — Section 126

Citation : (1912) 14 BOMLR 340

Hon'ble Judges : Dinsha Davar, J

Bench : Single Bench

Judgement

Davar, J.—In August 1909, Malubai, an old woman belonging to the Telagu community of Bombay, presented a petition to be allowed to sue in forma pauperis. After investigation, the Prothonotary, on the 28th of September 1909, granted leave to sue as pauper and her petition then became her plaint in this suit. Malubai used to be a Muccadum of a gang of working women and was, previous to May 1908, possessed of a small house at Kamatipura worth about two or three thousand rupees. She apparently had no nearer relatives than the four sons of her three predeceased brothers. On the 8th of May 1908, she executed a deed of gift whereby she unconditionally transferred and made over her house as a free gift to one of her four nephews named Khandu Balu. She filed this suit for the purpose of having that deed of gift cancelled and the title-deeds of her property returned to her.

2. In her petition she stated that she had intended to leave her property to her four nephews after her death, that Khandu at first "taking advantage of her old age and ignorance " represented to her that she should execute some document by which her aforesaid intention would be carried out, and that he said " he would arrange for such a document being prepared." She adds that Khandu, taking advantage of the absence of her other nephew Rajaram, proposed to her that she should leave the said property after her death to him alone and she adds that, though she was unwilling to do so, Khandu finally prevailed upon her

to give her consent to that arrangement. She then goes on to say that on the 8th of May 1908 she was taken to the office of a solicitor in Fort, where she was asked to put her mark to a document which was represented to her as the document giving effect to the aforesaid arrangement. On the same day, she says, she admitted execution of the document before the Registrar, but subsequently discovered that the said document was a gift in favour of the defendant and, under the circumstances narrated in her petition, she claimed that she was entitled to have the deed of gift cancelled and her property restored to her.

3. It seems that, after executing the deed of gift on the 15th of June 1908, Malubai made a will of which she appointed Rao Saheb Manaji Rajuji Kalewar and another, executors. Before her suit came on for hearing, she died on the 25th of December 1909. Rao Saheb Manaji proved her will and applied to the Prothonotary to have his name substituted as plaintiff in place of the deceased Malubai and to be allowed to continue the suit in forma pauperis, and by an order, dated the 17th of June 1910, made by the then Prothonotary, Rao Saheb Manaji Rajuji became the plaintiff in this pauper suit.

4. The case came on for hearing before me on the 1st of April 1911, and the very first question raised by the learned Counsel for the defendant was, " whether the plaintiff can maintain or continue the suit in forma pauperis." That question was argued before me at an adjourned hearing, and on the 16th of June I delivered my judgment and found on the preliminary issue that Rao Saheb Manaji Rajuji, being a man of means, was not, for the reasons I gave in my judgment, entitled to maintain or continue the suit in forma pauperis Rao Saheb Manaji Rajuji Kalewar Vs. Khandoo Baloo, . The then plaintiff asked for a short time to consider his position and, on the 19th of June 1911, his counsel announced to the Court that he was not prepared to go on with the suit otherwise than in forma pauperis. On this occasion two of the four nephews of Malubai, namely Rajaram and Shanker, applied to me to be made parties to the suit and to be permitted to go on with it.

5. After I heard arguments on the application, on the 23rd of June I made an order whereby the two applicants were made plaintiffs, the fourth nephew, who did not join in the application, was made a co-defendant with Khandu and Rao Saheb Manaji was retained on the record and made the third defendant in suit. In this altered form, the suit came on for hearing before me on the 8th of November and has occupied me several days in trying the question whether the deed of gift of the 8th of May 1908 ought to be upheld or cancelled.

6. At the first hearing, the defendants' counsel raised only one issue, namely, whether the deed of gift dated the 8th of May 1908 is not valid and binding on all parties. Mr. Jinnah for the plaintiffs raised two other issues, namely, whether the first defendant did not stand towards Malubai in the position of active confidence and whether Malubai was not a purdanashin woman. As the onus of the last two issues undoubtedly lay on the plaintiffs, I held that they should begin. Plaintiffs

led no evidence, their counsel merely put in correspondence and the evidence which Malubai had given in a Small Cause Court case, and closed the plaintiffs' case. On behalf of the defendant Khandu Balu, Mr. Solomon Judah, a solicitor of this Court, his managing clerk Shanker Sayana Persha, Mr. Almeida, the Sub-Registrar, Raju Babaji, a leading member of the Telugu community of Bombay, and the first defendant himself gave evidence. Plaintiffs then applied for leave to call rebutting evidence and the first plaintiff and Rao Saheb Manaji Rajuji were examined on behalf of the plaintiffs.

7. The case of the plaintiffs, as originally framed by Malubai and as set out in the present plaintiffs' joint affidavit, affirmed on the 20th of June 1911, in support of their application to be made parties, is somewhat different from the case placed before the Court by the learned Counsel who conducted the plaintiffs' case. Malubai's grievance, as it is gathered from her plaint, is that it was represented to her that the document she executed was not a gift out and out to Khandu but that it was a document which carried out the arrangement that the property should be left to Khandu after her death. Her case was, to all intents and purposes, one of misrepresentation made to her and fraud practised on her. The present plaintiffs took up the same attitude. In para 2 of their affidavit to which I have referred, they say :-

In the 8th of May 1908 the defendant above-named by fraud and misrepresentation caused the said Malubai to execute a deed of gift of the said (sic) in his own favour representing to her that it was her will by which she was bequeathing her property in equal shares to her four nephews.

8. It will be observed that Malubai herself does not put her case as high as the present plaintiffs have put in their affidavit. She admits in her plaint that she consented to execute a document whereby the property was to be left to Khandu alone.

9. Mr. Jinnah for the plaintiffs in the very beginning admitted that he was not in a position to adduce any evidence of mis-representation and fraud, but he contended that having regard to all the circumstances of the case, to the fact that Malubai was an old and infirm woman, that she had no independent solicitor but that the same solicitor who acted for the donor acted for the donee, having regard again to the fact that there was no power of revocation inserted in the deed and to the fact that she was not told that she could have such a power inserted, having regard also to the fact that she had no other property except this house, that this was a deed which could not be and ought not to be supported and must be cancelled. Mr. Desai, who took up the conduct of the plaintiffs' case in its later stages, contended that a voluntary gift, which leaves the donor destitute with no provision for his or her maintenance, would of itself be sufficient to entitle the donor to come to the Court and ask for its cancellation, and that a mere verbal promise by the donee that he or she will take care of the donor is not sufficient. The learned Counsel further contended that a deed evidencing a voluntary gift would be set aside, if there was no power

of revocation in it, unless it is proved that the executants had independent advice, that he or she thoroughly understood the effect of omitting that power and that it was the intention of the donor that such a power should be excluded.

10. I may state at once, before I discuss the evidence more fully, that there is not in this case any evidence whatever to support the original allegation of Malubai and the present plaintiffs that this deed of gift was obtained by any misrepresentation or fraud whatsoever. In fact that aspect of the case was practically abandoned before me at the hearing, and stress was laid on what is stated in several English cases on the point of voluntary gifts and settlements, and I was asked to hold that on the admitted facts of this case it would be inequitable to allow this deed to stand. I think it is desirable under the circumstances first to ascertain how the law applicable to case stands, before I proceed to discuss the evidence.

11. It has been argued before me with great insistence that mere fact that Malubai was an old woman of sixty and in feeble health and that because there is no power of revocation in the deed of gift and that a common solicitor acted for both, the entire burden of proving that the transaction was thoroughly understood and assented to by her and was a righteous one was on the donee. And on the authority of *Coutts v. Acworth* (1869) L. R. 8 Eq. 558 it was further contended that the mere fact that there was no power of revocation was quite sufficient for the Court to hold that the deed must be set aside.

12. It is true that this being a voluntary gift, the onus of proving that Malubai executed the deed with the full knowledge of its contents and did so willingly and without any pressure or solicitations which might amount to the exercise of undue influence lies heavily on the defendant Khandu Balu. But I think it is as well to keep in mind the exact position of the parties in such a case, as laid down by Mr. Justice Kay in *Henry v. Armstrong* (1881) 18 Ch. D. 668. The learned Judge there says (at p. 669):-

No doubt there are to be found in reported cases dicta to the effect that the onus of supporting a voluntary deed rests upon those who set it up; but I do not think that these dicta go so far as to say that whenever a voluntary settlement is impeached on any ground whatever the onus is at once thrown on those who would maintain it. As I understand it, the law is that anybody of full age and sound mind who has executed a voluntary deed by which he has denuded himself of his own property, is bound by his own act, and if he himself comes to have the deed set aside, especially if he comes a long time afterwards, he must prove some substantial reason why the deed should be set aside.

13. In this case Malubai, though aged and physically weak, was, at the date of the execution of the deed and long before and after it, of perfectly sound mind and there are indications in the case that she was a woman of intelligence. The question therefore is whether she thoroughly understood the contents of the document she executed, whether all the material clauses were explained to her,

whether she appreciated the effect the execution of the deed would have on her with respect to her property, and whether the deed carried out her intentions at that time. If the evidence establishes all these facts, and the onus of proving this is entirely on the defendant Khandu and when he has discharged that onus, it would be for the plaintiffs to show that some substantial reason exists why the deed should be set aside. I confess, on the question of the absence of the power of revocation, I was considerably startled at the language used by Vice Chancellor Malins in *Coutts v. Acworth* (1889) L. R. 8 Eq. 558. The learned Judge there says (at p. 567):-

If I had the power, I would lay it down as a rule, that wherever a voluntary gift of a material part of a person's property is made (unless, as in *Taker v. Taker* (sic), it is prepared by an independent Solicitor, and the donor distinctly repudiates and refuses to have the power of revocation), it is the duty of the Solicitor to insist that there should be, and almost to go to the extent of refusing to execute such an instrument unless there be, a power of altering that which was done, so as to meet the various exigencies that may arise in future life.

14. A study of the case law on this subject, however, leads me to believe, that the Vice Chancellor has given far greater importance to the absence of the power of revocation in deeds of voluntary gifts than the law justifies. In *Villers v. Beaumont* (1682) 1 Vern. 100, which is a very ancient case, it was held that a voluntary settlement without a power of revocation shall bind the party and shall not be defeated by a subsequent will.

15. In the case of *Henry v. Armstrong* (1881) 18 Ch. D. 668, which I have cited above, after discussing the question of onus, Mr. Justice Kay held that a voluntary deed of settlement is not voidable by the settlor merely because it does not contain a power of revocation.

16. In *Phillips v. Mullings* (1871) 7 Ch. 247, Lord Hatherley L. C., referring to *Coutts v. Acworth* (1869) L. R. 8 Eq. 558, says :-

Some cases, however, have attempted to lay down what ought to be in such an instrument. It has, for instance, been almost laid down in *Coutts v. Aoworth* (1862) 31 Beav. 629 that where there is no power of revocation, the deed will be set aside But whether there should be a power of revocation or not must depend upon the circumstances; and it cannot be laid down as a general rule that such a deed would be voidable unless it contained a power of revocation.

17. In *Taker v. Toker* (1862) 31 Beav. 629, the Master of the Rolls sums up the law on the subject of voluntary deeds in these words (at p. 644):-

The law of this Court is very strict on the subject of voluntary deeds, it gives no assistance to the completion of them, it does not lay down as a rule that they are always void j and the mere alteration of intention is not sufficient to induce this Court to interfere and cancel an instrument which was fully understood and deliberately executed by the grantor. That I believe to be the case here, and

being so, I cannot interfere, because the feelings of the plaintiff towards the defendant are now no longer what they were in November, 1853.

18. This case in appeal is reported in 3 De Gex, Jones and Smith, at page 487, where, in affirming the Judgment of the Master of the Rolls, Lord Justice Turner says (at p. 491):-

I think it is going too far to say that no voluntary settlement can be valid unless the settlor is advised that there should be a power of revocation inserted in it. What the Court has to be satisfied of in these cases, as I apprehend, is this, that the settlement whether containing or not containing a power of revocation, is the free determined act of the party making it; and the absence of advice as to the insertion of a power of revocation is a circumstance, and a circumstance merely, to be weighed in connection with the other circumstances of the case.

19. And similar was the finding of the Court of Appeal in Hall v. Hall (1873) L. R. 8 Ch. 480, where it was held that the absence of the power of revocation and the fact that the attention of the settlor was not called to that absence did not make a voluntary settlement invalid. They were merely circumstances to be considered in deciding on the validity of a voluntary settlement.

20. Throughout this case it has been strenuously contended on behalf of the plaintiffs that the fact that the deed of gift in question did not contain a power of revocation in favour of the donor was in itself sufficient to enable the Court to declare against its validity; and it was further urged that that fact coupled with the facts that the donor was an old woman and illiterate, that she disposed of the whole of her property, leaving herself nothing and that she had no independent solicitor acting for her alone, made it incumbent on the Court to hold that the deed of gift was not valid and binding on her and ought to be set aside and cancelled.

21. The arguments urged in respect of the absence of the power of revocation ignored the fact that in India a deed of gift with an unconditional power of revocation in favour of the donor would make the gift a nullity. Section 126 of the Transfer of Property Act provides that the donor and donee may agree that on the happening of a specified event which does not depend on the will of the donor, a gift shall be suspended or revoked, but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void wholly or in part as the case may be.

22. When this was pointed out to the learned Counsel for the plaintiffs, he argued that in this instance the power of revocation may have been made conditional on the failure of the donee to maintain herself and her nephew Vithal. On the authorities, it seems to me clear that the absence of the power of revocation in a deed of gift is after all one of the circumstances to be taken into consideration, when the Court has to consider whether a deed of gift shall stand or be set aside.

23. Having regard, therefore, to the principles laid down in the cases I have referred to, I will now proceed to consider the evidence and apply those principles to the present case. Malubai is, unfortunately for the plaintiffs, dead and they have not the benefit of her evidence in this case. But before her death, she gave evidence in respect of this very deed of gift in a Small Cause Court suit, which she had filed against Khandu's mother, to enforce payment of rent for the occupation of a portion of the property in question. That evidence I have permitted the plaintiffs' counsel to put in. In the course of her cross-examination, Malubai stated:-

Rajaram is disappointed on account of this gift to Khandu. The Solicitor had read out and explained to me the contents of the document. The Registrar had also asked me about the contents.

24. In her plaint she admits that she agreed to execute a document by which her property was to go to Khandu after her death. Four witnesses, whom I consider to be both in dependent and trustworthy, have been examined on behalf of the first defendant Khandu, and their evidence I have no hesitation whatever in accepting as wholly truthful.

25. Mr. Solomon Judah, a solicitor of this Court, has given clear and explicit evidence that the contents of the deed of gift were explained to Malubai in Marathi, which was her mother tongue, by his Marathi speaking clerk Shanker in his presence, and that he was satisfied that she fully understood the conditions of the deed and assented to them. This evidence is corroborated by the evidence of his clerk Shanker, who is equally clear and emphatic in his statement, that he explained the contents of the deed of gift to her and she expressed her assent. The third witness Raju Babaji has given evidence which establishes beyond all doubt that it was the firm resolution of Malubai to execute a document making a free gift of this house to Khandu. Mr. Judah's evidence is not attacked on any ground either of its veracity or honesty. The only argument urged against his evidence is that he does not know sufficient Marathi to be able to say definitely that every thing was explained to Malubai. Mr. Judah has told the Court that although he cannot speak Marathi very well, he understands it quite sufficiently to enable him to say that the contents of the deed were explained in his presence to Malubai. Mr. Judah has lived all his life in Bombay, and I feel sure that he is correct when he said that he understood Marathi sufficiently to know that the deed was correctly interpreted to Malubai. Mr. Judah's clerk Shanker Sayana Persha impressed me most favourably. He gave his evidence with-out the slightest bias and in a most straight-forward manner. He did not know the parties before and I have no reason whatever to believe that in this matter he has acted throughout with anything other than scrupulous good faith. I cannot recall to my mind any single argument of any substance as to why I should not accept Shanker's evidence as wholly truthful.

26. The third witness Raju Babaji again is one whose evidence created a very favourable impression on my mind. He is a wealthy and leading member of his

community and heads one of the factions. No doubt he and Rao Saheb Manaji Rajuji are not on good terms with each other, but both these men are much too well placed in their community and would not, I think, go out of their way to give untruthful evidence on behalf of parties who occupy a very humble position in their community. No doubt Rao Saheb Manaji has befriended the plaintiffs and Raju Babaji has befriended the first defendant, but I see nothing in their conduct to discredit the evidence which they have given. Accepting as I do Raju Babaji's evidence, it seems quite clear that Malubai after a great deal of consideration came finally to the conclusion that she would give this house to her nephew during her lifetime so as to avoid all possibility of fights, quarrels and litigation, after her death.

27. In addition to the evidence of these three witnesses, I have before me the evidence of Mr. Almeida, the Sub-Registrar of Bombay. It seems to be his practice, when old, illiterate and not very intelligent parties appear before him, to admit execution of documents, to satisfy himself that the executants have understood the contents of the documents which they have executed. I think this is a most excellent practice on his part. In this case he says :-

Seeing that Malubai was a very old lady, I asked her questions and I was satisfied that she understood what the document was.

28. Khandu of course is deeply interested in this litigation and therefore his evidence has to be considered with caution. I found nothing in his demeanour and nothing in his evidence, which would lead me to distrust what he stated. He is a man of small intelligence and of extremely weak manners. He was subjected to very rigorous cross-examination, from which he emerged wholly unharmed. As against this evidence, the first plaintiff himself entered the witness-box and called Rao Saheb Manaji Rajuji on his behalf. Rao Saheb Manaji's evidence does not assist the plaintiffs in any material portion of their case nor does it destroy any part of the first defendant's case. The first plaintiff did not create an impression favourable to himself on my mind by his demeanour in the box. He seems to be gifted with far higher intelligence than Khandu. If one can judge by his behaviour in the witness-box, one would be inclined to think that he is a man of aggressive temperament and is easily excited. Taking the evidence of the first plaintiff and the first defendant side by side, I have come to the conclusion that it would be infinitely safer to rely on the evidence of Khandu in preference to that of Rajaram.

29. The second defendant Vithal or Vithoba Sayana was not called by either of the parties to give evidence at the end of the first defendant's case. However, while enquiring whether he desired to give evidence on his own behalf or call witnesses, I had him sworn and asked him a few questions. He is a young boy of 18 or 19. He possesses intelligence beyond his years. It is true he exhibited a good deal of animus against Rajaram, but in spite of that I am inclined to believe that what he said, about Malubai's relations with Rajaram and Khandu, was on the whole correct.

30. After a full and careful consideration of all the evidence recorded in this case, my findings of facts are that about fifteen years before her death Malubai, when she was seriously ill, expressed a desire to give her property to her four nephews after her death but she recovered and the intended will was not executed. I find that many years thereafter she leaved by herself in her own house and attended to her own wants and managed her own property. The assertion of Rajaram that he used to manage her property till within a short time of the deed of gift is, I think, incorrect. He is not able to produce any single paper or voucher evidencing the fact that he managed her property, and beyond vague statements he has not proved one single act of his management of Malubai's property. I find that sometime previous to the execution of the deed of gift, she was ill, weak, and in bad health. She seems to have approached Rajaram asking him to take care of her but he treated her overtures unfavourably. On the other hand, as soon as it was found that she was ill and unable to cook her own food, Khandu's mother began attending to her. Malubai, when able to move out of the house, took her meals at Khandu's place, and when ill and unable to move out, Khandu's mother took her meals to her. This friendly intercourse evidently irritated Rajaram, and I believe the evidence which goes to show that he frequently abused and ill-treated Malubai. She seems to have given expression to her desire to give her property to Khandu, and that seems to have aroused greater ill-will in Rajaram, both against Malubai and Khandu. If one can read the mind of Malubai about this time, and with the aid of the incidents deposed to in the course of the evidence before the Court such reading is not very difficult, it clearly appears that Malubai was much distressed at the ill-treatment which Rajaram was subjecting her to and she felt that possibly all the quarrels would end, if she definitely carried out her intentions with respect to her property and set the matter at rest once for all. She apprehended that if she did not do that, there were certain to be quarrels, fights and litigation, amongst her nephews and her property would be lost. Under these circumstances, she makes up her mind, takes Khandu with her and goes to Raju Babaji and asks him to help her in carrying out her intentions to make a gift of her house to Khandu. When Raju Babaji is satisfied that she has definitely made up her mind, he sends for Shanker, who was known to him but was a stranger to Malubai and Khandu, and entrusts him with the work. Shanker ascertains her wishes, takes her to his Master's office, gets his master to prepare a deed of gift in accordance with Malubai's instructions, and the deed is duly executed. Mr. Judah did consider the question whether the deed should have a power of revocation, and he says he thought it was unnecessary as the lady was old and she wished to give the house away to Khandu. When Mr. Judah discussed this question with his clerk and when he gave evidence in the box, it seems to me that the provisions of Section 126 of the Transfer of Property Act were not present to his mind, otherwise he would have said that in an Indian deed of gift, I could not put in an unconditional clause containing a power of revocation, for that would nullify the gift. When Malubai made up her mind to give the only property she owned to Khandu, she knew perfectly well that she would be thereby divesting herself of all means of maintenance during the rest of

her life. She seems, however, to have been quite satisfied that Khandu and his mother would look after her and provide for her wants during the remaining portion of her life. She was ill, she was feeble, she was ailing, and she must have realized that she was not likely to survive the gift many years. Be that as it may, she made the gift with a full conviction in her mind that Khandu would provide for her and look after her during the rest of her life. She had one other wish. She wanted to make sure that Vithal should be provided for and maintained by some one, and she stipulated orally in the first instance that Khandu would do so. A second document was executed in Mr. Judah's office simultaneously with the deed of gift. That document was tendered but for want of registration was rejected on objection taken by the learned Counsel for the plaintiffs. The result is the Court is not entitled to refer to the contents of that document.

31. The conclusion to which I have come after a careful consideration of the whole of the evidence is that Malubai in full possession of all her senses and without the exercise of any fraud, misrepresentation or undue influence on her, voluntarily conveyed her property to her nephew Khandu; that when she executed the deed of gift she fully understood its contents and the effect it would have of divesting her of her property and that the gift to the nephew was her " free determined act "; that she intended the gift to be irrevocable; and that there is not in this case a single " substantial reason why the deed should be set aside." The evidence in the -case, I think, fully establishes that Malubai before execution of the deed of gift, had unmistakably manifested her intention of making an unconditional and irrevocable gift of her house to Khandu and she carried out that intention of her own free will.

32. What happened subsequent to the deed gift is not a matter of any importance. Whether it was through the influence of Rao Saheb Manaji Rajuji and his sister or whether it was through the working of Rajaram, it is quite clear that Malubai's feelings towards Khandu were changed within a month of the date of the deed of gift. That change of feeling was not due to any act of Khandu or his mother. As in *Taker v. Taker* (1862) 31 Beav. 629 the feelings of Malubai towards the defendant were no longer what- they were when she executed the deed. Rajaram seems to have been considerably embittered against Khandu because Malubai had given him her house and it is in evidence that he started a campaign of persecution against Khandu, and openly expressed his intention of doing all in his power, so that Khandu may not have the benefit of a single brick of that house. He resorted to a false charge to the Police and a prosecution before the Magistrate, both unsuccessfully. He then seems to have got Malubai to file this suit. He and his brother, the two plaintiffs, are admittedly men of no means or very small means which they have already exhausted in this litigation, and although the defendant may succeed in this suit, he stands a very poor chance of recovering his costs, and if he has to pay them himself, the house will be gone.

33. I find first issue in the affirmative and find that the deed of gift of the 8th May 1908 is valid and binding.

34. I find issues 2 and 3 in the negative, and I dismiss the plaintiffs suit. I direct the plaintiffs to pay to the first defendant his costs of this suit from and after the 19th of June 1911, on which date they applied to me to be made party-plaintiffs. The second defendant has incurred no costs nor has the 3rd defendant after he was made a defendant and I have dealt with the costs previous to the re-constitution of the suit.