

(1958) 09 MAD CK 0033
In the Madras High Court

Serandaya Pillai and Another

APPELLANT

Vs

Sankaralingam Pillai and Another

RESPONDENT

Date of Decision : 30-09-1958

Acts Referred:

Transfer of Property Act, 1882 — Section 123

Citation : (1959) 72 LW 206 : (1959) 2 MLJ 502

Hon'ble Judges : Ramaswami, J

Bench : Division Bench

Judgement

Ramaswami, J.—This Second Appeal is preferred against the decree and judgment of the learned Subordinate Judge, Tirunelveli, in A.S. No. 21 of 1955, reversing the decree and judgment of the learned District Munsif of Tuticorin in O.S. No. 42 of 1953.

2. The plaintiffs are the uterine brothers of the second defendant Gnanamuthammal whose husband is the first defendant. The father of plaintiffs and the second defendant died when the second defendant was very young. The second defendant has been brought up by the plaintiffs. The second defendant, not to put too fine a point on it, seems to have grown up into an ugly black woman. Therefore, eligible bridegrooms were not forthcoming to marry her. In fact she remained a comparatively old spinster till she was aged 28. In fact in this community of Nangudi Vellalas of Srivaikuntam, it is very unusual for a girl to remain unmarried till she becomes middle-aged. The plaintiffs finally selected the first defendant. They had to offer him special terms over and above the customary gift of a small extent of immovable property, which is prevalent in this community of Nangudi Vellalas and which custom is affirmatively found by both the Courts below and which is perfectly legal and valid ; Vide Palwanna Nadar v. Annamalai Ammal (1957) 1 M.L.J. 238. In other words, the plaintiffs entered into a contract with the first defendant, the consideration for which was the marriage of the first defendant with the second defendant who was not exactly a catch in the marriage market, to settle upon them 74 cents of land bearing survey No.

362 and comprised in patta No. 471 and called Veppal Vayal situated in the village of Keelapadugai in Srivaikuntam Taluk. In pursuance of this contract the marriage took place in Avani of 1123 Andu (1947) and the defendants were put in possession of the land and they have filed Exhibits B-5 and B-6 for payment of kist in the name of the second defendant for the years 1948 and 1949 in respect of the suit land. Subsequently, the parties had fallen out and the plaintiffs were evasively putting off the execution of a registered instrument in favour of the defendants and what is more they have been claiming back the land on the ground that the gift was invalid being hit by Section 123 of the Transfer of Property Act and Section 17 of the Registration Act and that it is not open to the transferees to plead part-performance. On the other hand, the case for the defendants was that first of all this is a transaction contemplated u/s 9 of the Transfer of Property Act and need not be registered ; and secondly, by virtue of there being a subsisting enforceable contract between themselves and the plaintiff, the plaintiffs, are not entitled to the declaration and injunction or in the alternative for recovery of possession asked for. The learned District Munsif upheld the contention of the defendants and dismissed the suit. On appeal the learned Subordinate Judge found that this was an unjust claim but that the plaintiffs were entitled to the relief asked for as the gift is also a transaction hit by Section 123 of the Transfer of Property Act and Section 17 of the Registration Act. Therefore he allowed the appeal and decreed the suit. The defeated defendants have preferred this Second Appeal.

3. The scope of Section 9 of the Transfer of Property Act has been well explained in the AIR Commentaries (Third Edn.) at page 361. It is a general principle of law that everything is to be taken as permissible unless there is a prohibition against it. Where, therefore, a transaction is not required by law to be in writing, it may be brought about without writing. Section 9 is an enactment of this principle in so far as transfers of property are concerned, and seems to have been inserted *ex abundanti cautela* in view of a different principle as to transfers of property, adopted in England. Under the Statute of Frauds in England the general rule adopted was that all transfers of property should be in writing, while the general rule and policy adopted by the Legislature in this country, as shown by Section 9, is that all transfers of property may be without writing unless they are expressly required by law to be in writing. The test therefore in this country, to determine whether a transaction (be it a transfer or not) can be made without writing is to see if it is expressly required by law to be in writing. If the transaction is a "transfer of property" and there is no express provision of law requiring it to be in writing, Section 9 will enable it to be made without writing. If, on the other hand, the transaction is not a "transfer of property" and there is no express provision of law requiring it to be in writing the general principle referred to above will enable it to be validly made without writing. (Muhammad Sulaiman Khan v. Tar Khan (1889) A11 W.N. 55 Arumugham Chetti (deceased) and Others Vs. Y. Pr.K.R.V. Subramaniam Chetti and Others, Bhuta Singh v. Mangu AIR 1930 Lah. 9.

4. In *Ariyaputhra Padayachi v. Muthukumaraswamy Padayachi* AIR 1914 Mad. 423 it was observed by Sadasiva Iyer, J., that all transfers inter vivos were intended to be included in one or other of the transactions coming under the heads of "sale", "mortgage", "lease", "exchange", and "gift"; in other words, that the Transfer of Property Act is exhaustive of all modes of transfer. This view has not, however, been followed, see *Bishan Dial v. Gazinuddin* (1901) 23 All. 175 *Madam Pillai Vs. Badrakali Ammal and Another*, ; *Fowler v. Secretary of State* (1920) 13 L.W. 230. *Jiwan Lal v. Chudaman* AIR 1914 Nag. 54 *Tehilram Girdharidas Vs. Longin D'mello, Ali Hossain Shaikh and Another Vs. Jonabali Mondal and Others*, ; *Gunniah v. Gopal* AIR 1919 Mad. 547 *Jagdeo Singh Vs. Ram Saran Pande and Others*, the general trend of opinion being that the Act is not exhaustive of all modes of transfer. It has accordingly been held that a transfer by an award, a pledge of moveable property, Government Promissory Notes and Policies of Insurance and the like are all transfers of property but they would not fall under any of the heads of "sale", "mortgage", "lease", "exchange", or "gift": *Bhagwatibai v. Bhagwandas* AIR 1927 Sind 206 *Amir Bibi v. Arokiam* (1917) 34 M.L.J. 184 : AIR 1919 Mad. 1113 ; *Subbaraya Rowlu Minda Nainar v. Kuppuswamy Aiyangar* I.L.R.(1909) Mad. 442.

5. To sum up, in the language of Mulla's Transfer of Property Act (4th Edition) page 884:

Writing was not necessary under Hindu law to the validity of any transfer whatsoever, and in all ancient systems of law transfer of possession was the only requisite to the transfer of title. The present Act makes writing necessary in the case of a sale of tangible immovable property of the value of Rs. 100 or upwards, or the sale of a reversion or other intangible thing--Section 54 ; in the case of a simple mortgage, and in the case of all other mortgages (except a mortgage by deposit of title deeds) when the principal sum secured is Rs. 100 or upwards--Section 59 ; in the case of a lease if it is from year to year, or for any term exceeding one year or reserving a yearly rent--Section 107 ; and in the case of all gifts of immovable property--Section 123, and of all transfers of actionable claims--Section 130. Exchanges are subject to the same rule as sales--Section 118; and the law as to leases is subject to rules which the Local Government are empowered to Make--Sections 107 and 117.

6. Thus, in the case of several types of transactions writing has been held to be not necessary. The following are some of the examples given in B.B. Mitra's Transfer of Property Act (11th Edition) page 103. A relinquishment or surrender by a Government ryot to the Government of the properties included in his patta is neither a mortgage nor a sale, nor a gift, nor a lease, as denned in the Transfer of Property Act and is not by law required to be in writing or in any of the modes prescribed by the said Act : *Fowler v. Secretary of State* (1920) 13 L.W. 230. Similarly, relinquishment or surrender by a limited owner under the Hindu Law may be effected by any voluntary act which may operate as her civil death. *Mt. Akhaj and Others Vs. Arjun Koeri and Another*, . A surrender of a lease

is not a transfer and need not be in writing : Brojonath v. Maheshwar (1918) Cri.L.J. 220 ; Elias Meyer v. Monoranjan 22 C.W.N. 441. A transfer made in compromise of a claim is neither a sale, nor a gift, nor an exchange and no writing is necessary under the Transfer of Property Act to validate the same, though such transfer may relate to immovable property : K. Thiruvengidachariar Vs. Ranganatha Aiyangar and Others, . A partition of joint family property is not an exchange and is not by law required to be in writing: Satya Kumar v. Salya Kripal (1909) Cri.L.J. 503 Ma Sein Nyun v. Mating U 25 Ind.Cas. 498. The creation of an easement is not a transfer thereof, and therefore it can be created by oral agreement, without requiring any writing: Sital Chandra v. Delaney 20 C.W.N. 1158. A grant of Immovable property by way of guzara, not being a grant of the corpus, but only of the right to enjoy the usufruct, need not necessarily be in writing : Gajraj v. Indarpat 49 I nd.Cas. 406. A transfer of land by a husband to be enjoyed by his wife during his lifetime in discharge of future maintenance is not a gift or a sale and may be made without writing : Madam Pillai v. Badrakali Ammal (1962) 42 M.L.J. 410 : ILR Mad. 612 . Where a purchase is made by a joint-dccree-holder in his own name, other joint decree-holders are beneficially interested in the purchase and their right which is short of ownership can be relinquished without a written instrument: Jain Glass Works Vs. Secy. of State, . There is no express provision of law that a charge can be created only by a document. Consequently a valid charge can be created orally. But if a charge is created by a document, it must be registered where the charge is for a sum in excess of Rs. 100: Kuppuswamy and Another Vs. Rasappa Chettiar and Others, To enable parties to an agreement to treat a sale as a mortgage by a subsequent agreement, no writing is necessary : Narsingdas v. Radhakisan AIR 1952 Bom. 425. In the case of oral gift or unregistered deed of gift accompanied by delivery of possession and allowing the donees to treat the property gifted as their absolute property the Rangoon and Calcutta High Courts on the principle of estoppel and that Courts will not lend themselves to promote frauds have dismissed suits of donors to take back the properties following : Ma Htay v. U. Tha ILR (1924) Rang. 649 : AIR 1925 Rang. 184 M.P.L.M.P. Chetty v. Ma Ngwe AIR 1924 Rang. 200 Ma Shin v. Maung AIR 1924 Rang. 102 Pran Mohan Das and Others Vs. Hari Mohan Das and Another, following Mahomed Musa v. Agora Kumar I.L.R.(1915) Cal. 801. But it is a matter for consideration whether these cases are good law in view of Ariff v. Jadunath AIR 1931 Pat. 79. In the case of unregistered deed of gift it is not suspended until registration. It can be compulsorily registered AIR 1927 42 (Privy Council) ; Venkata Subba v. Subba Rama (1928) 54 M.L.J. 573 : AIR 1928 P.C. 86. (See pages 119 and following of the 2nd edition of the lucid commentaries of the Indian Registration Act, Section 17).

7. Bearing these principles in mind, if we examine the facts of this case, we find that the contract entered into by the plaintiffs with the first defendant for the consideration of his marrying the second defendant, is neither a sale, nor a lease, nor an exchange. The idea of gifting constituted only the motive and must

not be confused with the enforceable contract expressing the intention of the parties. In other words, the motive of gifting was the root and the contract was the fruit. Therefore, this is a transaction which does not fall within the ambit of a sale, mortgage, lease, exchange or gift and for which a writing is necessary and which has got to be registered. This is a case which would fall within the principle laid down in *Madam Pillai Vs. Badrakali Ammal and Another*, . This anomalous transaction falling within Section 9, Transfer of Property Act and accompanied by delivery of possession cannot be nullified by alleging it is void because there is no writing registered.

8. This transaction will not otherwise also be void, because on the date of the filing of the suit, there is an enforceable contract subsisting between the parties. The contract has been freely entered into between the plaintiffs and the first defendant and there was good consideration. In *Salliyal Kotakkat Manakkal Narayanan Nambudiri Vs. Patticharavoor alias Charavoor Manakkal deceased Narayanan Nambudiripad daughter Unnimayya Antharjanam and Another*, it was held that a promise to pay a particular sum of money or to settle some property in consideration of the terms for marrying a daughter or equally well a sister of the promisor, is valid and enforceable and it is not immoral or opposed to public policy. This is also the English law. In *Chitty on Contracts*, (21st Edition), Vol. 1, page 398, it is stated:

It should be borne in mind, however, that a promise of marriage is a consideration, so that although a promise to marry is not specifically enforceable, an agreement to settle property in consideration of a promise to marry is.

In England, as pointed by *Chitty on Contracts*, 21st Edition, Vol. 2, page 505:

Contracts for settlement of property or otherwise made in consideration of marriage were by virtue of Section 4 of the Statute of Frauds, 1677, unenforceable unless the agreement or some memorandum or note thereof was in writing, and signed by the party to be charged or his agent, but this provision has now been repealed

by Law Reform (Enforcement of Contracts) Act, 1954 (2 and 3 Eliz. 2. C. 34) Section 1.

9. The contract in the present case was not vitiated by any of the invalidating circumstances vitiating a contract. There is also no question of bar of limitation. On the date of suit this oral and enforceable contract was subsisting. The evidence shows that in the natural and probable course of conduct the defendants have been asking the plaintiffs to execute and register an instrument. But the plaintiffs in the first instance have been putting it off and naturally defendants have not been hurrying the plaintiffs, because they were in possession and enjoyment of the property. Subsequently, apparently due to ill-feelings and probable increased straitened circumstances of the plaintiff's family, the plaintiffs have come to feel that they should not have made a gift of these 74 cents of land when they have come to possess only 90 other cents overlooking

that what they put the defendants in possession was not the customary gift of a small extent of property usual on these occasions, but a considerable extent of land under a contract in pursuance of the special circumstances necessitating it. The plaintiffs have started thereupon the preliminary round of criminal litigation and then came to the civil Court. In other words, this suit is a counterblast to the possible litigation of the defendants pressing the plaintiffs to execute and register a document which the latter were successfully putting off by promising to do and which they could no longer put off. The claim of the plaintiffs for a declaration and injunction or in the alternative for recovery of possession, will be clearly unsustainable in the face of this enforceable subsisting contract. It is on this foot primarily that the learned District Munsif has dismissed the suit.

10. This is not a case of mere oral gift or an unregistered deed of gift. If that were so, the provisions of Section 123 of the Transfer of Property Act being mandatory and imperative and no gift of immovable property can be made except by means of a registered instrument, the defendants, cannot resist the claim of the plaintiffs to take back the land however unjust their claim may be and however opposed it may be to the Sastraic principles exemplified in Manu's Text (ix-47) that

once is the partition of inheritance made, once is a damsel given in marriage, and once does a man say " I give ", these three are by good men done once for all and irrevocably,

In such cases even the doctrine of part performance will not come to the aid of the donee. An agreement to make a gift is not capable of specific performance and therefore, part performance has no application. Besides, the rule of part performance enunciated in the new Section 53-A of the Transfer of Property Act does not apply to a gift, because that section applies only to a transfer for consideration. The only defence open will be that if under the oral gift the donee remains in possession for more than 12 years, his title will be perfected by adverse possession and it will not be in the power of the donor to take back the property : *Varada Pillai v. Jeevaratnammal* (1919) 38 M.L.J. 313 : 1919 L.R. 46 IndAp 285 : ILR 43 Mad. 244 (P.C.).

11. The net result of this analysis is that the decision of the learned District Munsif is correct in that this transaction will fall firstly u/s 9 of the Transfer of Property Act, and secondly, by reason of a subsisting and enforceable contract on the date of suit, the plaintiffs will be barred from obtaining the relief of declaration or recovery of possession. The decree and judgment of the learned Subordinate Judge are set aside and those of the learned District Munsif are restored.

12. This Second Appeal is allowed and in the circumstances without costs.