

(1917) 10 BOM CK 0013
In the Bombay High Court

Somashastry Vishwanath Shastri Kashikar

APPELLANT

Vs

Swamirao Kashinath Nadgir

RESPONDENT

Date of Decision : 03-10-1917

Acts Referred:

Contract Act, 1872 — Section 69

Citation : 43 Ind. Cas. 482

Hon'ble Judges : Heaton, J;Beaman, J

Bench : Division Bench

Judgement

Beaman, J.—The point raised in this appeal is certainly one of considerable difficulty, that is to say, it is very difficult to find any definite and well-known principle of law upon which to base a decision which the facts and justice of the case most certainly demand. The point arises thus:

One Krishnaji owned a considerable estate. In 1878 he gave a portion of that estate paying judi to Government to the husband of his daughter. The deed of gift expressed that the donor intended it to be free of judi, that is to say, that he undertook to pay the Government judi which would otherwise have had to be paid by the owner of this parcel of land. About this there is no dispute. In 1902, the donor, then being an old man, made a gift of the residue of all his real estate to one Bisto out of gratitude for services rendered, and this gift contains special reference to the previous gift of 1878 and enjoined the donee to act according to that gift. Again it is common ground that Bisto, the donee, accepted the gift on the understanding that the donor Krishnaji's obligation to pay the judi upon the plaintiff's land was transferred along with the rest of Krishnaji's estate to him. Between 1903 and 1905 Bisto honorably and punctually performed this obligation. In 1905, he in turn, and again for love and affection, made a gift of all the property he had received from Krishnaji to the present defendant Swamirao. In the interval it appears that Bisto had himself given away two pieces of land, and he makes special reference to this in the deed of gift to the defendant, requiring him to observe the terms and conditions of those dispositions of the

property. He then proceeds to refer to the two alienations made by the original donor, one of which is the gift to the plaintiff of 1878. Here he adds no words requiring the donee defendant to abide by the terms of that gift, but he handed over all the papers to the defendant, and it is not denied that the defendant had full notice of the obligation undertaken by the original donor in 1878 to pay the judi on the plaintiff's land. Immediately after making this gift to the defendant in 1905 Bisto naturally ceased to pay the judi on the plaintiff's land. The plaintiff has paid the judi as of course he would be compelled to do, and now seeks to recover it from the defendant.

2. It is obvious, we think, that the undertaking of Krishnaji in 1878 to pay the judi on plaintiff's land is not a covenant running with the land. It is equally difficult, I think--though that was the view which first commended itself to me as offering the simplest solution--to spell a trust out of the terms and conditions of the gift which Krishnaji made in 1902 to Bisto. I feel some difficulty also in saying that the" gift to Bisto was an onerous gift of the kind contemplated in Section 127 of the Transfer of Property Act. I certainly feel no doubt but that while that section is so expressed as to cover cases which might otherwise be cases of difficulty, that is to say, gifts of several things one of which is, while the others are not, burdened with an obligation, the principle must, a fortiori and without need of being expressed, apply to cases Of a gift of a single thing burdened with an obligation. My only doubt here has been whether it can fairly be said that the lands which Krishnaji gave to Bisto in 1902 were as a whole burdened with this obligation to pay the judi upon the plaintiff's land. That obligation no doubt was annexed to the gift as a whole, but rather, I think, as a special condition at the time that the gift was made, and the difficulty I feel might be explained in this way. Suppose while Bisto acknowledged his obligation to pay the judi on the plaintiff's land he acquired other properties of his own and then gave those, properties as well as the land which he received in 1903 from Krishnaji, could it be, said that any one part of those lands was more burdened than another with Bisto's personal obligation to pay the judi on, plaintiff's land? On the other hand we entertain no doubt but that the understanding between Bisto and the defendant in 1905 was as clear as that which the defendant admits existed between Krishnaji and Bisto in 1902. Just as in 1902 Krishnaji gave all his landed property to Bisto on the distinct understanding that Bisto was to continue paying the judi On plaintiff's land and so to relieve Krishnaji from any; further obligation in that respect, so we do not doubt that in 1905 when Bisto passed on all the land with notice to the defendant of this obligation, the defendant accepted; those lands on the understanding that as he received the benefit of the gift, so he, would undertake the obligation, in other words, as a matter of fact we do not doubt that between Bisto and the defendant there was a contract that the defendant receiving the gift from Bisto would for his part undertake to discharge Bisto's liability to the plaintiff. If that were so, the only difficulty in the way of making a just decree between these parties would lie in surmounting the apparent difficulty caused: by lack of privity If the relations

were in contract, then it is very clear that the plaintiff could not sue the defendant inasmuch as there is no privity of contract between them. I think, however, that a practical way is open to us by availing ourselves of Section 69 of the Indian Contract Act. That section is part of the Indian law of contracts, and yet it expressly contemplates one party suing for a remedy against another, although between them there is no privity. All that is required to make good an action of that kind is that the defendant should be bound, by law to pay money in the payment of which the plaintiff also has an interest. Here the plaintiff undoubtedly has an interest in the payment of the judi. For if it, be not paid, his lands would be forfeited.

3. Then the only question is whether the defendant is bound by law to pay that judi. Taking each step in order, I think, it is very clear that he is, Bound by law does not mean bound by law to the plaintiff, but that the defendant at the suit of any person might be compelled to pay Here we should have to begin with the original donor Krishnaji against whom, it is conceded, the plaintiff might bring a suit to recover this judi upon the covenants of the deed of 1878. Krishnaji in turn, it is conceded, might reimburse himself from Bisto according to the tenor of the deed of 1902 and the understanding and resultant contract of the parties.

4. Then it becomes merely a question of fact whether Bisto in turn could compel the defendant Swamirao to reimburse him, and that is the question which I have already answered in anticipation by indicating that in our opinion notwithstanding the inartificial character of the deed of 1905, its real intention--that intention being well understood--was that the defendant undertook Bisto's obligation to pay the judi plaintiff's land.

6. Thus by three stages the plaintiff could put the law in motion in such a way that the result would show that the defendant was bound in law to pay the money in the payment of which the plaintiff was interested and which the plaintiff had thus in the first instance had to pay. On that view we think that we find solid ground for doing what we do not doubt is justice in the case, i.e., compelling the defendant to carry out the original donor's obligation to pay the judi on the plaintiff's land.

7. I have not touched here upon many other difficult questions which were raised and discussed in the full argument we heard. It is needless to involve this decision in considerations drawn from the rule against perpetuities and various other extremely complicated branches of the English technical law. All that need be said here is that when the property passes, if it does pass by transfer from the present defendant, it will be time enough to say whether this personal obligation goes along with it or whether it will be exhausted during the lifetime of the present donee. We need not now anticipate those difficulties.

8. We reverse the decree of the learned District Judge and restore the decree of the Court of first instance with costs throughout upon the defendant.