

(1933) 07 BOM CK 0011
In the Bombay High Court

Sugrabai and Others

APPELLANT

Vs

Mahomedalli Ahmedalli and Another

RESPONDENT

Date of Decision : 13-07-1933

Acts Referred:

Citation : AIR 1935 Bom 34

Hon'ble Judges : Kania, J

Bench : Division Bench

Judgement

Kania, J.—The plaintiffs have filed this suit claiming to be beneficiaries under a trust-deed dated 2nd December 1915. Defendant 1 is the father of plaintiffs 1 and 3 while defendant 2 is the father of plaintiff 2. Plaintiff 2 is the husband of plaintiff 1. The trust-deed (Ex. B) appears to have been made shortly after the marriage of plaintiff 1 with plaintiff 2 and was intended to be for the benefit of the children of defendant 1 and his son-in-law. In the plaint it is alleged that after the trust-deed was executed and accepted by defendants 1 and 2, as shown by the endorsement at the foot of the trust-deed, defendant 1 constituted himself the managing trustee, collected the rents and profits of the property and utilised the same in accordance with the terms and provisions of the trust-deed. The plaintiffs say that only for about two years prior to the filing of the suit no payments were made to them in accordance with the provisions contained in the trust-deed and they had therefore to file the suit. Defendant 2 is stated not to have taken any active part in the administration of the trust, but allowed defendant 1 to manage the same in such, manner as he liked. The first prayer in the plaint is that defendants 1 and 2 should be removed from the trusteeship. The whole plaint is verified as true on information only.

2. After the written statement of defendant 1, in which he contested the validity of the trust-deed, was filed, it appears that an attempt was made to take a consent decree as between the plaintiffs and defendants 1 and 2 under which the trust-deed was being confirmed. Defendant 3, who claimed to be an, equitable mortgagee of the property from defendant 1, thereupon, applied to be made a

party to the suit. He has filed a written statement adopting the contention contained in the written statement of defendant 1.

3. The validity of the trust is contested on the ground that the gift by way of trust was not complete as the settlor had not transferred the possession of the property as required by the Mahomedan law. It is next urged that the settlor has revoked the settlement by a declaration dated 18th January 1926. It is further contended that although the trust-deed was executed there was no bona fide intention on the part of defendant 1 to settle the property and in fact defendant 1 always dealt with the property as his own. The onus of proving that defendant 1 continued to deal with the property as his own, and therefore the trust-deed was not valid and binding, would be on those who allege it.

4. The difficulty which faces the plaintiff's in this case is the complete absence of evidence of the transfer of possession. Under the Mahomedan law, in order to transfer the ownership of an immovable property, it is essential, that the possession of the property should be transferred to the transferee or the donee as the case may be. In the present case the evidence only shows that after the trust-deed was executed by the settlor, defendants 1 and 2 have put their signatures at the foot of that document after the words "we accept this trust" were written thereon. It is alleged on behalf of the plaintiffs that this constitutes a complete trust and as in the present case defendant 1 is the father of plaintiff's 1 and 3, no delivery of possession was necessary to complete the trust. In this connexion reliance is placed on behalf of the plaintiff's on the decisions in *Ameeroonissa Khatoon v. Abedoonisa Kliatoon* (1874) 2 I.A. 87 *Mirza Sadik Husain v. Said Hashim* 1916 P.C. 27 and *Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam* 1932 P.C. 13. These decisions only show that in order to constitute a valid gift by a father in favour of his minor children it was not necessary to transfer possession, but proof of bona fide intention to give should be established. I do not think those decisions apply in the present case because in the first instance the trust is not merely for the benefit of the minor children of the settlor, and secondly, because the settlor has not constituted himself the sole trustee. In so far as the trust is for the benefit of plaintiff 2, it requires the transfer of possession under the Mahomedan law, and inasmuch as there are two trustees appointed under the trust-deed the considerations which would weigh with the Court when the settlor father constituted himself the sole trustee for his minor children, do not prevail. I regret, I am unable to extend the principles of those cases in favour of the plaintiffs, however much I would like to do so, having regard to the difference in facts.

5. Only plaintiff 2 has given evidence in support of the trust and the whole of his evidence as to the application of the rents of this property, as shown by the cross-examination, is hearsay. Three material witnesses, viz., defendant 2, Shekh Ali, the maternal uncle of plaintiff 2, and Abdulhusain, the maternal grandfather of plaintiff 2, who could have supported the case as set out in the plaint and who are alive have not given evidence to support the plaintiff's case. I

am unable to find any just excuse for their absence if the plaintiffs' case was true. On the evidence on record therefore I am unable to hold that the plaintiff's were paid the rents of this property up to about two years prior to the institution of the suit as alleged in the plaint.

6. The evidence led on behalf of defendant 3 about defendant 1 dealing with the property as his own is not sufficient to justify any finding on that issue in favour of defendant 3. The evidence consists merely of an abortive attempt to sell the property. Mr. Lalji had agreed not to rely on this document as it was not disclosed. The other documents produced by defendant 3 are all of a date after defendant 1 is alleged to have stopped paying money to the plaintiffs, and therefore much importance cannot be attached to the same. Defendant 3 has entirely failed to lead any evidence in respect of issue 7.

7. The plaintiffs have failed in their main contention. Defendant 3, however, has failed to prove the charge of undue influence which he attempted to support and has also failed to prove that the property was dealt with at all material times by defendant 1 as his own absolute property. Under the circumstances, I think, the plaintiffs should pay three-fourths of the costs of defendant 3.