

(1979) 07 GUJ CK 0001

In the Gujarat High Court

Case No : Letters Patent Appeal No. 10 of 1976

Suleman Isubji Dadabhai

APPELLANT

Vs

Naranbhai Dahyabhai Patel and Others

RESPONDENT

Date of Decision : 27-07-1979

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 63
Transfer of Property Act, 1882 — Section 122, 5

Citation : AIR 1980 Guj 165 : (1980) 21 GLR 232

Hon'ble Judges : S.H. Sheth, J;G.T. Nanavati, J

Bench : Division Bench

Advocate : K.A. Mehta, for the Appellant; R.N. Shah and M.B. Shah, Asstt. Govt. Pleader, for the Respondent

Judgement

S.H. Sheth, J.—The appellant was the owner of survey Nos. 432. 433, 434 and 461 of village Kholvad in Kamrej Taluka of Surat District. Respondents 1 and 2 claim to be his protected tenants under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948, (hereinafter referred to as "the Tenancy Act" for the sake of brevity). On 12th December 1956, the appellant -served upon respondents 1 and 2 notice terminating u/s 32 of the Tenancy Act their tenancy in respect of the lands in question. On 31st December 1956, the appellant created a trust in respect of the lands in question for the purpose of running a free public dispensary and for giving scholarships to Muslim students for prosecuting their studies. On 20th January 1957, he made an application for registration of that trust which was styled as "Dadabhai Trust- u/s 18 of the Bombay Public Trusts Act, 1950. On 31st January 1967, it was registered under S. 19 of the Bombay public Trusts Act. Respondents 1 and 2 appealed to the Charity Commissioner against the order of registration of Dadabhai Trust. It was appeal No. 56 of 1957. The appeal was dismissed. Thereafter an application u/s 72 of the Bombay Public Trusts Act was made by respondents 1 and 2 to the District Judge at Surat calling in question the appellate order of the Charity Commissioner. The District Court dismissed it by its order dated 18th October

1967. That order was challenged in this High Court in First Appeal No. 247 of 1968, That appeal, in the first instance, came up for hearing before Mr. Justice T. U. Mehta who held that the transaction evidenced by the deed of settlement dated 31st December, 1956, was a gift. Therefore, u/s 85A read with Section 70(O) of the Tenancy Act, he referred to the Mamlatdar. Karnrej, the following issue:

"Whether the transaction evidenced by the vesting of the disputed property in Dadabhai Trust under document dated 31-12-1956, is valid or not in view of the provisions contained in Section 63 of the Bombay Tenancy Act."

Mr. Justice T.U. Mehta felt that since the transaction in question amounted to a gift, it might be hit by the provisions of Section 63 of the Tenancy Act because that transaction was brought about with out the previous permission of the competent authority specified in Section 63, Upon reference, the Mamlatdar, Kamrej, held that the gift resulting from the deed of settlement was not valid because previous t permission of the Collector to make that gift had not been obtained as required by Section 63 of the Tenancy Act. , We are now told that the appellant appealed against that order to the Prant Officer. We are further told that that appeal has been dismissed. We are also told that a revision application against that appellate order filed by the appellant is pending before the Gujarat Revenue Tribunal.

2. However, on 22nd September 1975, that First Appeal came up for final hearing and disposal before Mr. - Justice J. M. Sheth. Mr. Justice J. M. Sheth decided the appeal on merits because he was told that no appeal against the Mamlatdar's judgment had been preferred to the Collector or the Prant Officer. The learned single Judge, therefore, proceeded to decide the appeal on -the basis that the Mamlatdar's order had become final and conclusive. He also felt " that the order made by the Mamlatdar under the Tenancy Act was binding upon him because he was exercising the jurisdiction of the Civil Court. Since the Mamlatdar had held that the gift of the lands in question to the trust was bad in law, he allowed the appeal, set aside the orders made by the Courts below and held that the land in question had not vested in public trust Dadabhai" Trust - and that they continued to be the private property of the appellant.

3. It is that order which is challenged by the appellant in this Letters Patent Appeal.

4. Mrs. Mehta who appears on behalf of the appellant has raised before us the following contentions:

(i) The deed of settlement executed by the appellant on 31st December 1956, was not a gift within the meaning of Section 122 of the Transfer of Property Act. 1882

(ii) u/s 6 of The Indian Trust Act, 1882, there was no transfer of property but it was only a vesting declaration. Therefore also, the transaction in question did not

amount to gift-

(iii) Section 63 of the Tenancy - Act does not require the previous permission of the Collector in cases where the property is settled in trust.

(iv) Reference made to the Mamlatdar, Kamrej, by Mr. Justice T. U. Mehta by his interlocutory order is bad and without jurisdiction.

(v) The jurisdiction of the Charity Commissioner to decide whether particular properties are public trust proper-a ties or not is not excluded by Section 85 of the Tenancy Act and, therefore, he decided the question correctly and with jurisdiction.

5. The first two contentions raised by Mrs, Mehta can be conveniently dealt with together. Section 122 of the Transfer for Property Act, defines "Gift" in the following terms:

"Gift" is the transfer of certain existing- moveable or Immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee".

The rest of the provision of Section 122 is not material for the purpose of the present case. The deed of settlement executed by the appellant on 31st December 1956, shows that he created tilder that transaction a trust in respect of the lands in question and appointed himself as the sole trustee. He has also provided for succession to the trustee after his death. However, that is not material for the purpose of the present case

6. The question, which has, therefore, arisen is this: can there be a gift by a person to himself of his own property.

7. Mrs. Mehta has argued that for a particular transaction to become a gift, there must be two persons - the donor and the donee - and that" the gift must be accepted by donee or by some one on his behalf. In other words, according to her, it is inconceivable that there can be a gift by a person to himself. Ex facie, the argument, which Mrs. Mehta has raised, appears to be sound. The transactions in immovable property dealt with by the Transfer of Property Act consist of sales, mortgages, leases, exchanges and gifts.. We are not referring to transfers -of actionable claims provided in Chapter VIII of the Transfer of Property Act because it has no relevance to the present case.

8.. Now, on a close and meticulous analysis of the definition of "gift" given in Section 122, we find that in: order that a transaction becomes gift there must firstly be a transfer of an Immovable property voluntarily and without consideration. Therefore, (i) there must be a transferor, (ii) there must be a transferee and (iii) the transfer must be accepted by or on behalf of the donee. No difficulty arises when the owner of an Immovable property gifts it to another person. But, can we say that the owner of an Immovable property can gift the property to himself? We are unable to conceive of a case where there can be a

transfer of an Immovable property by a person to himself, except indeed in case of a trust, to which we are adverting shortly. As for example, there cannot be a sale of a property by its owner to himself, Similarly there cannot be mortgage of an Immovable property by owner or the mortgagor to himself. Similarly, there cannot be the lease of a property "from its owner to himself. Next, an owner of an Immovable property cannot exchange one property of his with another. Lastly, except in cases of trust there cannot be a gift of an Immovable property by an owner to himself. We have said so because transfers, connotes transfer of an Immovable property by an owner to some one else. -There cannot be a transfer to oneself because such a transfer is meaningless. A sale in one's own favour, a mortgage in one's own favour, a lease in one's own favour, an exchange in one's own favour and a gift in one's own favour do not bring about any change in the character or ownership of the property and therefore they are not transfers. Therefore, there is no transfer at all in the properties so dealt with and all rights therein remain where they are and do not undergo any transfer or transformation whatsoever even after a transaction of sale," mortgage, lease, gift or exchange has been executed by the owner in favour of himself. It is, therefore, clear that, in order that a transaction may amount to a gift, there must be a donor under the deed and there must be a donee. One person cannot be the donor and the donee. He cannot in his capacity as the donor gift an Immovable property to himself and accepts it as the donee. We say so because there is no transfer whatsoever in this case. We are mindful of the definition of "transfer" given in Section 5 of the Transfer of Property Act. We are dealing with it shortly. We are, however, clear in our minds that in order that a transaction may amount to a gift, there must be a transfer from one legal person to another legal person of an Immovable property and that there must be two legal persons - one of whom is the donor, another of whom is the donee and that the donee has accepted the gift or that it has been accepted on his behalf. Ex facie, therefore, when the appellant appointed himself as the sole trustee of the lands in question after settling them in trust for public benefit, he did not gift those properties firstly because there was no transfer of lands in question amounting to gift and also because there was no donee as he himself could not become the donor and- the donee and could not accept the gift on his own behalf.

9. Mr. Justice T. U, Mehta held that the transaction in question amounted to gift because of the provisions of Section 5 of the Transfer of Property Act. We now turn to Section 5 of the Transfer of Property Act in order to find out whether it conditions or modifies the impact of Section 122 and, if it so does, to what extent.

10. Section 5 of the Transfer of Property Act reads as follows:

"In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons, and "to transfer property" is to perform such act".

It is not necessary to refer to paragraph 2 of Section 5 because it is not relevant

for the purpose of the present case. There are three classes of persons which Section 5 contemplates to whom a property can be transferred: (i) one or more other living persons to whom a property can be transferred, (ii) a person can transfer an Immovable property to himself, and (iii) a person can transfer an Immovable property to himself and one or more living persons. The expression "living person" has been defined in second paragraph of Section 5 so as to include "a company or association or body of individuals, whether incorporated or not". In the instant case, assuming that the deed of settlement executed by the appellant amounted to a transfer, he transferred the lands in question to himself. Ex facie, therefore, the transaction in question appears to be satisfying the provisions of Section 5 of the Transfer of Property Act because it was a transfer of the property by the appellant to himself. Before Section 5 was amended in 1929, an Immovable property could be transferred by a person "to one or more other living persons or to himself and one or more other living persons. He could not transfer it to himself. It was by the Amending Act 20 of 1929 that transfer of an Immovable property to oneself was provided by Section 5. What is this transfer to oneself and how does it reflect upon Section 122? When a person owns an Immovable property, he is both its legal owner as well as its beneficial owner. When he sells it to another person, he transfers both the ownerships to the vendee. When he mortgages an Immovable property to another person, he transfers all his rights of legal ownership and beneficial ownership therein to the mortgagee except the equity of redemption, which he retains. When a person leases out his Immovable property to another person, he transfers all his rights - legal and beneficial - to the lessee, except the right to recover rent and the right of re-entry, which he " reserves for himself. It is difficult to imagine a person exchanging in his own favour one property of his for another property of his. Such a situation in the very nature of things is inconceivable. When a person gifts a property to another - not by way of trust - he transfers both - the legal and the beneficial ownership therein -to the donee. Therefore, ordinarily, "transfer" of an Immovable property to oneself will be an exercise in futility in as much as he would not transfer anything nor" he would transfer any rights of his - legal or beneficial - to a third party. It is impossible for us to conceive that a person can be a vendor and a vendee, a mortgagor and a mortgagee, a lessor and a lessee or a donor and a donee. Therefore, it is only in case of a trust that the concept of "transfer" to oneself comes into play, particularly when the settlor appoints himself as the sole trustee. When a settlor creates a "trust" by settling some of his properties and appoints himself as the sole trustee, he bifurcates-- his dual ownership, retains in himself the legal ownership of the and transfers beneficial or equitable ownership to those for whose benefit he has created the trust. In other words, in case of a trust, where the settlor appoints himself the sole trustee, he, in his capacity as the settlor, transfers the legal ownership of the trust property to himself in his capacity as the sole trustee and transfers equitable or beneficial ownership to the beneficiaries of the trust.

11. The next question, which we are, therefore, required to answer is: Does this

concept of transfer to himself reflect upon the gift as defined by Section 122 of the Transfer of Property Act?

12. In other words, if a person, in his capacity as the owner, transfers an Immovable property to himself in his capacity as the sole trustee, does he make a gift to his beneficiaries" of that property within the meaning of Section 122 of the Transfer of Property Act?

13. If the forms of transfer of Immovable property are only those, which are specified in the Transfer of Property Act, the question must be answered in the affirmative. If there are other forms of transfer, then the question need not necessarily be answered accordingly. The other form of transfer, which we are able to conceive of, is the creation of a trust. When a person creates a trust, is there necessarily a "gift" of his property to a "trust" as contemplated by Section 122 of the Transfer of Property Act?

14. In order to examine this concept, is necessary to turn to Section 6 of the Indian Trusts" Act, 1882. It specifies the manner in which a trust can be created. It provides as under:

"Subject to the provisions of Section a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee".

Section 6 of the Trusts Act, in terms, contemplates the "transfer" of "the trust property" except where--the author of the trust or the settlor is himself the trustee. Therefore, within the meaning of Sec., 6 of the Trusts Act, 1882, when the settlor or the author of the trust appoints himself as the sole trustee, there is no transfer. If the transaction amounts to a gift, there must be a "transfer". But, every transfer of a property to himself does not create a "gift". Creation of a trust and transfer to it of the properties by a person is one more mode of transferring the property, independently of and de hors the "gift". We say so because the gift requires the donor and the donee and acceptance by and on behalf of the donee. In addition, the donee must be an individual or an ascertainable class of persons. When a person creates a trust for the benefit of the members of the public, there is no ascertainable class of donees.

15. In *Pallayya and Others and Mallayya Vs. Ramavadhanulu*, , it has been laid down upon the construction of Section 122 of the Transfer of Property Act that the word "donee" refers to an ascertained or ascertainable person or persons by whom or on whose behalf the gift can be accepted or refused and has no application to an unascertained number of persons such as the public. This decision was rendered in 1903 when Section 5 of the Transfer of Property Act was in its unamended form in force. In our opinion, the principle laid down by the Madras High Court in that decision is still applicable to Section 122 of the

Transfer of Property Act because consequent upon amendment to Section 5, Section 122 has not been amended. We think that Section 5 was amended not with the object of casting its reflection upon the forms of transfer of Immovable property specified in the Transfer of Property Act but with the object of providing for cases in which a person created a trust and appointed himself as the sole trustee. It was in order to provide for bifurcation of legal ownership and beneficial ownership in case of such a trust that Section 5 was amended in 1929.

16. In *Himansu Kumar Roy Chowdhury Vs. Moulvi Hasem Ali Khan and Others*, , Section 6 of the Trusts Act came up for construction before a Division Bench of that Court. The learned Judges have expressed their view in the following terms:

"Under Section 6 of the Act subject to the provisions of Section 5 a trust is created when the author of the trust indicates with reasonable certainty by any words or acts: (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust property to the trustee. Section 6 therefore contemplates that the author of the trust should transfer the trust property. The word "transfer" is to be found also in the Transfer of Property Act which was passed "in the same year. The word "transfer" has been used in a wider sense. It includes sales, mortgages, leases, gifts, but it also includes vesting declarations. In the case of moveable property, the ownership of the property is to be transferred. In the case of Immovable property only a declaration is necessary."

Therefore, in the view of the Calcutta High Court, transfer contemplated by Section 6 of the Trusts Act not only includes a sale, mortgage, lease, exchange and gift but also includes a vesting declaration. Therefore, what a person does by creating a trust in respect of his Immovable properties and appointing himself as the sole trustee of the trust is to make a vesting declaration and not to make a gift of the property. It is this vesting declaration, which invests him with the legal ownership of the property, divests him of the beneficial ownership and transfers the latter to the beneficiaries of the trust.

17. Therefore, when the appellant created *Dadabhai Trust* and appointed himself as the sole trustee, what he did was to make a vesting declaration and not to make a gift. Since he appointed himself as the sole trustee, he did not bring about the transfer of the property as contemplated by Section 122 of the Transfer of Property Act but produced a situation contemplated by Section 6 of the Trusts Act. If we take a different view and hold- that such a transfer creates both a gift and a trust, then, we shall be creating a conflict between Section 122 of the Transfer of Property Act and Section 6 of the Trusts Act. We say so because, in our opinion, whereas Section 122 in terms contemplates the transfer of that property to the donee and acceptance thereof by and on behalf of the donee, Section 6 of the Trusts Act does not contemplate the transfer of property to oneself. That, in our opinion, is the effect of the expression which appears in brackets in Section 6 of the Trusts Act. In our opinion, therefore, what the

appellant did was to make a vesting declaration by creating Dadabhai Trust and to appoint himself as the sole trustee and did not make a "gift" of the property. Therefore, the transaction in question did not amount to "gift". With respect, therefore, we are unable to uphold the conclusion recorded by Mr. Justice T. U. Mehta in his interlocutory judgment in this case and reported in *Naranbhai Dahyabhai Patel v. Suleman Isapji Dadabhai* (1975) 16 GuJ LR 289. The finding recorded by him is, therefore, set aside.

18. Turning to the third and the fourth contentions raised by Mrs. Mehta, it is necessary to find out the transactions to which the provisions of Section 63 of the Tenancy Act apply. Subsection (1) of Section 63 specifies sales, gifts, exchanges, leases and mortgages of any land or interest therein. It also specifies agreements made in writing for the sale, gift, exchange, lease or mortgage of an agricultural land and interest therein and provides that none of these transactions shall be valid, inter alia, if the permission of the Collector or an officer authorised by the State Government in that behalf has not been obtained for it. The first proviso to sub-section (1) further provides that the Collector may grant permission on such conditions as may be prescribed. It is not necessary for us to refer to the second proviso to sub-section (1), because it is not relevant for the purpose of the present case. Sub-sections (2) and (3) of Section 63 carve out only exceptions to the rule which has been laid down by the Legislature in sub-section (1) of Section 63. It is, therefore, clear that the provisions of Section 63 do not apply to a trust created by a person in respect of his own Immovable properties where he "has appointed himself as the sole trustee. All that the appellant did in the instant case was to make a vesting declaration without bringing about the transfer of his Immovable property within the meaning of Section 122 of the Transfer of Property Act. Therefore, no question arose under the provisions of the Tenancy Act, which was required to be settled, decided or dealt with by the Marnlatdar or the Tribunal. Therefore, no reference could have been made by Mr. Justice T. U. Mehta u/s 85A of the Tenancy Act of the issue to the Mamlatdar, Kamrej. In our opinion, therefore, the reference of the issue, which he made, was without jurisdiction. The order of reference made by him is, therefore, set aside. This is the answer to the third and the fourth contention, which Mrs. Mehta has raised before us.

19. The last contention which she has raised is that the jurisdiction of the Charity Commissioner to find out whether the properties in question were the public trust properties or not, was not excluded by Section 85 of the Tenancy Act and that, therefore, also, the reference made by Mr. Justice T. U. Mehta to the Mamlatdar was bad in law. In view of the findings, which we have recorded on the first contention, it is not necessary for us to express any opinion on this question.

20. Before we part with this case, we may refer to the decision of the Supreme Court in *Tulsidas Kilachand Vs. The Commissioner of Income Tax, Bombay City I*, . it has been observed by the Supreme Court in paragraphs 11 and 12 of the report that under Sections 5 and 6 of the Indian Trusts Act, if the declarer of the

trust is himself the trustee also, there is no need that he must transfer the property to himself as trustee; but the law implies that such a transfer has been made by him, and no overt act except a declaration of trust is necessary. The capacity of the declarer of trust and his capacity as trustee are different, and after the declaration of trust; he holds the assets as the trustee. Under the Transfer of Property Act, there can be a transfer by a person to himself or to himself and another person or persons. In the context of Section 16 (3) (b) of the Income Tax Act, 1922, the Supreme Court has observed in that decision that change of capacity makes the declarer answer the description "any person". In that case, Tulsidas Kilachand created a trust and settled his shares upon himself as the trustee. In that context, the Supreme Court observed that the deed of settlement executed by Tulsidas Kilachand must be regarded as involving a transfer even though the same individual in his capacity as the transferor and in his capacity as the trustee was the same. The observations made by the Supreme Court lend support to the view which we have expressed on the concept (if transfer to himself incorporated in Section 5 of the Transfer of Property Act.

21. It has, however, been argued on behalf of the respondents that in view of the observations made by the Supreme Court that when a person himself is the transferor and the trustee, he means two distinct personalities and that, therefore, "there is a transfer of property by the transferor in that capacity of his to the trustee which is another capacity of his. Therefore, it has "been argued on behalf of the respondents that the transaction brought about by the appellant on 31st December, 1951 must be regarded as a gift. The Supreme Court- has indeed clearly distinguished between two capacities of the said individual but has not gone to the extent of saying that the transfer of property in one capacity to himself in another capacity amounted to a gift. The learned advocates appearing in the case on behalf of the respondents would like us to take a step further and hold that that is the necessary corollary of the decision of the Supreme Court. We are unable to uphold the argument raised in that behalf because to take the view which has been canvassed on behalf: of the respondents is to nullify a part of the provision, of Section 6 of the Trusts Act while unduly enlarging the scope of Section 122 of the Transfer of Property Act.

22. The next decision to which we may refer is in AIR 1931 1 (Privy Council) . It was a case in which the Privy Council was concerned with the application of Section 5 of the Transfer of Property Act as it was before it was amended. It has been observed in that decision that the Indian law does not recognize legal and equitable estates and that therefore there can be but one "owner" and where the property is vested in a trustee the "owner" must be the trustee. It has been further observed that the trustee is the owner of the trust property, the right of the beneficiary -being mi a proper case to call upon the trustee to convey to him. These observations made by the Privy Council cannot be applied to the facts of the instant case because we are concerned with amended Section 5 of the Transfer of Property Act which provides for the concept of "transfer to himself

projecting its long arms to Section 6 of the Trusts Act.

23. Reference has been made to the decision of this Court in Village Panchayat Jaspur v. State of Gujarat (1970) 11 Guj LR 695. In that case, a Division Bench of this Court has construed the expression "vest" as used in S. 96 of the Gujarat Panchayats; Act, 1961. It has been observed that the word "vest" has a variety of significations depending on the context in which it is used. It may mean transfer of proprietary interest in the land or it may mean transfer of the right to possession of the land or the right to obtain and deal with the land. The principle, which this Court has laid down in that behalf is a very general principle to which no exception can be taken. We cannot, however, apply the meaning of the word "vest" as used in Section 96 of the Gujarat Panchayats Act, 1961, to the facts of the instant case, because, to do so is to violate the principle laid down in that very decision. A word has got to be construed in light of and in context of the other words with which it has been used. Therefore, reference to that decision of this Court does not carry the case further.

24. Mr. R. N. Shah has, however, tried to argue that Section 88E of the Tenancy Act abolishes all rights of the appellant and confers upon respondents 1 and 2 the ownership of the lands in question. That is not the question, which was canvassed before the Courts below. We are, therefore, unable to express any opinion on this question." If respondents 1 and 2 have any rights resulting from Section 88E of the Tenancy, Act, it will be open to them to agitate them in appropriate proceedings before a competent authority.

25. In light of the conclusions, which we have recorded, we are unable to uphold the order made by the learned single Judge in First Appeal No. 347 of 1968

26. The appeal is, therefore, allowed; the impugned order is set aside and the order made by the District Court, Surat, is restored. There shall be no order as to costs of this appeal. The cost of the Chanty Commissioner shall come out of the estate.

27. Mr. R. N. Shah who appears on behalf of respondents 1 and 2 prays for a certificate of fitness under Article 133(1) of the Constitution to appeal against this decision to the Supreme Court. In our opinion, the question, which we have decided, is a substantial question of law. It is a question, which is required to be answered upon the interpretation of three sections of two different Acts. We, therefore, grant respondents 1 and 2 certificate of fitness under Article 133(1) Of the Constitution.

28. Appeal allowed.