

(1972) 03 MAD CK 0036

In the Madras High Court

Case No : Second Appeal No. 1754 of 1969

Thakkadi Syed Mohamed

APPELLANT

Vs

Ahmed Fathumml and Others

RESPONDENT

Date of Decision : 09-03-1972

Acts Referred:

Contract Act, 1872 — Section 16
Evidence Act, 1872 — Section 111

Citation : AIR 1973 Mad 302

Hon'ble Judges : V. Ramaswami, J

Bench : Single Bench

Judgement

1. The first defendant is the appellant. The suit was filed by the first respondent herein for partition, separate possession and for accounts. The first schedule and second schedule to the plaint are immovable properties and the third and the fourth schedules are moveable properties. The plaintiff claimed 38/240th share in the first and fourth schedules, 53/1440th share in the second schedule and one-fifth share in the third schedule properties. The plaintiff is the sister of the first and second defendants. They are the children of one Thakkadi Ahmad Mohideen. According to the plaint, the first and fourth schedule properties belonged to Thakkadi Ahmed Mohideen. After his death, the plaintiff and first and second defendants inherited the same and were in joint and constructive possession. The deceased Thakkadi Ahmed Mohideen left also one Thakkadi Mohammed Abubacker and Asini Beevi as his heirs, along with the plaintiff and the second defendant. Thakkadi Mohameed Abubacker died leaving his only son, the third defendant who succeeded to his share. Though the fourth defendant is the son of another brother of the plaintiff, since the brother pre-deceased the father, the fourth defendant was not entitled to any share. Pending the suit the fourth defendant died and defendant 5 and 6 are his heirs. Thus, on the admitted facts, the plaintiff, the first defendant and the third defendant would have been entitled to a share in the properties of Thakkadi Ahmed Mohideen. As already stated, the first and fourth schedule properties are the properties left by the said

Thakkadi Ahmed Mohideen. The plaintiff's mother inherited the second schedule properties that belonged to her father and she was in possession with the other co-owners. The third schedule is said to be the moveable property inherited by the plaintiff's mother. Since Asial Beevi is dead, the plaintiff is entitled to 53-1440th share in the second schedule in the properties and one-fifth share in the third schedule properties. These facts in the third schedule properties. These facts are admitted. While so on 14-6-1961 the plaintiff executed a document which is styled as gift settlement deed of her share in the immovable properties set out in schedules 1 and 2 to the plaint. It was the case of the plaintiff that this deed was obtained from her under undue influence and coercion and that in any case it was not a valid gift, as the requirements of a valid gift are not satisfied. She also pleaded that by way of abundant caution she had also executed a cancellation of that document; but such a cancellation document has not been produced in this case.

2. The trial Court on a consideration of the oral and documentary evidence came to the conclusion that Ex. B-3 was a gift deed executed by the plaintiff, that it was true, valid and binding on her and that it was not executed under undue influence and coercion. The trial Court also found that the plaintiff has not proved the existence of the movables mentioned in the third and fourth schedules to the plaint. In view of the finding that the gift deed is valid, the suit was dismissed.

3. On appeal by the plaintiff, the learned Subordinate Judge of Tirunelveli, accepted the finding of the trial court that the plaintiff has not proved the existence of the third and fourth schedule movables, but different from the finding of the trial court held that Ex. B-3 was not a valid document, that it must have been obtained under undue influence and coercion and that in any case the conditions for a valid gift are not satisfied and that, therefore, there was no valid gift of the share of the plaintiff in favor of defendants 1 to 3. The first defendant has preferred this second appeal.

4. The first ground on which the Lower Appellate Court held that the gift was not valid was that the gift deed was ab initio void for want of the three essential ingredients provided in the Mohammedan Law, namely, offer acceptance and delivery of property. I must state that the reasonings of the Lower Appellate Court on this part of the case are incorrect and unsustainable. Merely on the basis that the defendants pleaded the document could also be construed as a release deed, the Lower Appellate Court seems to think that there was no offer or acceptance as a gift. The plea of the defendants was that there was a valid gift and in any case, the strict conditions of a valid gift need not be insisted, as this will also amount to a case of release of the undivided share of the plaintiff in favor of the other sharers. This could not by any means be construed as saying that there was no offer or acceptance as a gift. On the ground that there was no mutation or change in the registry of the properties, the Lower Appellate Court has held that there was no delivery of property. It should be remembered that the properties will stand in the name of Thakkadi Ahmed Mohideen, the father of

the plaintiff and the defendants. After the death of Thakkadi Ahmed Mohideen, it does not appear that the registry was changed to the name of his legal representatives. There is no registry of the properties in the name of the plaintiff or plaintiff with others. In any case such a registry has not been produced. The Lower Appellate Court assumes that the properties stood in the name of the plaintiff and that had not been transferred to the name of the defendants. On the other hand, the defendants have produced receipts for payment of kist in respect of the properties. Further, delivery of possession for a valid gift is, such possession as the property is capable of. In the case of a gift of an undivided share in immovable property where the donee is already in possession of the property, there was no further need to make any further act or taking of possession. From the moment the gift deed was executed, the donee shall be deemed to be in possession of the entire properties to the exclusion of the donor. There is no evidence that subsequent to the gift, the plaintiff was in possession of the properties along with the donees. She has not adduced any evidence to show that she was partaking the income or was in possession. The Lower Appellate Court, on the basis that the plaintiff was permitted to store bricks for construction of her new building in one of the first items, found that possession has not been handed over to the donees. It is unreasonable to think that when a brother permits his sister to store certain bricks intended for the construction of a new house of the plaintiff, that she must be deemed to be in possession of that property in which she was permitted to store the bricks. Though the Lower Appellate Court has stated that the lands were jointly enjoyed after the gift, there is absolutely no evidence to show that it was enjoyed by the plaintiff subsequent to her gift. Yet another reason given by the Lower Appellate Court in support of its finding that the plaintiff was in joint possession and did not hand over possession is that the plaintiff had paid court-fee under Section 37(1) of the Madras Court-fees and Suits Valuation Act as a person in joint possession and not u/s 37(2) of the Act. The Lower Appellate Court forgets that the court-fee is payable on the pleadings in the plaint and not with reference to any real fact or the defendants' contention. Merely because she pleaded that she was in joint possession and paid court-fee under Sec(37)(1) of the Act, that will not show that the plaintiff was in joint possession and enjoyment of the properties and the defendants did not take possession in pursuance of the gift. The other reason given by the Lower Appellate Court is that the gift is of a fractional share and, therefore, it is not valid. The learned counsel for the respondent himself would not support this reasoning and no authority has been cited to show as to how the gift of an undivided share in favor of the other undivided sharers is not valid. I have, therefore, no doubt in holding that the finding of the lower appellate Court that the gift is not valid as not satisfying the conditions required under the Mohammedan law is not supportable on evidence or on law and, therefore, I reverse that finding.

5. But the learned counsel for the respondents strenuously contended that the document was executed under undue influence and coercion and that, therefore,

it is not valid. The learned counsel further submitted that the burden is on the donee to prove that the gift was the result of a free exercise of independent will and there is a presumption of undue influence and coercion on the facts and circumstances of this case. Section 16 of the Indian Contract Act defines "undue influence" as follows:

"1. A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

2. In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another,

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other, or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.

(c) where a person who is in a position to dominate the will of another, enters into a contract with him and the transaction appears, on the face of it or on the evidence adduced to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provision of Section 111 of the Indian Evidence Act, 1872."

Unless it is shown here that the donee was in a position to dominate the will of the donor and used that position to obtain an unfair advantage, it cannot be held that the gift was vitiated. The learned counsel relying on the decisions reported in *M.A. Abdul Malick Saheb Vs. T.P. Muhammad Yousuf Sahib and Others*, and *Mannankutti Ammal v. Vaiyapuri Udayar*, (1961) 2 MLJ 367 argued that as the relationship between the plaintiff and the defendants are sister and brother, a fiduciary relationship arises and, therefore, there was presumption of undue influence and the burden is on the donee to rebut this presumption. The decision reported in *M.A. Abdul Malick Saheb Vs. T.P. Muhammad Yousuf Sahib and Others*, is a case of a gift by the son in favor of the mother. The Division Bench has held that the transactions in the nature of a bounty from a child to parent are in equity looked upon with caution and it is the duty of the donee to prove that the gift was the result of free exercise of independent will and the court should be satisfied that the donor was acting independently without influence from the donee. The mere existence of the fiduciary relationship of parent and child between the donee and the donor raises a presumption of undue influence and it is for the donee to rebut the presumption. The decision reported in (1961) 2 MLJ 367 is a case of a gift by the younger sister in favor of the elder sister. The

learned Judge held that normally it would be for the person who pleads undue influence to establish that fact, but where confidential relations exist between the parties, those standing in such relations are not entitled to hold benefit unless they can show that the party who has conferred the benefit had competent and independent advice. On the facts and circumstances of that case, this court agreeing with the courts below held that gifts was not valid. The relationship in the present case is that of a sister executing in favor of the brothers. But certain other factors will have also to be borne in mind in considering the question whether any presumption arises. The plaintiff donor was residing in a separate house and not along with the donees. She is a married woman living with her husband and the document was attested by her husband. The properties are the family properties owned by the father of the plaintiff and defendants 1 and 2. The plaintiff's share was only a fractional share on the total estate. It is also in evidence that she was married long ago and at the time of marriage she was provided with about 70 sovereigns of gold. Having regard to these circumstances, in my opinion, no presumption of undue influence would arise in this case and the decisions relied on by the learned counsel for the respondent are not applicable. As already stated, the document was attested by the plaintiff's husband. But he has not been examined by the plaintiff. The defendants had examined one of the attestors to the document apart from examining the first defendant. They have spoken to the execution and attestation of the document. There is no other evidence to show that the document is vitiated by any undue influence or coercion. The mere existence of relationship alone is relied on by the learned counsel for the respondent in support of his plea that the document was executed by undue influence, which I am clearly of opinion is not enough.

6. I am satisfied that the finding of the lower appellate Court that the document was executed by undue influence is not supported by evidence and the finding of the trial Court that it was not executed by undue influence or coercion is correct.

7. For the foregoing reasons, the second appeal is allowed, the judgment and decree of the lower appellate Court are set aside and the judgment and decree of the trial Court are restored with costs throughout.

8. Appeal allowed.