

1903

MATHURA  
DAS  
v.  
JAMNA  
PRASAD.

have been open to objection. But he claimed, and still claims, to have acquired the whole of the property for himself. On application of the judgment-debtor the sale was set aside by the Collector, on the ground of irregularities which, in the Collector's opinion, were the cause of the property having been sold for an inadequate price. The plaintiff Mathura Das had the right of appeal from the order of the Collector to the Commissioner. Of that right he did not choose to avail himself. He brought the present suit against the judgment-debtor and against his co-decree-holder asking for the relief which would, if granted, have the result of making him the sole owner of the property in dispute. In my opinion, on the facts stated, the plaintiff is clearly not entitled to any such relief. On this short ground I am of opinion that the appeal should be dismissed.

ORDER OF THE COURT:—The appeal is dismissed with two sets of costs.

*Appeal dismissed.*

1903

February 16.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkill.*

PHUL CHAND (DEPENDANT) v. LAKKHU AND OTHERS (PLAINTIFFS).\*

*Act No. IV of 1882 (Transfer of Property Act), section 123—Hindu law—Gift—Transfer of possession not necessary when gift of immovable property registered—Act No. I of 1872 (Indian Evidence Act), section 111—Gift to an agent—Undue influence—Mental capacity of donor.*

*Held* that, assuming that delivery of possession was essential under the Hindu law to complete a gift of immovable property, that law has been abrogated by section 123 of the Transfer of Property Act in cases where the instrument of gift has to be registered. *Dharmodas Das v. Nistarini Dasi* (1) followed.

*Held* also that there is nothing to prevent an agent from being the object of the bounty of his principal. If an agent can clearly show that a gift was made in his favour by a donor who was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing, the gift will be upheld.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal*, for the respondents.

STANLEY C. J., and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Aligarh, setting aside a

\* First Appeal No. 306 of 1900 from a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 27th of June 1900.

(1) (1887) I. L. R., 14 Calc., 446.

1903

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 PHUL CHAND  
 v.  
 LAKKHU.

deed of gift which was executed by one of the plaintiffs Kalyan Singh in favour of his son-in-law, the defendant, Phul Chand. The plaintiffs are Kalyan Singh, two of his daughters, his wife, and the widow of a son who had pre-deceased him. Kalyan Singh, who has died since the institution of the suit, was the owner of some zamindari property which was self-acquired. He also carried on a money-lending business. His son-in-law Phul Chand lived with him for seven or eight years prior to the execution of the deed of gift, the subject-matter of the suit, and helped him in carrying on his business. Kalyan Singh had, it appears from the evidence, a stroke of paralysis over two years before the deed of gift was executed, and in consequence was rendered more or less incapable of conducting his business as theretofore. On the 2nd of April 1898, he executed a general power of attorney in favour of Phul Chand, in which it is stated that suits were pending between himself and others, which he was unable to attend to owing to his being engaged in his personal business, *i. e.*, his money-lending business. The deed of gift is dated the 16th of August, 1898. In it Kalyan Singh states that he is old and life is uncertain, therefore he wished to make arrangements in respect of his property, so that there might be no dispute after him; that he had no son, but had three daughters who were comfortable in their respective homes; that he had great affection for his son-in-law, Phul Chand, to whom his second daughter was married, and that he (Phul Chand) had also attended on him a good deal; that he was very much pleased with him (Phul Chand), and considered him competent in every way and hoped he would not waste his property, but, on the contrary, would take care of it so that his name might be perpetuated. By the document he transfers to Phul Chand a number of small shares in different villages, and also his interest in certain mortgages, the estimated value of the property so disposed of being Rs. 6,000. Of this Rs. 3,000 represented mortgage debts. He reserved for himself the holding, consisting of 31 bighas 19 biswas which he held as an occupancy tenant, and also a dwelling-house. He also retained his money-lending business and the capital employed in it. According to the evidence Kalyan

1903

PHUL CHAND  
v.  
LAKKHU.

Singh paid Rs. 130 yearly as income-tax. This sum would represent the tax upon trading income of about Rs. 5,000 a year. Under the circumstances the gift does not appear to be unnatural. The donor had no son. He felt, no doubt, that owing to his age and infirmity his life would not be long spared, and he was, as he says, attached to his son-in-law who had assisted him in business. It was not unnatural, therefore, that he should have desired to make a substantial provision for him. The deed in question was drawn up and executed at Aligarh, to which place Kalyan Singh had gone, according to the evidence, for the purpose not merely of having this deed executed, but also of attending at the hearing of a case in which he was the plaintiff, and it was there drawn up, executed and registered. When Kalyan Singh returned from Aligarh, the female members of his household, who had evidently taken umbrage at the preference which was shown to Phul Chand, induced him to join with them in the present suit for the purpose of having the deed set aside, and accordingly the suit out of which this appeal has arisen, was launched, and the deed impeached on the ground that the donor was incapable of understanding the transaction, and that the gift was procured by Phul Chand by the exercise of undue influence and pressure. The Subordinate Judge yielded to the contention of the plaintiffs and set aside the deed.

There has been a good deal of discussion and argument before us in regard to the obligation of a party who sets up a deed of gift made in his favour to establish the *bona fides* of the transaction. Let us see what the evidence is which was adduced in support of this voluntary deed. The plaintiffs adopted the objectionable practice which prevails in these Provinces of examining the defendant as their witness. Phul Chand, the defendant, was accordingly one of the first witnesses who was examined on behalf of the plaintiffs. This procedure appears to us to be highly inconvenient, and it has been carried to great lengths in these Provinces. Phul Chand in his evidence states that on several occasions Kalyan Singh had stated to him that he would make a gift of the property to him. He gives an account of what took place at

1903

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PHUL CHAND  
v.  
LAKKHU.

Aligarh when the deed was prepared. They had gone there, he said, not merely for the purpose of having the deed executed, but also for the hearing of the case in which one Ganga Ram was a defendant. That case was, as a matter of fact, adjourned on the 18th of August, the day on which the deed was registered. The draft of the deed, he says, was prepared by Ulfat Rai, a pleader, who gave the draft, when prepared, to his clerk to have a fair copy of it made. The draft was made on the 16th, a fair copy was made on the 17th, and the deed was registered on the 18th. He says that Kalyan Singh executed the deed of his own accord, and that no pressure was put upon him. He also in his evidence says that property worth Rs. 20,000, including the capital employed in the money-lending business, was left undisposed of by Kalyan Singh. He also says that Kalyan Singh paid Rs. 130 for income-tax; this has not been controverted. The pleader Ulfat Rai, who prepared the draft, was examined on commission. He testified to the effect that Kalyan Singh was quite intelligent and "in his senses," as he describes it, when he gave instructions for the draft, but that he faltered in his speech. He says that Kalyan Singh and Phul Chand were present at the time, and he made the draft at the direction of both of them; that Phul Chand gave the details of the property, and Kalyan Singh admitted the correctness of it; that after the draft had been prepared he read it out to them. He says that in his opinion Kalyan Singh could understand the nature of the transaction, and that he gave reasonable answers, but that he spoke falteringly. Two other persons were present, but he could not say whether they were relations or not of Kalyan Singh. This witness says that Kalyan Singh assigned as a reason for making the gift that he was pleased with Phul Chand and wanted to make a gift in his favour. It has been commented upon by the learned counsel for the respondents that it was strange on the part of Kalyan Singh that he should go to Ulfat Rai for the purpose of having this draft prepared, Ulfat Rai never having done any work before for him. One would no doubt expect that he would have placed the matter in the hands of a pleader who had acted for him before. The clerk

1903

PHUL CHAND  
v.  
LAKKHU.

of Ulfat Rai, Kanhaia Lal, states in his evidence that he made a fair copy of the draft and that he read it out to Kalyan Singh; that Kalyan Singh signed the deed of his own free will; that no pressure was put upon him, and that he was perfectly intelligent and understood what he was doing, so far as he could see. He also says that he read out the document to Kalyan Singh at Kalyan's request, and that Kalyan paid him a fee of Rs. 4 for making a fair copy of the draft. He also says that Kalyan Singh himself paid Rs. 10 to Ulfat Rai for the preparation of the draft. If this evidence be reliable, it is difficult to see that any pressure was put upon Kalyan Singh to execute the deed in question. In addition, however, to these witnesses, Khwaja Muhammad Ismail, a pleader, who was an old acquaintance of Kalyan Singh, was asked by him to attend at the house of the District Registrar to identify him for the purpose of registration. He says that at this time Kalyan Singh appeared to be perfectly sensible. He says, "his senses were all right". Further than being an identifying witness, he was no party to the preparation or execution of the deed and was not aware of its contents. Paras Ram, who was an attesting witness to the document, says that he witnessed it at the request of Kalyan Singh, and that when he asked Kalyan Singh what the document was he replied that it was a deed of gift in favour of his son-in-law. Witness says that before he witnessed the deed he read out the whole of it in a loud voice and that Kalyan Singh must have heard him. This evidence shows that the deed was not executed without deliberation on the part of Kalyan Singh. A somewhat important witness is the patwari of the village in which Kalyan Singh resides, namely, Prasadi Lal. He accompanied Kalyan Singh to Aligarh on the occasion when the deed was executed, and went with him to the house of Ulfat Rai, and was present when instructions were given to the pleader for the preparation of the draft. He says that when they reached the house of Ulfat Rai, Kalyan Singh gave instructions for the preparation of the draft; that Kalyan Singh had the details of the property in Hindi with him, with the exception of one village, and that Kalyan read out the lists of property to Ulfat Rai; those lists he says were brought by Kalyan Singh

1903

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PHUL CHAND  
v.  
LAKKHU.

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and not by Phul Chand. He also says that Kalyan himself paid the fee to the pleader for the preparation of the draft. This seems to us very strong evidence in support of the *bona fides* of the transaction. Not merely was an independent pleader employed to prepare the draft, but a pleader who was an old acquaintance of Kalyan Singh was requested by Kalyan Singh to accompany him to the house of the District Registrar and identify him for the purpose of registration. Kalyan Singh came from his home prepared with all the particulars of the property to be given to his son-in-law, and so far as we can judge from all the facts he was perfectly capable at the time of understanding what he was doing and had come with a free and unfettered intention of making a gift to his son-in-law. As against this body of evidence we have the evidence of a few witnesses, whose evidence, intended to show that Kalyan Singh was incapable of executing a deed of gift at the time, was worthless in the face of the evidence that has been given on behalf of the defendant. It is clear that Kalyan Singh before the Subordinate Judge feigned to be more seriously affected, both physically and mentally than he really was. The learned Subordinate Judge makes the following comment on this in the course of recording his evidence:—"The witness takes a long time to answer a question which is prejudicial to him, and a question which is favourable to him is answered easily." From his evidence it appears that up to the time it was given he was actually managing his money-lending business, which disproves the allegation of his own witnesses that he was then mentally incapable of understanding money transactions. In his evidence Kalyan Singh patently exaggerated his illness and endeavoured at first to make out that he had no knowledge of the deed of gift but was forced to sign it by Phul Chand. The other witnesses, including the plaintiff Musammat Makundi, are clearly unreliable.

The law as regards voluntary gifts is not doubtful. A man may make a deed of gift of his property, if he so pleases; but when such a gift is made, it must satisfactorily appear that the donor knew what he was doing and understood the contents of the instrument and its effect, and also that undue influence or pressure was not exercised upon him by the party

1908

PHUL CHAND  
v.  
LAKSHU.

in whose favour the gift is made. If the person in whose favour the gift is executed stood at the time in a position of active confidence to the donor, the law throws the burden of proving the good faith of the transaction on the donee (see section 111 of the Indian Evidence Act). In this case Phul Chand did stand in a position of active confidence to Kalyan Singh at the date of the execution of the deed of gift, as he was at that time managing some of his business under the power of attorney, but that he had any influence over Kalyan Singh there is no evidence to indicate. There is nothing to prevent an agent from being the object of the bounty of his principal. If an agent can clearly show that a gift was made in his favour by a donor who was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing, the gift will be upheld. The fact that Kalyan Singh at the date of the gift was advanced in years, and that he had had a paralytic seizure have been pressed upon our attention. There is nothing, however, in the evidence to lead us to suppose that he was so physically or mentally affected as not to be able to transact business, and exercise a free and unfettered judgment in the management of his property. On the contrary, it shows that he was capable of transacting, and did transact his money-lending business at the time of the execution of the deed, and up to the time when he was examined at the hearing of this case. The evidence also shows that he gave instructions for the preparation of the deed to the pleader Ulfat Rai, and had it registered himself. We have no hesitation in coming to the conclusion that Kalyan Singh was competent to deliberate upon and weigh the nature and consequences of the deed of gift, and that he understood it fully, and in making it exercised a free and unfettered judgment. It was only when he was overborne by the tears and importunities of his women folk that he submitted to the humiliation of joining in the institution of the present suit, and to the subsequent humiliation of making the personal exhibition of himself in Court which elicited the unfavourable comments of the Subordinate Judge, in order to undo what was on his part a deliberate act. The Subordinate Judge, in our opinion, took an erroneous view of the case. It would seem

from his judgment that he regarded it as inequitable on the part of Kalyan Singh to confer such large benefits on one member of the family to the disappointment of the others, and that an old man who was not strong in physical health was not, in the eyes of a Court of Equity, justified in making an unequal division of his property. He did not, however, in his judgment find that Kalyan Singh was incapable of executing the deed, and it seems to us that the learned Judge did not consider that he was legally incapable of doing so. As has been said, where there is legal capacity there can be no such thing as equitable incapacity. This does not appear to be the view held by the learned Subordinate Judge. On the merits, therefore, we hold that he was in error, and that the deed should not have been set aside, either on the ground that Kalyan Singh was not capable of understanding its contents, or did not understand its contents, or on the ground that he was labouring under undue influence or pressure. The learned Judge says that the deed was not read out to Kalyan Singh by the District Registrar, but we may point the attention of the learned Judge to the fact that there is no duty imposed on the District Registrar to read out to the parties deeds brought by him for registration.

Another question has been discussed before us at some length, and that is, as to whether or not it was necessary in order to perfect the gift that possession of the property should have been delivered over to the donee. Pandit *Moti Lal* has pressed upon us this point. There is no doubt that prior to the passing of the Transfer of Property Act, there was some doubt as to whether or not delivery of possession was necessary in order to perfect a deed of gift according to the Hindu law. It seems to us, however, that this question has been set at rest by the provisions of section 123 of the Transfer of Property Act. Section 123 provides that "for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses." In the case of a gift of movable property, the same section provides that transfer may be effected either by a registered instrument or by delivery. This section

1903

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 PHUL CHAND  
 v.  
 LARKHU.

1903

PHUL CHAND  
v.  
LAKKHU.

clearly seems to have the effect of rendering unnecessary the delivery of possession, substituting, as it does, for delivery of possession registration. On turning to section 54 this becomes more apparent. In that section, in dealing with the sale of immovable property of a value less than Rs. 100, it is provided that the transfer may be made either by a registered instrument or by delivery of the property, while in the case of a transfer of immovable property of greater value than Rs. 100 the transfer can be made only by a registered instrument. This shows that, though delivery of possession of property is necessary in the one case, it is not necessary in the other. That the Hindu law upon the question of gift does not now affect the provisions of the Transfer of Property Act, is apparent from the terms of section 129. This question was discussed in the case of *Dharmodas Das v. Nistarini Dasi* (1). It was there held that, assuming that delivery of possession was essential under the Hindu law to complete a gift of immovable property, that law has been abrogated by section 123 of the Transfer of Property Act. The judgment of Mr. Justice Mitter is well deserving of attention, and commends itself to us as a true exposition of the present state of the law.

For these reasons we are of opinion that this appeal must be allowed. We accordingly allow the appeal, set aside the decree of the learned Subordinate Judge, and dismiss the plaintiff's suit with costs in both Courts.

*Appeal decreed.*

1903

February 17.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burdett.*

BHIKHI RAI AND ANOTHER (DEFENDANTS) v. UDIT NARAIN SINGH

(PLAINTIFF) AND HANWANT RAI AND ANOTHER (DEFENDANTS)\*

*Act No. III of 1877 (Indian Registration Act), section 50—Prior and subsequent incumbrancers—Notice—Prior incumbrance not compulsorily registrable, but incumbrancer in possession.*

*Held* that if a person about to take a mortgage which must be made by registered deed, finds some person other than the intending mortgagor in possession, the fact of such possession is sufficient to put the would-be mortgagor on inquiry as to the title of such person; and if such person's title is that of

\* Appeal No. 2 of 1902, under section 10 of the Letters Patent.

(1) (1887) I, L. R., 14 Cal., 446.