

APPELLATE CIVIL.

Before Mr. Justice Brown.

MA YIN HU AND ANOTHER

v.

MA CHIT MAY.*

1929

Feb. 26.

Gift, when revocable—Transfer subject to restriction on alienation or charge—Revocation, power of, limited to donor only, during his lifetime—Absolute restraint—Transfer of Property Act (IV of 1882), ss. 10, 126.

Where on the making of a gift of immoveable property it is agreed between the donor and the donee that the gift would be revoked if the donee, transferred or mortgaged the property without the donor's consent in his lifetime the agreement is valid according to the provisions of s. 126 of the Transfer of Property, Act. It is a promise to the donor personally, the happening of the event is not dependent on the will of the donor, and it is only the donor during his lifetime who could revoke the gift. This is not an absolute restraint on alienation such as is void under s. 10 of the Act.

Makund v. Rajrup, 4 All. L.J. 708—*referred to.*

Bhairo v. Parmeshri Dayal, 7 All. 516; *Gopi Ram v. Jeof Ram*, —*distinguished.*

Thein Maung for the appellants.

Ba Thein for the respondents.

BROWN, J.—U Chan Nyein, now deceased, brought a suit against the appellants Ma Yin Hu and Limma and one S.T. Chokalingam Chettyar for cancellation of a deed of gift and possession of a certain house and its site. The plaintiff's case was that on the 3rd of December 1923 he had executed an outright deed of gift in favour of the 1st appellant who was his sister, but that on the same day the 1st appellant executed another registered deed whereby she undertook not to make a gift of, transfer, sell or mortgage the property without the knowledge, consent and permission of the donor,

* Civil Second Appeal No. 607 of 1928 from the judgment of the District Court of Thaton in Civil Appeal No. 52 of 1928.

and that, if she did so, she would transfer and return the property to the donor. On the 10th of July 1925 the appellants executed a mortgage of the property in favour of the 3rd defendant, Chokalingam Chettyar, for Rs. 1,000. The plaintiff claimed that this mortgage was effected without his consent and that he was therefore entitled under the terms of the agreement to have the property reconveyed to him. As against Chokalingam Chettyar the case has been dismissed, and the validity of the mortgage so far as he is concerned is not now in question, as there is no appeal against this order of dismissal. The trial Court, however, gave a decree in favour of the plaintiff against the two appellants. This decree was confirmed on appeal to the District Court and the appellants now come in second appeal to this Court.

— Certain allegations were made as to undue influence at the time the gift was made and it was also contended that U Chan Nyein had given his consent to the mortgage, but on these points the decision of the two lower Courts is against the appellants and they have not been urged in this appeal.

U Chan Nyein died during the pendency of the suit in the trial Court and is now represented by his widow Ma Chit May.

— The contention now put forward on behalf of the appellants is that the promise not to transfer without the donor's consent is void. It is contended that, if the gift and the promise be considered as forming one transaction, then the provisions of section 10 of the Transfer of Property Act are operative, and that, if the promise is treated as a separate transaction, then it must be held to be void as being opposed to public policy and without

1929

MA YIN HU

AND

ANOTHER

V.

MA CHIT

MAY.

BROWN, J.

1929
 MA YIN HU
 AND
 ANOTHER
 v.
 MA CHEU
 MAY.
 BROWN, J.

consideration. I do not think the claim as to consideration can be substantiated. It is clear that two registered documents were executed on the same day, and that the gift of the property was consideration for the promise made. The gift and the promise were made on separate registered documents but it is clear that they were made at the same time and it seems to me that they must be treated as forming part of one transaction.

Section 10 of the Transfer of Property Act lays down that where property is transferred subject ~~to a~~ condition or limitation, absolutely restraining the transferee or any person claiming under him from parting with, or disposing of, his interest in the property, the condition or limitation is void. I have been referred to two Allahabad cases on this subject.

In the case of *Bhairo and others v. Parmeshri Dayal and others* (1), by a compromise between the parties it was agreed that one of the parties should hold possession of certain property generation by generation and would not alienate the property. It was held that this condition restraining the power of alienation was void as contravening the provisions of section 10 of the Transfer of Property Act. Apart from the provisions of section 126 of the Transfer of Property Act, which I shall refer to later, *Bhairo's* case differs considerably from the present case. In that case the transferee was to hold possession generation by generation and the condition restraining the powers of alienation was apparently to be in force for ever. In the present case there is no absolute condition that is to last for ever. As regards the property here the condition merely is that the donee will not transfer it without the

(1) (1884) 7 All. 516.

consent of the donor. There is no provision in the deed restraining the power of transfer after the donor's death.

Another case referred to on behalf of the appellants is the case of *Gopi Ram and another v. Jeot Ram and others* (1). In that case there was a covenant in a deed of sale that, if the vendee, his heirs or representatives desired to sell the house purchased, they should in such a case first ask the executant, his heirs or representatives for the time being, to purchase it. It was held that this condition was void as offending against the law of perpetuities. But here again the condition was applicable not only to the parties but to their heirs and representatives.

These are the only two official reports to which I have been referred on behalf of the appellants. The trial Judge in his judgment referred to the case of *Makund Prasas and others v. Rajrup Singh and others* (2). This is an unauthorised report and therefore cannot be cited as an authority. But it seems to me that the arguments in that case are sound. In that case as here there was a gift of certain immoveable property subject to a condition that the land would be liable to be taken back in the event of the donee transferring it.

It was pointed out that section 126 of the Transfer of Property Act recognises the validity of a power of revocation. That section lays down that the donor and donee may agree that, on the happening of any specified event which does not depend on the will of the donor, a gift shall be suspended or revoked. That appears to me to be the effect of the two documents in the present case when read together. At the time of the gift it was agreed by

1929
 MA YIN HU
 AND
 ANOTHER
 v.
 MA CHIT
 MAY.
 BROWN, J.

(1) (1923) 45 All. 478.

(2) (1907) 4 All. L. J. 108.

1929
 MA YIN HU
 AND
 ANOTHER
 v.
 MA CHIT
 MAY.
 BROWN, J.

the donee that the gift would be revoked on the donee's transferring or mortgaging the property without the donor's consent, that is to say, on the happening of any specified event which does not depend on the will of the donor. Looked at in this light the agreement does not seem to me to contravene the provisions of section 10. There is only a promise to the donor personally and it is only the donor, during his life time who could revoke the gift. There is no absolute restraint on the transferee or any person claiming under him from alienating the property. I am of opinion therefore that the provisions of section 10 of the Transfer of Property Act do not apply to the present case and that the promise made by the 1st appellan is not void as being opposed to public policy. The appellants are bound by that promise and their appeal must therefore fail.

I dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Brown.

A.K.R.M.M.C.T. CHETTY FIRM.

v.

MAUNG THA DIN AND ANOTHER.*

1929
 Mar. 1.

Civil Procedure Code (Act V of 1908), s. 47 ; O. 21, r. 2—Suit to recover money paid towards satisfaction of a decree when such payment not certified, maintainability of—Basis of the claim.

Where the judgment-debtor paid a certain sum towards the partial satisfaction of a decree and the decree-holder failed to certify the payment and executed the whole decree,

Held, that a suit would lie to recover the sum paid. Section 47 of the Civil Procedure Code would not bar such suit as the claim is based on a failure to carry

* Civil Miscellaneous Appeal No. 92 of 1928 from the judgment of the District Court of Pynmana in Civil Appeal No. 39 of 1928.