

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Batchelor and
Mr. Justice Davar.*

IN RE GOVIND PANDURANG KAMAT.*

1910.
August 19.

*Undivided brothers--Instruments whereby co-owners divide property
in severalty--Release--Partition--Stamp.*

Instruments whereby co-owners of any property divide or agree to divide it in severalty are instruments of partition.

One of three undivided brothers agreed to take from the eldest brother, the manager of the family, as his share in the family property, moveable and immovable, a certain cash and bonds for debts due to the family, and passed to the eldest brother a document in the form of a release.

Subsequently one of the two brothers passed to the eldest brother a document in the form of a release whereby he and the eldest brother divided the remaining family property by the latter handing over to the former securities for money.

A question having arisen as to whether for the purpose of stamp duty the said two documents were to be treated as releases or instruments of partition,

Held, that the documents were instruments of partition.

REFERENCE by M. C. Gibb, Commissioner, S. D., under section 59 of the Indian Stamp Act (II of 1899).

Three brothers, Govind, Waman and Anant Pandurang, were members of an undivided Hindu family. Among them Govind being the eldest, he was manager of the family.

On the 1st September 1909 Anant agreed to take his share in the family property from Govind and passed to him the following document which was stamped as a release :—

To

Govind Pandurang Supekar of Nandagad, taluka Khanapur.

Deed of release executed by Anant Pandurang Kamat Supekar of Nandagad.

Our father Pandurang Balc Kamat, now deceased, made a will on the 13th March 1899. From that day, we are living together. Now there is discord between us. I do not like now to live with you jointly as I did before now,

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and transacted and managed the joint ancestral property. I therefore take from you my share in the property—moveable and immoveable—of the description given below :—

(Here follows description of the property.)

Total value Rs. 13,948.

I have thus taken my share in the property as detailed above and now hereby relinquish my interest as bhauband in the remaining property to you. I acknowledge hereby receipt of Rs. 4,004 in cash paid to me as shown above and the deeds (papers) referred to above which you have handed over to me today. There is no necessity to pass a separate receipt for the same. You are now the owner of all the transactions which I carried on in my name when we were living jointly. You are also responsible for all the profits and losses which may result from transactions you may now carry on on your own account. I will also be responsible for losses resulting from transactions which I may henceforward carry on on my own account. You are not concerned in it in any way. The well in the house which we occupy and the back verandah will be in our joint enjoyment. I have now nothing due from you as my share in the joint property. I alone will be responsible for the losses and profits in respect of the deeds given to my share. I have passed this deed of release willingly. Dated 1st September 1909.

On the next day, that is, the 2nd September 1909, Waman passed to Govind a similar document similarly stamped. It was as follows :—

To

Govind Pandurang Kamat Supekar, Gowd Saraswat, age 35, merchant of Nandagad.

Deed of release executed by Waman Pandurang Kamat Supekar of Nandagad.

Our father Pandurang Bale Kamat, now deceased, made a will on the 30th March 1899. From that day we are living together. Now there is a discord amongst us. I do not like to live with you jointly as I did before this time. I have decided to take from you Rs. 12,500 in cash as my share in the property; but as you have not with you such a large amount I have taken property of the description given below :—

(Here follows the description of the property.)

Total value Rs. 40,183.

As the amount of some of the deeds cannot be recovered and as some others cannot be sued upon, the whole amount of all the deeds cannot therefore be obtained. I have therefore contracted to take the deeds for Rs. 12,500. I am alone responsible for the profits and losses which may result from these deeds. You are not concerned with them. I have now relinquished my whole interest and rights as bhauband over the joint property. You are now the

owner of all the transactions which I carried on in my name when we were living jointly. You are responsible for all the transactions which you may now carry on on your own account. I will also be responsible for mine. I have received from you the deeds above described today. There is no necessity for passing a separate receipt for the same. I have now nothing due from you as my share in the property. This deed I have executed most willingly. Dated 2nd September 1909.

Both the deeds were presented to the Sub-Registrar for registration. He treated them to be instruments of partition and impounded them as insufficiently stamped.

On appeal to the Collector the Sub-Registrar's view was upheld,

The matter, thereupon, went up to the Commissioner, S. D., who, in making the reference to the High Court, made the following observations:—

Section 2 (15) of Act II of 1899 defines instrument of partition as "Any instrument whereby co-owners of any property divide or agree to divide such property in severalty." Schedule I, Article 55, defines release as any instrument whereby a person renounces a claim upon another person or against any specified property.

2. In the case now in question the intention was undoubtedly to effect a partition of the property. The manner in which the partition was effected was that two brothers each executed separate deeds renouncing claims to remaining property in favour of a third brother on condition of receiving certain specified property. The third brother did not sign either of these instruments.

It was practically admitted by the pleader that the intention was to effect a partition but he contended that the third brother in whose favour the two instruments purporting to be releases were made not having signed them would not be bound by them. I understand him to mean that legally the third brother, while retaining the share left with him, would still be able to claim a share in the property handed over to the two other brothers as a consideration for their not claiming shares in the property left with the third brother. I am not in a position to say whether this contention of the pleader was well founded. I find it difficult to believe that the Courts would allow what would be nothing less than a fraud.

3. It will be seen that though, as I have said, the intention was to effect a partition, I am in doubt how far the result intended was legally effected. I find it therefore difficult to give an opinion. I may state, however, that supposing the pleader to have been wrong and the third brother to be estopped in future from getting hold of part of his brothers' shares in addition to the share

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left with him, then a partition was practically effected and the instruments should be held to be instruments of partition. On the other hand, supposing the pleader's opinion to have been right, even then the intent of the parties being to divide the property, it would seem wrong that parties should be able to evade the payment of stamp duty by executing deeds which have the effect of a partition unless one of the persons concerned perpetrates a moral fraud.

The reference came on for argument before Scott, C. J., and Batchelor and Davar, JJ.

T. R. Desai appeared for Govind Pandurang, the appellant, before the Commissioner, S. D.

We submit that each document must be read by itself. Each is a release evidencing family arrangement: *In the matter of the Maharajah of Durbhanga*⁽¹⁾. Section 2 (15) of the Stamp Act is not applicable.

The Stamp Act is a fiscal enactment and should be construed in favour of the subject: *Girdhar v. Ganpat*⁽²⁾. *The Empress v. Soddanund Mahant*⁽³⁾.

G. S. Rao, Government Pleader, for the Government, was not called upon.

SCOTT, C. J.:—The question referred to us is whether the two documents, dated respectively the 1st of September and the 2nd of September 1909, are instruments of partition or release.

They are instruments of partition if they are instruments whereby co-owners of any property divide or agree to divide any property in severalty.

By the first document Anant Pandurang agreed to take from his brother, as his share in the family property, moveable and immoveable, Rs. 4,000 in cash and certain securities for money in the form of bonds securing debts due to the family. The document was in the form of a release executed in favour of Govind Pandurang, the eldest brother and manager of the family. The effect of the document was to divide the property of the three co-owning brothers between Anant on the one hand and Govind and Waman on the other. Govind took a certain share of the family assets not converted into cash and we, therefore,

(1) (1880) 7 Cal. 21.

(2) (1874) 11 Bom. H. C. R. 129.

(3) (1881) 8 Cal. 259.

think that the document passed by him amounts to an instrument of partition.

Similarly on the 2nd September, Waman Pandurang passed to his brother Govind a document in the form of a release whereby he and Govind divided the remaining family property by Govind handing over to Waman securities for money of the nominal value of Rs. 40,183 and of the estimated value of Rs. 12,500. That also, in our opinion, for the reasons already stated, amounts to an instrument of partition whereby the two remaining co-owners divide their property in severalty.

Our answer to the reference is, therefore, that both the documents are instruments of partition.

Order accordingly.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

VASUDEO ATMARAM JOSHI AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS, v. EKNATH BALKRISHNA THITE AND OTHERS (ORIGINAL
DEFENDANTS), RESPONDENTS.*

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August 23.

Limitation Act (XV of 1877), articles 143 and 144—Suit to recover possession—Dispossession—Discontinuance of possession—Possession as an agent of minors—Decree by the minors on attaining majority against the agent for possession of the property—Decree not executed and barred by limitation—Agent wrongfully dispossessed by a third person—Money decree against the original owners—Decree-holder seeking to attach property—Adverse possession—Civil Procedure Code (Act XIV of 1882), section 283.

N died in 1879 leaving behind him two minor sons R and D, and a mistress A. The latter looked after the minors and managed their property. When they arrived at the age of majority they found that A claimed the property in her own right. In 1891, R and D sued A for the possession of the lands and obtained a decree on the 30th of August 1892, which was confirmed on appeal on the 15th of June 1894. This decree was sought to be executed on the 26th June 1897, but the application was dismissed as barred by limitation. A was

* Appeal No. 8 of 1910 under the Letters Patent.