

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

SOMASHASTRI VISHWANATHSHASTRI KASHIKAR (ORIGINAL PLAINTIFF), APPELLANT v. SWAMIRAO KASHINATH NADGIR (ORIGINAL DEFENDANT), RESPONDENT.^a

1917.

October 2.

Indian Contract Act (IX of 1872), section 69—Payment by a person interested which another is bound by law to pay—Gift of land by donor who undertakes to pay judi on the land—Another donee taking gift of the rest of the donor's property with full notice of the obligation, but the gift deed containing no stipulation to that effect—Obligation of the second donee to pay the judi.

K, who owned considerable property, gave a portion of it to his daughter's husband (plaintiff) in 1878, the deed of gift expressly providing that K undertook to pay the *judi* in respect of the portion. In 1902, K made a gift of the residue of his property to B, the gift-deed containing special reference to the previous gift of 1878 and enjoining the donee to act according to that gift. The *judi* was regularly paid by K first and B afterwards. In 1905, B in his turn made a gift of the property to the defendant, the deed of gift in this case contained a reference to the gift of 1878, but it contained no words requiring the donee defendant to abide by the terms of that gift. The defendant having failed to pay the *judi* to Government, the plaintiff was required to pay it. He sued to recover the amount from the defendant :—

Held, that the plaintiff was entitled to recover the amount from the defendant under section 69 of the Indian Contract Act (IX of 1872), because the defendant was bound in law to pay the money in the payment of which the plaintiff was interested and which the plaintiff had paid.

SECOND appeal from the decision of E. Clements, District Judge of Dharwar, reversing the decree passed by V. V. Bapat, Subordinate Judge at Haveri.

One Krishnaji owned a considerable estate in Byatanhal village of which survey No. 92 formed a part.

In 1878, Krishnaji gave survey No. 92 to his son-in-law (plaintiff) by way of gift, and expressly undertook in the deed of gift to pay *judi* in respect of survey No. 92.

^a Second Appeal No. 562 of 1916.

1917.

SOMASEASTRI
v.
SWAMIRAO
KASHINATH.

Krishnaji gave away in gift the rest of his property to Bisto in 1902, the deed of gift containing a special reference to the gift of 1878 and enjoining Bisto to continue to pay the *judi* in respect of survey No. 92.

In 1905, Bisto in his turn conveyed the property to the defendant by way of gift, the gift deed in this instance though it contained a reference to the gift of 1878 contained no words requiring the donee defendant to abide by the terms of that gift. The defendant had full notice of the obligation to pay the *judi*.

The *judi* was regularly paid by Krishnaji first, and Bisto afterwards. But the defendant did not pay it. The plaintiff had accordingly to pay the *judi* for the years 1911-13 to Government.

The plaintiff sued in 1914 to obtain a declaration that the defendant was bound to pay the *judi*, and also to recover the amount of the *judi* paid by him (plaintiff).

The defendant contended *inter alia* that he was not liable to pay the *judi* as it was not mentioned in the deed of gift passed in his favour by Bisto.

The Subordinate Judge awarded the plaintiff's claim and granted a declaration that the defendant was liable to pay the *judi* so long as he held the property acquired by him by way of gift from Bisto, on the following grounds :—

Bisto had taken the plaint land subject to the liability of paying its *judi* and local cess. He was not entitled to enjoy the whole income of the land. He was entitled only to enjoy such income as remained after paying the *judi* and the local cess. Bisto could not transfer the land to another and bestow upon him a higher or greater right than he himself possessed. Bisto was not personally liable. He was liable because he held the land subject to the condition whoever acquired title through him and holds the land is bound to comply with that condition. It is a covenant running with the land. True the condition or liability is not expressly mentioned in Exhibit 17, but the delivery of Exhibit 16 by Bisto to defendant and the express mention of the

plaint land being given by Krishnaji to plaintiff's father is sufficient notice to defendant of the condition on which Bisto himself held property given to him by Krishnaji and on which defendant was to hold it. Besides the defendant is a universal donee. He is bound to discharge all the obligations of the donor and comply with all the conditions of holding the property. There is nothing in the deed which expressly or impliedly absolves the defendant from that liability.

This decree was, on appeal, reversed by the District Judge on the following grounds :—

It appears to me that this case is governed by section 40 of the Transfer of Property Act on the principle '*exclusio unius est exclusio alterius.*' Had the obligation been annexed by Exhibit 16 to the land by appropriate words a subsequent transferee with notice or a gratuitous transferee such as the defendant would have been bound.

The estate in this case is a large one ; it is repugnant to public policy that its sub-division, partition or transfer should be in perpetuity hampered by Krishnaji's promise to pay Government dues on another person's land.

The plaintiff appealed to the High Court.

K. H. Kelkar, for the appellant.

G. S. Mulgaokar, for the respondent.

BEAMAN, J. :—The point raised in this appeal is certainly one of considerable difficulty, that is to say, it is very difficult to find any definite and well-known principle of law upon which to base a decision which the facts and justice of the case most certainly demand. The point arises thus :—

One Krishnaji owned a considerable estate. In 1878, he gave a portion of that estate paying *judi* to Government to the husband of his daughter. The deed of gift expressed that the donor intended it to be free of *judi*, that is to say, that he undertook to pay the Government the *judi* which would otherwise have had to be paid by the owner of this parcel of land. About this there is no dispute. In 1902, the donor, then being an old man, made a gift of the residue of all his real estate to one Bisto out of gratitude for services rendered and this gift contains special reference to the previous gift

1917.

SOMASHASTRI
v.
SWAMIRAO
KASHINATH.

1917.

SOMASHASTRI
v.
SWAMIRAO
KASHINATH.

of 1878 and enjoined the donee to act according to that gift. Again it is common ground that Bisto, the donee, accepted the gift on the understanding that the donor Krishnaji's obligation to pay the *judi* upon the plaintiff's land was transferred along with the rest of Krishnaji's estate to him. Between 1902 and 1905 Bisto honourably and punctually performed this obligation. In 1905, he in turn, and again for love and affection, made a gift of all the property he had received from Krishnaji to the present defendant Swamirao. In the interval it appears that Bisto had himself given away two pieces of land and he makes special reference to this in the deed of gift to the defendant requiring him to observe the terms and conditions of those dispositions of the property. He then proceeds to refer to the two alienations made by the original donor one of which is the gift to the plaintiff of 1878. Here he adds no words requiring the donee-defendant to abide by the terms of that gift, but he handed over all the papers to the defendant, and it is not denied that the defendant had full notice of the obligation undertaken by the original donor in 1878 to pay the *judi* on the plaintiff's land. Immediately after making this gift to the defendant in 1905, Bisto naturally ceased to pay the *judi* on the plaintiff's land. The plaintiff has paid the *judi* as of course he would be compelled to do, and now seeks to recover it from the defendant.

It is obvious, we think, that the undertaking of Krishnaji in 1878 to pay the *judi* on plaintiff's land is not a covenant running with the land. It is equally difficult, I think, though that was the view which first commended itself to me as offering the simplest solution—to spell a trust out of the terms and conditions of the gift which Krishnaji made in 1902 to Bisto. I feel some difficulty also in saying that the gift to Bisto was an onerous gift of the kind contemplated in

section 127 of the Transfer of Property Act. I certainly feel no doubt but that while that section is so express as to cover cases which might otherwise be cases of difficulty, that is to say, gifts of several things one of which is, while the others are not, burdened with an obligation, the principle must, *a fortiori* and without need of being expressed, apply to the cases of a gift of a single thing burdened with an obligation. My only doubt here has been whether it can fairly be said that the lands which Krishnaji gave to Bisto in 1902 were as a whole burdened with this obligation to pay the *judi* upon the plaintiff's land. That obligation no doubt was annexed to the gift as a whole, but rather, I think, as a special condition at the time that the gift was made, and the difficulty I feel might be explained in this way. Suppose while Bisto acknowledged his obligation to pay the *judi* on the plaintiff's land he acquired other properties of his own and then gave those properties as well as the land which he received in 1903 from Krishnaji, could it be said that any one part of those lands was more burdened than another with Bisto's personal obligation to pay the *judi* on plaintiff's land? On the other hand we entertain no doubt but that the understanding between Bisto and the defendant in 1905 was as clear as that which the defendant admits existed between Krishnaji and Bisto in 1902. Just as in 1902 Krishnaji gave all his landed property to Bisto on the distinct understanding that Bisto was to continue paying the *judi* on plaintiff's land and so to relieve Krishnaji from any further obligation in that respect, so we do not doubt that in 1905, when Bisto passed on all the lands with notice to the defendant of this obligation, the defendant accepted those lands on the understanding that as he received the benefit of the gift, so he would undertake the obligation, in other words, as a matter of fact we do not doubt that between Bisto and the defendant

1917.

SOMASASTRI
v.
SWAMIRAO
KASHINATH.

1917.

SOMASHASTRI
v.
SWAMIRAO
KASHINATH.

there was a contract that the defendant receiving the gift from Bisto would for his part undertake to discharge Bisto's liability to the plaintiff. If that were so, the only difficulty in the way of making a just decree between these parties would lie in surmounting the apparent difficulty caused by lack of privity. If the relations were in contract, then it is very clear that the plaintiff could not sue the defendant inasmuch as there is no privity of contract between them. I think, however, that a practical way is open to us by availing ourselves of section 69 of the Contract Act. That section is part of the Indian law of contracts, and yet it expressly contemplates one party's suing for a remedy against another although between them there is no privity. All that is required to make good an action of that kind is that the defendant should be bound by law to pay money in the payment of which the plaintiff also has an interest. Here the plaintiff undoubtedly has an interest in the payment of the *judi*. For if it be not paid, his lands would be forfeited.

Then the only question is whether the defendant is bound by law to pay that *judi*. Taking each step in order, I think, it is very clear that he is. 'Bound by law' does not mean bound by law to the plaintiff, but that the defendant at the suit of any person might be compelled to pay. Here we should have to begin with the original donor Krishnaji against whom, it is conceded, the plaintiff might bring a suit to recover this *judi* upon the covenants of the deed of 1878. Krishnaji in turn, it is conceded, might reimburse himself from Bisto according to the tenor of the deed of 1902 and the understanding and resultant contract of the parties.

Then it becomes merely a question of fact whether Bisto in turn could compel the defendant Swamirao to reimburse him, and that is the question which I have already answered in anticipation by indicating that

in our opinion notwithstanding the inartificial character of the deed of 1905, its real intention—that intention being well understood—was that the defendant undertook Bisto's obligation to pay the *judi* on plaintiff's land.

Thus by three stages the plaintiff could put the law in motion in such a way that the result would show that the defendant was bound in law to pay the money in the payment of which the plaintiff was interested and which the plaintiff had thus in the first instance had to pay. On that view we think that we find solid ground for doing what we do not doubt is justice in the case, i.e., compelling the defendant to carry out the original donor's obligation to pay the *judi* on the plaintiff's land.

I have not touched here upon many other difficult questions which were raised and discussed in the full argument we heard. It is needless to involve this decision in considerations drawn from the rule against perpetuities and various other extremely complicated branches of the English technical law. All that need be said here is that when the property passes, if it does pass, by transfer from the present defendant, it will be time enough to say whether this personal obligation goes along with it or whether it will be exhausted during the lifetime of the present donee. We need not now anticipate those difficulties.

We reverse the decree of the learned District Judge and restore the decree of the Court of first instance with costs throughout upon the defendant.

Decree reversed.

R. R.

1917.

SOMASHASTRI
v.
SWAMIRAO
KASHINATH.