PRIVY COUNCIL.

SHAM SHIVENDAR SAHI
v.
JANKI KOER.*

P. C.*
1908
Oct. 29, 30.
December 15.

[On appeal from the High Court at Fort William in Bengal.]

Title—Gift—Evidence of title—Gift made orally by proprietor of Betia Raj to his daughter at her marriage—Condition attached to gift—Subsequent deed with recitals confirming gift—Suit by successor in title of donor against husband of donee for possession of subject of gift—Donee's power of alienation to prevent gift devolving on husband.

The question in this case was whether the appellant or the respondent was entitled by inheritance to a village the subject of a gift said to have been orally made by a predecessor in title of the respondent to his daughter on her marriage to the appellant in 1868, for possession of which the respondent sued.

Her case was that the gift was subject to the condition that on the death of the donee without issue (which event had occurred) the village should revert to the donor and his heirs: and she relied on an *ekrarnama* executed by the donor in 1883, when the donee was separated from the appellant and was an inmate of her father's house, by which deed the alleged condition of the gift was recited and confirmed.

The defence set up by the appellant was that the village had been given to him at the marriage for the benefit of himself and his wife, or, in the alternative, that, if it was given to his wife, he took it as her heir. The Subordinate Judge found on the evidence that the appellant and respondent both failed to prove any condition attached to the gift, but that, inasmuch as it was common ground that there was a gift to the daughter, it must be presumed to have been an absolute gift, and the appellant was entitled as her heir.

Held, by the Judicial Committee, that the High Court was right in reversing that decision, because, if the gift of the village were absolute in favour of the daughter, she had, on the evidence in the case, by the subsequent deed of 1883, agreed it should at her death revert to her father and his heirs.

APPEAL from a judgment and decree (10th July 1905) of the High Court at Calcutta, which reversed a judgment and decree (14th April 1902) of the Subordinate Judge of Sarun.

The defendant was the appellant to His Majesty in Council.

* *Present*:—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble, and Sir Arthur Wilson.

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The principal question for decision in this appeal was the nature of the interest granted by the late Maharaja Rajendra Kishore Singh of Betia to his daughter Ratnabati Koer in the village of Samahuta.

The Betia Raj was an impartible estate. In 1867 the owner was Maharaja Rajendra Kishore Singh. On 28th July of that year, he executed a deed by which he appointed a committee for the management of his estates and undertook, among other things, not to alienate any portion of them. He died on 28th December 1883 and was succeeded by his son Maharaja Sir Harendra Kishore Singh, who died on 26th March 1893 and was succeeded by his senior widow Maharani Sheo Ratan Koer, on whose death on 24th March 1896 Maharani Janki Koer, the respondent, as junior widow became entitled to the estate.

On 15th June 1883, Maharaja Rajendra Kishore Singh executed the following document in favour of his daughter Babui Ratnabati Koer :—

"Mouzah Samahuta, Pergunnah Bal, District Sarun, was without the execution of any deed conveyed by gift in khoincha to my daughter Babui Ratnabati Koer on the occasion of her marriage, and no deed has up to this day been executed in respect thereof in favor of the said Babui Saheba. I have been paying the Government Revenue and road cess, etc., and my name still stands recorded in the Collectorate. It is now necessary that a deed in respect thereof should be executed in favor of the said Babui Saheba and her name registered in the Collectorate. Therefore I convey by gift in khoincha hereunder the said mouzah, *i.e.*, mouzah Samahuta, Pergunnah Bal, the value of which is Rs. 100,000 to Babui Ratnabati Koer (may she live long) with the same conditions as before. It is provided that the said Babui Saheba shall, without having the power of making transfer, hold possession of the said mouzah and enjoy the proceeds thereof during her lifetime. After the death of the said Babui Saheba any child born of the womb of Babui Saheba will hold possession of the same. In the event of her dying without any child born of her womb, the said mouzah will again revert to me and after me it will pass to my heirs as proprietors thereof. The said Babui Saheba shall get her name registered in the Collectorate on expunction of my name and pay the Government Revenue and public demands; I neither have nor shall have any objection to it."

The oral gift therein referred to was made in January 1868 on the occasion of the marriage of Ratnabati Koer to Sham Shivendar Sahi, the present appellant, and it appeared from

the recitals in the above deed that subsequent to the gift the name of the donee was not entered in the Collector's registers, whilst the Government revenue and village cesses were paid in respect of Samahuta by the Maharaja: though from the time of the marriage until his death in 1880, Sridhar Sahi, the father of the appellant, seems to have received the rents and profits of Samahuta on behalf of his son.

On the succession of Maharaja Sir Harendra Kishore Singh in December 1883 to the Raj, in pursuance of a step which had been contemplated in his father's life-time, an application was made on 13th February 1884 that the name of the donee Ratnabati Koer should be recorded in the Collector's registers, and orders for the entry therein of the lady's name were made on 21st June 1884. The claim for such registration was expressly based on the deed of 15th June 1883.

On 29th August 1890, the appellant's name was entered in the register as manager on behalf of his wife in regard to one half the village of Samahuta, and on 31st March 1896 in regard to the other half.

Ratnabati Koer, who since 1875 had separated from her husband and had lived with her father, died on 6th August 1896 without leaving issue; and on 29th October 1896, application was made to have the name of Maharani Janki Koer, who had then succeeded to the Raj, entered on the Collector's register in place of that of Ratnabati Koer, on the ground that under the conditions on which the village of Samahuta was held it reverted to the Betia Raj on the death of Ratnabati Koer without issue.

An application for the registration of his own name was made on 4th February 1897 by the appellant, who based his claim on his possession.

Both these applications were disposed of on 17th October 1898 by an order of the Deputy Collector, who directed the entry of the appellant's name on the register, in consequence of which Maharani Janki Koer on 13th February 1900 instituted the suit out of which the present appeal arose.

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The plaint recited the gift by Maharaja Rajendra Kishore Singh to Ratnabati and the conditions on which it was made, stated that in accordance with those conditions the village of Samahuta reverted to the Betia Raj, and prayed for possession thereof with mesne profits.

The defendant in his written statement asserted that at the time of his marriage the village of Samahuta was gifted to him personally for the benefit of himself and his wife and not to his wife; and, in the alternative, that if the gift was made to his wife it was made free of the limitations and conditions sought to be attached to it, and conveyed to her an absolute estate in the village, which on her death vested in him as her heir.

The Subordinate Judge was not satisfied with the oral evidence adduced on behalf of the plaintiff, remarking that it was incredible and repugnant to Hindu feeling that on the auspicious occasion of the marriage of Ratnabati the gift should have been made expressly defeasible on her death without issue, and he held that the ceremony at which, according to the plaintiff's case, the gift was made "only takes place when the bride for the first time goes to her husband's house, on which occasion farewell gifts are made in khoincha (extremity of the cloth worn by the girl) which is untied in the girl's husband's house:" and remarked that Ratnabati having been married in childhood went to her husband's house for the first time four years after her marriage, while "according to the case of either party the defendant's father, and after his death the defendant, have been in possession of Samahuta and enjoyed the profits since the date of the gift in 1868." With regard to the *ekrarnama*, dated 15th June 1883 on which the plaintiff relied, the Subordinate Judge, after observing that Ratnabati had no independent advice in the matter, expressed his opinion that "the young Rajah must have induced his father to execute the deed with a view to get the village back to the family, there being at that time bad blood between him and the defendant. Under these circumstances, Ratnabati herself would not have been bound by her acceptance of the *ekrarnama* and it was not binding on the defendant." He then proceeded to deal with

the documents relating to the various proceedings under the Land Registration Act (Bengal Act VII of 1876) and the Land Acquisition Act (X of 1870) and so far as the plaintiff's case was concerned he concluded as follows :—

"From the observations made above upon the oral and documentary proof of the plaintiff, I find she has failed to prove affirmatively her case as alleged in the plaint, *viz.*, that mahal Samahuta was given to Babui Ratnabati in *dan khoincha* for her life and that after her death it would devolve upon her issue and that on her dying childless it would revert to the Betia Raj."

As to the defendant's case the Subordinate Judge held that on the oral evidence "his title to Samahuta in *dahez* was not established." After considering the documentary evidence he expressed the opinion that it did not improve his case, and as to the cases of both parties he concluded his judgment as follows :—

"The result of the consideration of the evidence in this case is that the plaintiff has failed to establish the case as alleged by her and that the defendant has also not been able to make out the case of absolute gift of Samahuta in *dahez* to him. It is admitted on behalf of the plaintiff that village Samahuta was given under a verbal gift to the defendant's wife, Babui Ratnabati Koer, on the occasion of her marriage. She alleges, however, that the gift was a qualified one, being defeasible on Babui dying childless. This limitation or condition is not proved. Hence under the law the gift must be considered to have been made absolutely to the Babui, and on her death the defendant as her husband and heir is entitled to succeed to village Samahuta in which his possession has been undisturbed all through and as such it must be maintained. The plaintiff's suit must accordingly be dismissed."

On appeal by the plaintiff the High Court (Henderson and Geidt JJ.), whilst expressing their opinion that little reliance could be placed on the oral evidence on either side with regard to the terms on which the gift was made, held with reference to the *ekrarnama* of 15th June 1883, and the proceedings under the Land Acquisition Act, and Bengal Act VII of 1876, and having regard to the circumstances under which the gift was made and to the conduct of the parties subsequent to the gift, that the plaintiff had established that the gift was made subject to the condition alleged in the plaint. The High Court therefore reversed the decision of the Subordinate Judge and made a decree giving the plaintiff possession of Samahuta with mesne profits.

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ON THIS APPEAL.

Sir R. Finlay, K.C., and *Kenworthy Brown*, for the appellant, contended on the evidence that the High Court was wrong in holding that the respondent had proved that the gift was made subject to the condition alleged by the respondent. For the reasons given by the Subordinate Judge it was submitted that the High Court ought to have found that the appellant was entitled to the village sued for either in his own right or as heir to Ratnabati Koer. The village, the subject of the gift, was of considerable value, and it was very improbable that the condition, if made, would not have been put on record in writing, and not left, in the case of an estate of such value, to be settled orally. The burden of proof in the matter was on the respondent and she had not discharged it. Reference was made to the Land Registration Act (Bengal Act VII of 1876), section 3, clause 6.

DeGruyther, K.C., and *E. U. Eddis*, for the respondent, contended that there were concurrent findings of fact that at the time of his marriage the village in suit was not gifted to the appellant. As held by the High Court the respondent had sufficiently established that the village was given to Ratnabati Koer subject to the condition that, if she died without issue, it should revert to the Betia Raj. As to the probability that the *ekrarnama* of 15th June 1883 stated the true facts of the matter as to the gift, reference was made, among others, to the following passage from the judgment of the High Court. "It must not be lost sight of that at this time the defendant and his wife were on very bad terms, that they had ceased to live as husband and wife, and that there was no longer a possibility of issue of this marriage. On the one hand, this fact might be a very good reason for a deed being executed in order to put on record the actual terms of the gift. On the other hand, as suggested by the defendant, it might be an equally strong reason for the Maharaja endeavouring to prevent the village on the death of his daughter passing into the hands of the defendant and so being absolutely lost to the Raj. But the evidence is that the Maharaja was up to his death on good terms with his son-in-law,

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At the same time it must be taken that the Maharaja was aware of the terms of the original gift and he admittedly enjoyed the reputation of being a thoroughly upright and honest man." The reason for the *ekrarnama* being executed was in order to conform to the provisions of the Transfer of Property Act (IV of 1882) as to registration. The right of the parties to the village was now, it was submitted, governed by the terms of that deed, by which provision for reversion to the Raj in default of issue, is expressly made. Reference was made to Mayne's Hindu Law, 7th edition, pages 885, 886 as to the power of a wife to dispose of property without consent of her husband. The conclusion come to by the Subordinate Judge in favour of the defendant was one, which there was no evidence on the record to support.

Sir R. Finlay, K.C., in reply.

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The judgment of their Lordships was delivered by—

LORD MACNAGHTEN. This is an appeal from the High Court at Calcutta reversing the decree of the Subordinate Judge of Sarun.

The matter in controversy is the possession of mouza Samahuta. This mouza formed part of an impartible raj known as Betia Raj. In 1868 the owner of the Betia Raj was the Maharaja Rajendra Kishore Singh. In that year his daughter Ratnabati Koer was married to the appellant, Sham Shivendar Sahi. On the occasion of the marriage the Maharaja made a verbal gift of Samahuta. The question is : To whom and on what conditions, if any, was the gift made ?

In the Court of first instance the respondent, Maharani Janki Koer, who had succeeded to the raj, maintained, as she still maintains, that the mouza was given to Ratnabati subject to a condition that, if she should happen to die without issue—as she did—it should revert to the raj. She was plaintiff in the suit. The appellant, who was defendant, asserted that Samahuta was given to him, for the benefit, of course, of his wife and himself. He also set up, argumentatively, an alternative

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case. In his written statement he suggested that, if it should be held that the gift was a gift to his wife—which, he averred, was not true in fact—then it ought to be held that, on the death of his wife without issue, he became the owner as her heir.

The marriage of Ratnabati took place in January 1868. The bride was then seven or eight years old, the bridegroom nine or ten. In April or May 1872 Ratnabati went to her husband's house. She stayed there only a short time, returning to her father in June or July 1872. In November 1873 or 1874 she went back to her husband, but left in November or December 1874 or 1875, declaring that she would rather die than live with him any longer. The rest of her life was spent at Betia, where she resided with the Maharaja.

From the time of the marriage until his death in 1880, Sridhar Sahi, the defendant's father, received the rents and profits of Samahuta on behalf of his son.

In 1877, after the Registration Act VII of 1876 came into force, the Maharaja applied that his name, which had remained on the Collectorate books, might be registered in respect of Samahuta. The necessary notifications were issued, and, after some opposition at first on the part of the defendant, the name of the Maharaja was registered, and registered ultimately without objection in July 1879.

On the 15th of June 1883, the Maharaja executed an *ekrarnama*, which is the most important document in the case. After reciting that Samahuta had been given to his daughter by way of khoincha gift at the time of her marriage, but that no deed had been drawn up, the Maharaja purported to convey Samahuta to Ratnabati by way of khoincha gift "with the same conditions as before," to hold possession and enjoy the income, but without power of alienation, subject, however, to the provision that, in the event of her dying without issue, the property should revert to him and after him to his heirs. It was also provided that Ratnabati should get her name registered in the Collectorate and pay the Government revenue and all public demands.

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On this deed being executed, Ratnabati took steps to get her name registered, relying on the deed of the 15th of June 1883 for her title. No objection was raised on behalf of the defendant.

The Maharaja Rajendra Kishore Singh died on the 28th of December 1883, and was succeeded by his son, Sir Harendra Kishore Singh.

Ratnabati's name was duly registered on the 21st of June 1884.

Shortly afterwards the defendant brought a suit against Harendra to recover his wife, but the suit was dismissed.

Between 1884 and 1891 several pieces of land in Samahuta were acquired for the Bengal North-Western Railway. The purchase money, or compensation, was received by the Maharaja, although there seems to have been a claim at first on the part of the defendant.

In 1887 the defendant brought rent suits against tenants of lands in Samahuta, alleging that he was in possession and making collections in his own name. The suits were dismissed on the ground that he was not the registered proprietor, the lands being registered in Ratnabati's name. Then he applied to be registered as manager for his wife. In this application the deed of the 15th of June 1883 was again referred to, and recognized as a document of title.

The Maharaja Harendra died on the 26th of March 1893, leaving two widows, but no issue. On the death of the elder widow the present respondent succeeded to the raj as her husband's heir. Then she claimed to be registered in the place of Harendra. But after a contest before the Deputy Collector, the defendant succeeded in getting mutation of names in his favour.

The ground of claim, which he asserted, was not inheritance from his wife, but "proprietary right, having possession."

The respondent then brought this suit.

The Subordinate Judge gave judgment on the 14th of April 1902. He observed at the outset of his judgment that it would be a difficult task to arrive at a right conclusion in this case.

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He put aside, as unworthy of credit, the oral evidence adduced on the one side and on the other, to prove what was said and done on the occasion of the marriage. He rejected the case put forward on behalf of the defendant, which was that Samahuta was given to him. He thought the defendant himself unworthy of credit. But he also rejected the case of the plaintiff, mainly on the ground that it was impossible to believe that on so auspicious an occasion as marriage the contingency of the death of the bride without issue could have been referred to. "The story of the gift," he says, "is altogether repugnant to a Hindu feeling. It can find no credence with me." And then he held that, as the plaintiff failed in her case and the defendant failed in his, it followed, inasmuch as it was common ground that there was a gift, that it must be taken that the gift was absolute in favour of Ratnabati. And so it was adjudged that the defendant should succeed as heir to his wife.

The learned Judges of the High Court on appeal reversed the judgment of the Subordinate Judge. They agreed with him in thinking that no reliance could be placed on the oral evidence. But they thought that there was no ground for impeaching the *ekrarnama* of the 15th of June 1883, and, after a careful and elaborate review of all the facts and circumstances of the case, they came to the conclusion that the acts and conduct of the defendant were inconsistent with the case which he set up as being the true case, and equally inconsistent with the case on which he was content to rely, although he protested it was not true.

The learned Judges rejected with something like scorn the excuses which the defendant made for his conduct and his affectation of ignorance in regard to what was being done from time to time in his name and on his behalf. This part of his case depended entirely on his own testimony. His character for truth fared no better in the Court of Appeal than in the Court below. The learned Judges describe him as "a man who is utterly reckless as to what he will say, if he thinks it will advance his case."

On the appeal to this Board the learned Counsel for the appellant attacked the judgment of the High Court on the ground that the learned Judges had not addressed themselves to what was then the real issue. They had, it was said, combated with great elaboration a case which had been disposed of in the Court below. They slew the slain over again. But they gave the go-by, or at least paid scant attention, to the grounds on which the Subordinate Judge had decided in favour of the defendant.

Their Lordships think that this criticism is not well founded. If the judgment of the High Court is read carefully, it is quite plain that the defendant must have relied, and relied entirely, on the case which he set up in his written statement. That was, as the learned Judges say, his "real case," although an alternative case was suggested. This is clear from the judgment, which does not even notice the main, if not the only, ground of the judgment of the Subordinate Judge. But it is made still plainer by the course which the defendant adopted. He was not altogether satisfied with the judgment he had obtained in his favour. He filed a memorandum of cross-objection to the plaintiff's petition of appeal. He preferred his petition, he said, "being dissatisfied with a portion of the decision of the Subordinate Judge." The main ground of his cross-objection was that the Court below was—

"wrong in rejecting the case set up by the petitioner and disbelieving the evidence adduced by him in support thereof. The said Court should have held upon the evidence on the record that Samahuta was given to him absolutely for the benefit of himself and his wife at the time of the departure of the barat as alleged by him."

Probably the defendant was well advised in taking this course. There is not a shred of evidence in support of the view which determined the Subordinate Judge in favour of the defendant. With all respect to the learned Judge, whether he was right or wrong in his view, it would have been out of the question to ask the Court of Appeal to rely on a statement unsupported by evidence at a time when there was no opportunity for contradiction or cross-examination. It certainly would seem that the defendant himself did not place much

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reliance on the view which commended itself to the Subordinate Judge, for it was the very ground on which the Assistant Collector had decided the application for mutation of names, and yet the advisers of the defendant did not think it worth while to produce, or at any rate they abstained from producing, any evidence in support of it.

Without going over the grounds which the learned Judges of the High Court have so fully discussed, it is enough for their Lordships to say that they think that the order under appeal is perfectly right.

The *ekrarnama* of the 15th of June 1883, if not a fraudulent document, is decisive of the case. The character of the old Maharaja for honour and probity stood so high that no one ventured to suggest that there could have been any fraud on his part. It was said that probably, or possibly, he signed the document without knowing what it contained, and that the real author of the scheme to defraud the defendant was Harendra. But there is not the slightest evidence of any fraudulent scheme at all. There was no reason for concocting a fraud. Assuming Ratnabati to have been the absolute owner, it is not disputed that it would have been competent for her to make a disposition of the property, which would have defeated the expectations of her husband. Considering the state of feeling that existed between herself and her husband, it probably would not have required much persuasion to induce her to put the property beyond his reach.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed.

The appellant will pay the cost of the appeal.

Appeal dismissed.

Solicitors for the appellant : *T. L. Wilson & Co.*

Solicitors for the respondent : *Sanderson, Adkin, Lee & Eddis.*

J. V. W.