

(1933) 07 BOM CK 0012**Bombay High Court****Case No:** O.C.J. Suit No. 2443 of 1927

Sugrabai

APPELLANT

Vs

Mahomedalli Ahmedalli

RESPONDENT

Date of Decision: July 13, 1933**Citation:** (1934) 36 BOMLR 1151**Hon'ble Judges:** Kania, J**Bench:** Single Bench**Judgement**

Kania, J.

The plaintiffs have filed this suit claiming to be beneficiaries under a trust-deed dated December 2, 1915. Defendant No. 1 is the father of plaintiffs Nos. 1 and 3 while defendant No. 2 is the father of plaintiff No. 2. Plaintiff No. 2 is the husband of plaintiff No. 1. The trust-deed (exhibit B) appears to have been made shortly after the marriage of plaintiff No. 1 with plaintiff No. 2 and was intended to be for the benefit of the children of defendant No. 1 and his sons-in-law. In the plaint it is alleged that after the trust-deed was executed and accepted by defendants Nos. 1 and 2, as shown by the endorsement at the foot of the trust-deed, defendant No. 1 constituted himself the managing trustee, collected the rents and profits of the property and utilised the same in accordance with the terms and provisions of the trust-deed. The plaintiffs say that only for about two years prior to the filing of the suit no payments were made to them in accordance with the provisions contained in the trust-deed and they had, therefore, to file the suit. Defendant No. 2 is stated not to have taken any active part in the administration of the trust but allowed defendant No. 1 to manage the same in such manner as he liked. The first prayer in the plaint is that defendants Nos. 1 and 2 should be removed from the trusteeship. The whole plaint is verified as true on information only.

2. After the written statement of defendant No. 1, in which he contested the validity of the trust-deed, was filed, it appears that an attempt was made to take a consent decree as between the plaintiffs and defendants Nos. 1 and 2 under which the

trust-deed was being confirmed. Defendant No. 3, who claimed to be an equitable mortgagee of the property from defendant No. 1, thereupon, applied to be made a party to the suit. He has filed a written statement adopting the contention contained in the written statement of defendant No. 1.

3. The validity of the trust is contested on the ground that the gift by way of trust was not complete as the settlor had not transferred the possession of the property as required by the Muhammadan law. It is next urged that the settlor has revoked the settlement by a declaration dated January 18, 1926. It is further contended that although the trust-deed was executed there was no bona fide intention on the part of defendant No. 1 to settle the property and in fact defendant No. 1 always dealt with the property as his own. The onus of proving that defendant No. 1 continued to deal with the property as his own, and, therefore, the trust-deed was not valid and binding would be on those who allege it.

4. The difficulty which faces the plaintiffs in this case is the complete absence of evidence of the transfer of possession. Under the Muhammadan law, in order to transfer the ownership of an immovable property, it is essential that the possession of the property should be transferred to the transferee or the donee as the case may be. In the present case the evidence only shows that after the trust-deed was executed by the settlor, defendants Nos. 1 and 2 have put their signatures at the foot of that document after the words "We accept this trust" were written thereon. It is alleged on behalf of the plaintiffs that this constitutes a complete trust and as in the present case defendant No. 1 is the father of plaintiffs Nos. 1 and 3, no delivery of possession was necessary to complete the trust. In this connection reliance is placed on behalf of the plaintiffs on the decisions in Ameeroonissa Khatoon v. Abedoonissa Khatoon 1874 75 L.R. 2 IndAp 87 Mirza Sadik Husain Khan Vs. Nawab Saiyed Hashim Ali Khan, and Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam (1931) L.R. 59 IndAp 1 These decisions only show that in order to constitute a valid gift by a father in favour of his minor children it was not necessary to transfer possession but proof of bona fide intention to give should be established. I do not think those decisions apply in the present case because in the first instance the trust is not merely for the benefit of the minor children of the settlor, and, secondly, because the settlor has not constituted himself the sole trustee. In so far as the trust is for the benefit of plaintiff No. 2, it requires the transfer of possession under the Muhammadan Law, and inasmuch as there are two trustees appointed under the trust-deed the considerations which would weigh with the Court when the settlor father constituted himself the sole trustee for his minor children, do not prevail. I regret, I am unable to extend the principles of those cases in favour of the plaintiffs, however much I would like to do so, having regard to the difference in facts.

5. Only plaintiff No. 2 has given evidence in support of the trust and the whole of his evidence as to the application of the rents of this property, as shown by the cross-examination, is hearsay. Three material witnesses, viz., defendant No. 2, Shekh

Ali, the maternal uncle of plaintiff No. 2, and Abdulhusain, the maternal grandfather of plaintiff No. 2, who could have supported the cost as set out in the plaint and who are all alive have not given evidence to support the plaintiffs" case. I am unable to find any just excuse for their absence if the plaintiffs" case was-true. On the evidence on record, therefore, I am unable to hold that the plaintiffs were paid the rents of this property up to about two years prior to the institution of the suit as alleged in the plaint.

6. The evidence led on behalf of defendant No. 3 about defendant No. 1 dealing with the property as his own is not sufficient to justify any finding on that issue in favour of defendant No. 3. The evidence consists merely of an abortive attempt to sell the property. Mr. Lalji had agreed not to rely on this document as it was not disclosed. The other documents produced by defendant No. 3 are all of a date after defendant No. 1 is alleged to have stopped paying money to the plaintiffs, and, therefore, much importance cannot be attached to the same. Defendant No. 3 has entirely failed to lead any evidence in respect of issue No. 7.

7. The plaintiffs have failed in their main contention. Defendant No. 3, however, has failed to prove the charge of undue influence which he attempted to support and has also failed to prove that the property was dealt with at all material times by defendant No. 1 as his own absolute property. Under the circumstances, I think, the plaintiffs should pay three-fourths of the costs of defendant No. 3.