

Shanbhagakannu Bhattar

Vs

Muthu Bhattar and Another

Civil Appeal No. 2561 of 1966

(K.S. Hegde, A.N. Grover JJ)

29.07.1971

JUDGMENT

GROVER, J. -

1. This is an appeal by special leave and arises out of a suit filed by Muthu Bhattar against Seethalaskhmiammal and her son Subba Bhattar alias Shanbhagakannu who was a minor at the time of the institution of the suit. The other defendants were Thiruvathavoor Thirumarainathaswami Temple Devasthanam through its Executive Officer residing at Thiruvathavoor village, Melur Taluk and Thiruvadagam Devasthanam through its trustees, residing at Thiruvadagam Nilakottai Taluk. The suit was for a declaration and possession of 1-7/8 share of the Archakam service in the temple and also to recover 1/8 share in the Inam village of Kelavikulam attached to the Archakam attached to the Archakam service in the third defendant temple. Other reliefs were also claimed relating to the fourth defendant temple which, however, do not survive in the appeal.

#2. It will be of assistance to set out the following pedigree table : ----- ||
Vellasubba Bhattar Devendra Bhattar ||| Mathu Bhattar | adopted by ||| Chinnaswami and |
Ammani Ammal | ----- || Velayutha Sadasiva Bhattar | | Vellasubba Bhattar II |
(d. 1857) Chokku || Meenammal Subba Bhattar (d. 1925) | (left will dated 16-1-24) | in favour of
wife - ----- Parvathi (d. 1946) || Kalyani (daughter) Alagia Meenal | (2nd daughter)
Duraismamy | (d. 1938) Parvathi (d. 1946) || Seetha Lakshmi adopted married Subba Subba Bhattar
alias Bhattar in the Shanbhagakannu immediately next branch after her husband's death##

Subba Bhattar had bequeathed his share in the disputed properties and rights to his wife Parvathiammal. On November 20, 1929 Parvathiammal executed a deed of gift in favour of Duraismamy who was described as her senior mother's son. The relevant part of the gift deed is as follows :

"I have conveyed to you under this deed the properties mentioned hereunder and worth Rs. 3000 together with pooja rights thereon and all my absolute rights pertaining there to and whereas I have this day itself delivered possession of the same to you, you yourself shall discharge the debt upto the tune of about Rs. 1000 in respect of the same, you yourself shall hold and enjoy the said properties together with pooja rights in respect of the two temples at Tiruvadavur and Tiruvadagam for all times from son to grandson and so on in succession with powers of alienation by way of gift, exchange, sale etc., absolutely as you please."

The plaint in the suit out of which the appeal has arisen is a complicated document and it is

unnecessary to refer to all the pleas taken in it. As many as 19 issues were framed by the trial Court. It may be stated, however, that there was neither any pleading nor was any issue framed on the question whether the gift deed which had been executed by Parvathiammal on November 20, 1929 was in effect and substance a document which had been executed for consideration and that the properties and rights covered by the gift deed had not been conveyed by way of a gift and without any consideration. The real controversy centered on the question whether the plaintiff, who was the nearest agnatic relation of Parvathiammal's husband was entitled to succeed to the properties and rights which were the subject-matter of the gift in preference to Duraiswamy the donee who was only a cognatic relation of Parvathiammal's husband Subba Bhattar. This was particularly so with regard to the pooja rights which, according to the contention of the plaintiff could have been gifted by Parvathiammal only to the plaintiff who was the immediate heir and not to Duraiswami who was a remoter heir. The trial Court dismissed the suit and its decree was affirmed by the first appellate court.

3. Before the first appellate Court five points were agitated. Out of those only the second and the third may be mentioned. These are :

(2) Is the gift by Parvathiammal valid ?

(3) Even if not valid is it valid as a family arrangement ?

As stated in the judgment of the first appellate Court the plaintiff's contention was that the will by Parvathiammal's husband and the gift by her were invalid because the pooja rights and inam lands were inalienable except to the immediate heir and that also if they had been conveyed without any consideration. It was almost admitted that the deed of gift executed by Parvathi was an alienation for no value but it was challenged on the sole ground that it was not in favour of the immediate heir. The first appellate Court was of the view that the gift by Parvathiammal was perfectly valid. The Court, however, did not accede to the alternative contention which had been pressed on behalf of the defendants that even if the gift be held to be invalid it should be upheld on the ground that it was a family arrangement. It was found that the deed of gift did not evidence family arrangement, and there was a positive recital therein that Duraiswami requested Parvathiammal to give him the properties in question as a matter of grace and she complied with his request and executed the deed Ext. B-9.

4. The matter was taken in second appeal to the High Court. Kailasam, J., has stated in unequivocal terms in his judgment that the only question that was argued before him on behalf of the plaintiff was that the will and the gift were invalid because pooja rights and inam rights were inalienable except to the immediate heir and that too without consideration. As by the gift the properties were not given to the immediate heir the gift was not valid. The learned Judge discussed mainly the various decisions of the Madras High Court and upheld the decision of the first appellate court that the gift deed was valid. An appeal was filed under Clause 15 of the Letters Patent to a Division Bench by the plaintiff. Before the Division Bench the plaintiff's counsel sought to raise a new point that the alienation relied upon, though termed as a deed of gift, was in fact an alienation for consideration and therefore invalid within the well established principles. This point was permitted to be raised because it was considered that the determination of the question did not depend upon the decision as to facts which were in dispute. The bench referred not only to Ext. B-9 which was the deed of gift but also to another document Ext. B-28 dated January 16, 1921. According to the learned Judges the deed of gift itself provided that the donee would have to discharge the encumbrances on the property which had been transferred to the extent of Rs. 1000. This

encumbrance was actually discharged on June 8, 1938 vide receipt Ext. B-29. The deed of encumbrance dated January 16, 1929 Ext. B-28 showed that besides the property which was the subject-matter of the gift there were other properties subject to encumbrance by way of othi for Rs. 1,800. The entire amount of Rs. 1,800 was paid and discharge obtained by means of the receipt Ext. B-29. The bench came to the conclusion that by reason of the discharge of the encumbrance the donee relieved from the encumbrance properties other than those which were the subject-matter of the gift. It was consequently held that the alienation evidenced by Ext. B-9 which purported to be a deed of gift was for consideration. The real question on which the litigation had been fought in all the courts was decided because of the above conclusion.

5. We are wholly unable to appreciate how on any principle or authority the Division Bench had, in an appeal under the Letters Patent, allowed a point which involved not only law but also facts to be agitated when that point had never been taken even in the plaint or before the trial Court, the first appellate court and the High Court in second appeal. It had not been raised even in the memorandum of appeal at any stage. Indeed it was admitted before the first appellate Court that the alienation evidenced by Ext. B-9 by Parvathiammal was one by way of a gift and was without consideration. It was never pleaded, asserted or claimed by the plaintiff that any consideration had passed for the properties which were the subject-matter of the gift by Parvathiammal in favour of Duraiswami. In such a situation it was not open to the Division Bench of the High Court to allow the question of consideration to be raised for the first time and that also without any amendment of the pleadings being allowed and without the defendants having a proper opportunity to meet the case.

6. It has been pointed out by learned Counsel for the defendants that the statements in Ext. B-9 did not in any way justify the view which has been taken by the Division Bench. The liability for the debt which was to be discharged was only up to Rs. 1000 which existed in respect of the properties which had been gifted. No reference was made to the discharge of encumbrances which were subsisting under the deed Ext. B-28, dated January 16, 1921 on other properties. If the donee himself chose to pay the entire amount of Rs. 1800 by means of the receipt Ext. B-29 and redeem all the properties including the gifted properties and rights that could not have the effect of rendering the alienation evidenced by the gift deed as one for consideration. We are of the view that it is wholly unnecessary for us to go into the question whether the deed of gift was an alienation for consideration for the reasons which we have already indicated.

7. Before us an alternative submission was sought to be raised on behalf of the defendants that even if the gift by Parvathiammal was invalid on other grounds it should be given effect to as valid on the ground that it constituted a family arrangement. We do not propose to express any opinion on this matter and it will be for the High Court to decide it if the point is still open for decision and if any necessity arises for going into it.

8. In the above view of the matter the judgment of the Division Bench is set aside. Since no decision was given on the real question of law which had been decided by the learned single Judge and which is of certain importance the case shall go back to the High Court for a fresh decision of the appeal in accordance with law. There will be no order as to costs in this Court.

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