Privy Council Appeal No. 54 *of* 1941

Ramchandra Jivaji Kanago and another – – – *Appellants*

v.

Laxman Shrinivas Naik and another – – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH DECEMBER, 1944

Present at the Hearing:

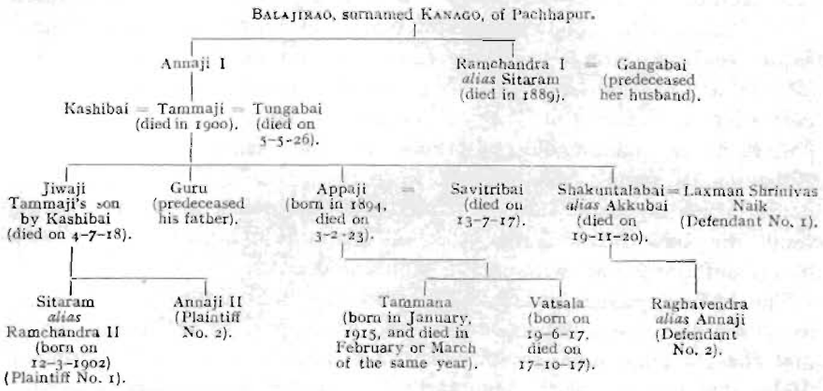
LORD RUSSELL OF KILLOWEN
LORD GODDARD
SIR MADHAVAN NAIR

[*Delivered by* SIR MADHAVAN NAIR]

This is an appeal from a decree dated 17th March, 1937, of the High Court of Judicature at Bombay, which reversed a decree dated 23rd April, 1932, of the Court of the First Class Subordinate Judge of Belgaum and dismissed the plaintiffs' suit.

The question for determination in the appeal is whether the plaintiffs' (appellants') suit for recovery of possession of the suit properties is barred by article 91 of the Indian Limitation Act 1908 (Act No. IX of 1908). This article prescribes a period of "three years" for a suit "to cancel or set aside an instrument not otherwise provided for"; and time begins to run "when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him".

The table given below shows the relationship of the parties to the suit who are members of a Hindu family descended from one Balaji Kanago:—



Balaji had two sons, Annaji I, Ramchandra I. As found by the High Court they separated in 1865. The elder, Annaji, died leaving a son Tammaji. The suit giving rise to this appeal was instituted by plaintiffs 1 and 2. Ramchandra II and Annaji II, the two sons of Jiwaji who was the son of Tammaji, against respondent No. 1 Laxman who was defendant No. 1, and his minor son Raghavendra, respondent No. 2 who was defendant No. 2. It was alleged in the plaint that the suit properties belonged to Appaji, son of Tammaji by Tungabai, that Appaji died without leaving surviving him either a widow or any issue, that on his death his mother Tungabai succeeded to his properties, and that on her death the plaintiffs as the nearest reversioners to Appaji were entitled to the properties in the suit. Tungabai died in 1926 and the suit was instituted in 1927.

Defendant No. 1 is the husband of a sister of Appaji named Shakuntalabai alias Akkubai deceased, and defendant No. 2 is their son.

In the joint written statement which they filed, they stated that the father of the plaintiffs, Jiwaji, was plaintiffs were adopted by Ramchandra I in the genealogical table, that defendant No. 2 was adopted by Tungabai after the death of Appaji, and that he was therefore a nearer heir to Appaji as he became his brother by Tungabai's adoption. As regards this plea, it may be stated at once that the Courts in India have held that Jiwaji was not the adopted son of Ramchandra I. It would therefore follow that the alleged adoption of defendant No. 2 was in law invalid for the reason that in the presence of the plaintiffs, the grandsons of Tammaji, his widow had no power to make any adoption to him. These questions are not now before the Board.

The defendants contended further that Appaji had made a gift of the suit properties to his sister Shakuntalabai by a deed of gift dated 24th May, 1915, that she left the same to her son defendant No. 2 by her will dated 16th November, 1920, which she had made before she died on the 19th November, 1920, and that defendant No. 1 as the guardian of his son came into possession of those properties. The plaintiffs met this plea with the case that Appaji was induced to execute the deed by the undue influence of defendant No. 1 and his wife Shakuntalabai and that therefore the gift was invalid.

Lastly, the defendants pleaded that the plaintiffs' suit was barred by limitation.

Issues 5, 6, and 9 which are as follows, relate to the validity of the gift set up by the defendants and their plea of limitation.

" Issue (5) Is the gift by Appaji to Shakuntalabai proved?

(6) If so, do Plaintiffs prove that it was brought about by undue influence?

(9) Is the Plaintiffs suit in time? "

On the above issues, the Subordinate Judge found that the gift was proved, but that it was not proved that it was made by Appaji " voluntarily " within the meaning of section 122 of the Transfer of Property Act (Act No. 4 of 1882) which says " gift is the transfer of certain existing movable or immovable properties made voluntarily and without consideration . . . . . "; that it was proved that it was caused by the undue influence of defendant No. 1, exercised upon Appaji, that it was void, that article 91 of the Limitation Act did not apply and that the suit was in time under article 141 which prescribes a period of twelve years for a " like suit " by a Hindu or Muhammedan entitled to possession of immovable properties on the death of a Hindu or Muhammedan female from the time when the female dies." " Like suit " in the article means a suit for recovery of immovable property. In the result, the Subordinate Judge gave the plaintiffs a decree for possession of the suit properties with mesne profits and costs.

The learned Judges of the High Court held that the gift was brought about by the undue influence exercised on Appaji by defendant No. 1 and also by Shakuntalabai, but they held differing from the Subordinate Judge that it was made " voluntarily " " as Appaji may have probably executed the deed ' voluntarily ' in the sense that he expected to die and wished to benefit his beloved nephew " though in doing so, he acted under the influence of his sister and her husband. As the transaction was, in their view, voidable and not void, they held that article 91 applied to the case and time began to run against Appaji who was aware of the character of the transaction from the date of the document, viz., 24th May, 1915, and that the suit was barred as it was brought beyond three years from that date. They also held that section 10 of the Indian Limitation Act also relied on by the plaintiffs would not apply to the case. In the result, they allowed the appeal and dismissed the plaintiffs' suit with costs.

Having regard to the findings of the High Court which their Lordships find no reason to reject, the main question for determination before the Board, as stated already, is whether the suit is barred by article 91 of the Indian Limitation Act. If the deed of gift is a void transaction no question of cancelling, or setting it aside, would arise, but if it is only a voidable transaction, that is, a transaction valid until rescinded, then the necessity to set it aside is obvious before possession of the property

can be claimed. Mr. Parikh's first argument was that as the transaction in question was brought about by undue influence as found by the Courts in India, it was not voluntary and was therefore void as a gift within the meaning of section 122 of the Transfer of Property Act. This argument cannot be accepted. Though the transaction was induced by undue influence it does not necessarily follow that it was not made " voluntarily." As held by the learned Judges of the High Court it is clear to their Lordships that Appaji wished to make a gift and acted " voluntarily " in making it. Circumstances brought out in the evidence amply support this view. Appaji was a delicate boy. In 1915, he was only 20. He suffered from epilepsy. Before he made the gift he had been travelling from place to place in search of health and visiting temples. At about the time of the gift he must have realised that his health was not improving and that the prospect of having any issue was becoming more and more uncertain. It was then that he made the gift to his sister in 1915. The opinion of the High Court that he was in no way an idiot or weak-minded intellectually, though he was under the influence of his sister and her husband, cannot be controverted in view of the evidence in the case. In these circumstances, their Lordships do not find any sufficient reason to differ from the opinion of the High Court that Appaji made the gift " voluntarily." The transaction is therefore not void, but only voidable as induced by undue influence and requires to be set aside before the properties conveyed by it could be claimed by Appaji or by anyone claiming through him.

Under article 91 of the Indian Limitation Act, limitation begins to run from the time the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. It is true that Appaji became insane in or about July, 1917, and continued so, until his death in 1923; but he was fully aware of the character of the transaction when he executed the deed in 1915 and before he became insane. On this point the High Court observes as follows:—

> " It is not shown that any of the facts which might have entitled him (Appaji) to have the gift cancelled were unknown to him—either his relationship with Laxman and Akkubai which gave them an opportunity of dominating his will, or the effect of this gift on his family and himself."

Their Lordships agree with this view. In this connection reference may be made to the decision of the Board in *Someshwar Dutt* v. *Tirbhawan Dutt* (61 I.A. 224) where it was held that time runs from the date of the knowledge and not from that of the removal of the undue influence. In that case it was held by their Lordships that " the plaintiff not being of weak intellect was aware of the character of the transaction at the date when it was entered into " and that time began to run from that date. It follows therefore that, in this case, time began to run against the plaintiffs from the date of the gift and that their claim was barred by limitation at the date of the suit.

It was also argued by the learned Counsel for the appellants that, inasmuch as the properties in the suit were obtained by undue influence, having regard to sections 88, 89 and 95 of the Indian Trusts Act (Act No. 2 of 1882), the donee and her successor, defendant No. 2 should be considered to be holding the properties, as if they were " trustees " of the same and the suit to recover their profits will not be barred by time, having regard to section 10 of the Limitation Act, which says:— ". . . . . no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his, or their, hands such property or proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time." Their Lordships do not think it is necessary to examine this argument beyond saying that, as section 10 of the Limitation Act applies only to a case of property which has become " vested in trust for a specific purpose " which certainly is not the case here, that section can have no application to the present case.

For the above reasons, their Lordships would humbly advise His Majesty that this appeal should be dismissed, but without costs as the respondents have not appeared before the Board.

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In the Privy Council

RAMCHANDRA JIVAJI KANAGO
AND ANOTHER

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AND ANOTHER

[DELIVERED BY SIR MADHAVAN NAIR]

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