

of substance or essence, that the trusteeship arises from the heirship.

For these reasons, the decree of the District Court must be reversed, and, as the pleaders on either side agree that there is no further question on the merits to be determined, the appeal is allowed. The Court doth declare that the property in dispute is a public religious trust under the will of Ambaram Bhikariram and must be dedicated to the worship of Shiva and that the plaintiff is entitled to recover possession for the purpose of carrying out the said trust according to the directions in the said will. The Court awards possession accordingly. The plaintiff should give an undertaking to the Court of the Subordinate Judge at Surat that within three months from the date of recovery of possession he will take the proper, legal and necessary steps for the purpose of completing the trust and securing its administration. Costs throughout on the respondent.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Rao.

TRIMBAK BHIKAJI (ORIGINAL PLAINTIFF), APPELLANT, v. SHANKAR SHAMRAV
alias MAHADEO BALVANT AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1911.

July 20.

Contract Act (IX of 1872), section 19—Registered deed of gift—Right of revocation not reserved by the donor—Title of the donee—Challenge by a third party having no title.

Though it might be open to a donor, within the time allowed by the law of Limitation, to attack his gift under a registered deed, which reserved no right of revocation, on the grounds mentioned in section 19 of the Contract Act (IX of 1872), still so long as the registered deed stands, the title of the donee under it cannot be challenged by a third party who has no title.

SECOND appeal against the decision of H. S. Phadnis, District Judge of Khandesh, confirming the decree of V. R. Kulkarni, Subordinate Judge of Yaval.

* Second Appeal No. 15 of 1910.

1911.

TRIMBAK
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v.
SHANKAR
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The property in suit belonged to one Balaji Ganesh, a Deshastha Brahmin. He died without male issue in the year 1902 and his daughter Jiji *alias* Bhikabai succeeded him as heir. On the 25th February 1907 Jiji passed to the plaintiff, her distant cousin, a registered deed of gift of the property inherited by her from her father, and on the strength of the deed the plaintiff brought the present suit against the defendants, who were in possession of the property comprised in the deed of gift, for a declaration that the adoption of defendant 1 by the deceased Balaji Ganesh was invalid, the defendant being sister's son, and for possession.

Defendant 1 contended that he was the duly adopted son of the deceased Balaji and his adoption was valid according to law and custom, that the plaintiff's suit for possession was not maintainable at law unless the defendant's adoption was legally sought to be set aside and cancelled and that the gift to the plaintiff by Jiji was tainted with fraud and could not convey any rights to the plaintiff.

Defendant 2 was absent.

Defendants 3 and 4 stated that they were tenants under defendant 1 and that they would surrender the lands to their lessor on the expiry of the period of tenancy.

The Subordinate Judge found that the gift relied on by the plaintiff was not proved; that the adoption of defendant 1 was proved, but it was invalid, being the adoption of a sister's son and as such *ab initio* invalid according to Hindu Law, the parties being Brahmins; that the plaintiff's grantor was the sole heir of the deceased Balaji; that it was not necessary for the purposes of the suit to set aside the adoption of defendant 1; and that the plaintiff was not entitled to any relief. The suit was, therefore, dismissed.

On appeal by the plaintiff the District Judge framed three issues, namely: "(1) Is the deed of gift relied on by plaintiff proved to be valid one? (2) Is defendant's adoption invalid? (3) What decree to be passed?" The first issue was found in the negative; no finding was considered necessary on the second issue and the decree was confirmed. In the judgment the

District Judge observed that the deed of gift was proved, but it came into existence under such circumstances that a Court of Justice could not "regard such a deed as valid and enforceable one as against the grantor, nor as against strangers on its being repudiated by the grantor."

1911,

TRIMBAK
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vs
SHANKAR
SHAMRAY.

The plaintiff preferred a second appeal.

Shortt, with *S. V. Bhandarkar*, for the appellant (plaintiff).

P. P. Khare and *B. V. Vidhvans* for respondent 1 (defendant 1).

SCOTT, C. J. :—In this case the plaintiff sues the defendants for possession of certain property.

The first defendant claims to be the adopted son of a previous owner named Balaji who died in 1902 leaving a daughter named Jiji.

The plaintiff claimed under a deed of gift dated the 25th of February 1907 executed in his behalf by Jiji and alleged that the defendant 1's possession was unlawful in that he was a sister's son of Balaji and therefore one who could not be adopted by Balaji.

The only question which has been argued before us is whether it is open to defendant 1, failing in his defence as to adoption, to set up a case that the plaintiff's deed of gift from Jiji, who was the heir of the last owner, is invalid.

The learned District Judge held that the deed of gift relied upon by the plaintiff is not proved to be a valid one. He found that it was a registered deed and was formally proved, but he said he was not satisfied that Jiji put her signature to it knowing its contents and consequences. He then made a number of observations with regard to the deed which indicate that he had not clearly made up his mind whether the deed from Jiji's point of view ought to be attacked as a sham or *benami* deed passed merely to enable the plaintiff to sue the defendant 1, who was in possession of the property, on Jiji's behalf, or whether it was a deed extracted by the plaintiff in his own interest from Jiji by undue influence or misrepresentation.

1911.

TRIMBAK
BHIKAJI
v.
SHANKAR
SHAMRAY.

It appears that Jiji gave evidence on behalf of the defendant 1 who claimed under a title adverse to her, and the learned Judge has held that it was open to defendant 1 when sued for possession to avail himself of such grounds of attack as would have been open to Jiji if she had sued to set aside the deed.

In our opinion, however, it is not open to defendant 1 to take that line of defence. *Ex hypothesi* he is a person who has no title to the property. The plaintiff is a person claiming under a registered deed of gift executed in his favour by the person who is admittedly the heir of the last holder. The plaintiff has, therefore, a *prima facie* title and must succeed unless the defendant 1 can show some better title in himself. Sir Richard Couch, in *Ram Bhurosee Singh v. Bissesser Narain Mahata*⁽¹⁾ which was a possessory action brought by a person with *prima facie* title, said: "I think that the title which the plaintiff had by the Mokurruree lease and the bill of sale was sufficient to enable him to bring the suit, and that the defendants were not at liberty, in a suit of this description, to raise the question whether he was only nominally the owner of the property, somebody else being the real owner. The difficulties which are suggested in the judgment in the case quoted might all be met without holding that the party who brings the suit and has a *prima facie* title, is bound to prove that he is the real owner." That case was followed by the Allahabad High Court in *Nand Kishore Lal v. Ahmad Ata*⁽²⁾, where they held that a *benamidar* suing for the recovery of immoveable property on title can sue in his own name, and when such a suit is instituted by a *benamidar* it must be held to have been instituted with consent and approval of the beneficiary, against whom any adverse decision on the title set up will take effect as a *res judicata*.

This Court in *Joitaram v. Ramkrishna*⁽³⁾ has taken the same view of the law without reference to Sir Richard Couch's decision. The learned Judges were there dealing

(1) (1872) 18 W. R. 454.

(2) (1895) 18 All. 69.

(3) (1902) 27 Bom. 31 at p. 42.

with the case of a deed of gift which was impugned on the ground that the donee had not acquired possession and they say :

"The defendant 2 preferred to impugn the plaintiff's title on the ground of an alleged defect, which if established would at most have shown that the donors were entitled, and though it is contended that in such case their title would have been time-barred, it would have been difficult to conceive how the possession of defendant 1 could have been adverse to them at a date earlier than that at which it could have become adverse to the plaintiff. So far as they could they completed the gift, the terms of which they embodied in the registered deed, and they have never attempted any reservation or revocation in their own favour, and a stranger cannot challenge its validity as against the donee."

Similarly in the present case the deed reserved to the donor no right of revocation nor has she taken any proceedings within the period allowed by the law of Limitation to set aside the deed on the ground that it was obtained from her under the circumstances mentioned in section 19 of the Indian Contract Act.

For these reasons we hold that the defendant 1 cannot rely upon the ground of attack which might be open to the donor if she sued the donee within the time allowed by the law of Limitation, and that so long as the registered deed stands the title of the donee under it cannot be challenged by a third party who has no title. We, therefore, set aside the decree of the learned Judge.

That, however, does not dispose of all the questions in the case, for, the learned District Judge has not found upon the question raised as to the validity of the first defendant's adoption. He held that no finding was necessary because the deed of gift relied upon by the plaintiff was not proved to be valid.

We, therefore, remand the case for disposal upon the second and third issues as raised by the District Judge.

The District Judge will find himself on those issues and dispose of the case accordingly.

Costs of this appeal must be paid by the present respondent.

Decree reversed. Case remanded.

G. B. R.