

CIVIL APPEAL

Present: Hon'ble Mr. Justice Tarun Kumar Gupta

Judgment on 03.09.2010

S.A. No. 21 of 2003

Jumman Saha

Versus

Dabir Saha and others

Points:

Presumption, Issue- Whether Court is justified in not presumed under Section 114 (e) of the Indian Evidence Act that “official acts have been regularly performed” as gift deed was registered-Whether appellate court should have decided all issues in suit.- Evidence Act, 1872 S.114(e)- Code of Civil Procedure, 1908 O 41 R 33

Facts:

Hara Saha gifted the 'Ka' schedule land along with other lands to the plaintiff by registered deed of gift. Due to mistake plot No.1581 instead of plot No.1481 was written in the deed of gift. Defendants threatened the plaintiff with dispossession from 'Ka' schedule property and as a result, plaintiff was compelled to file suit for declaration of title and other consequential reliefs. The last page of the deed of gift bearing the signatures of the attesting witnesses as well as the certificate of registration and the entry number in the registered book was not tagged with the deed of gift while it was produced in Court during evidence but the same was exhibited (Ext.3) without raising any objection from the side of contesting defendants. Trial court decreed the suit but the appellate court reversed the decree on the ground that in the deed there are no name of the attesting witnesses and certificate of registration.

Held:

It is true that the original deed of gift (Ext.3) which was produced in the Trial Court during trial did not bear the page whereupon there was signature of two attesting witnesses as well as certificate of registration and the endorsement of entry in the register book, but it has to be presumed under Section 114 (e) of the Indian Evidence Act that official acts have been regularly performed. In other words there was presumption that there was attestation of said deed of gift at least by two witnesses as per requirements of law, and that only thereafter there was registration, and that there was certificate of registration as well as entry of the number of the register books as per usual procedure. When those defects came to the notice of learned First Appellate Court, he should have given an opportunity to the appellant / plaintiff to remove those defects by producing the certified copy of the deed of gift and proving the same as per law by invoking his powers under Order 41 Rule 27 C. P. C. Without resorting to said procedure learned First Appellate Court preferred to allow the appeal on the technical ground without even discussing other issues. Para 12

First Appellate Court is the last Court of finding of facts. He should have discussed other issues particularly issue No.5 as to whether there was any bonafide mistake in the deed of gift dated 14.07.1973 regarding plot No.1481 which was purportedly written as 1581. Para 12

The impugned judgment of learned First Appellate Court is not sustainable in law and should be set aside by this Court of Second Appeal with an order of remand directing the First Appellate Court to take the required evidence under Order 41 Rule 27 C. P.C. by the said Court and not by transferring the same to Learned Trial Court and then to rewrite the judgment, after giving

opportunity to parties for further argument, if any, touching all relevant issues particularly issue No.5. Para 13

For the appellant: Mrs. Usha Maity

Tarun Kumar Gupta, J.:-

This appeal is directed against judgment and decree dated 24th May, 2002 and 1st June, 2002 respectively passed by learned Additional District Judge, Midnapur in Title Appeal No.95 of 2001 thereby reversing the judgment and decree dated 27th April, 2001 and 4th May, 2001 respectively passed by learned Civil Judge (Junior Division), 2nd Court, Contai, Midnapur East in Title Suit No.187 of 1995.

2. The appellant's / plaintiff's case, in short, is that 'Ka' schedule land previously belonged to one Hara Saha who by registered deed of gift being No.6537 dated 14.07.1973 gifted the 'Ka' schedule land along with other lands to the plaintiff followed by delivery of possession and that since then plaintiff was in possession of those lands by paying rent to the Government. Subsequently, it was detected that due to mistake of the scribe a plot No.1581 instead of plot No.1481 was written in the deed of gift. Though said mistake was palpable as Hara Saha had no right, title or possession over plot No.1581, though he had such right, title and interest on plot No.1481. On 25th Ashar, 1402 B.S. the defendants threatened the plaintiff with dispossession from 'Ka' schedule property i.e., plot No.1481 and as a result, plaintiff was compelled to file said Title Suit No.187 of 1995 for declaration of title over 'Ka' schedule land and other consequential reliefs.

3. The defendants contested said suit by filing written statement denying material allegations of the plaintiff and contending inter alia that Hara Saha

who was admitted owner of the suit property died issueless and out of love and affection handed over the possession of the same to the defendants being his nephews in the year 1970 and since then defendants were in possession and accordingly their names were recorded in record of right and that plaintiff had no right, title, interest and possession over the said land and the suit should be dismissed with cost. It was further case of the defendants that plot Nos. 219, 213 and 214 mentioned in the deed of gift were exclusive property of Pir Saheb and those were used by the people of Muslim community and that no individual had right to deal with the same.

4. On the basis of the plea of the parties learned Trial Court framed as many as seven issues which stand as follows:-

- (1) Is the suit maintainable in its present form and prayer?
- (2) Is the suit barred by limitation?
- (3) Has the plaintiff any cause of action?
- (4) Has the plaintiff right, title and interest over the 'Ka' schedule land?
- (5) Is there any bonafide mistake in the deed of gift dated 14.07.1973 regarding plot No.1481 which is purportedly written as 1581?
- (6) Is the plaintiff entitled to get relief what he has prayed for?
- (7) To what other relief, if any, is the plaintiff entitled?

5. During trial both the parties adduced oral as well as documentary evidence and the deed of gift was also marked as (Ext.3), on proof without objection. Learned Trial Court decreed the suit in favour of the plaintiff. However, learned First Appellate Court allowed the appeal by way of reversing the judgment and decree of learned Trial Court only on the ground that the deed of gift (Ext.3) as produced during evidence did not bear signature of at least two attesting witnesses as per requirements of Section 123 of T. P. Act and that the same did not also bear the certificate of

registration and its number in the registered book as required under Section 60 –61 of the Registration Act. According to learned Appellate Court deed of gift was not valid for those defects and that plaintiff did not get any title on the strength of the said deed of gift. Learned Appellate Court, however, did not discuss any other point or issue.

6. Being aggrieved with said judgment of learned First Appellate Court the plaintiff has filed this Second Appeal. At the time of admission of Second Appeal Hon'ble Division Bench has framed following law points to be heard.

(1) Whether the learned Additional District Judge erred in passing the judgment and decree in appeal, thereby reversing the judgment and decree as passed by the learned Trial Judge is contrary to the principle of law, as none of the issues as framed before the learned Trial Judge had not been properly dealt with?

(2) Whether the learned Additional District Judge, Midnapore erred in passing the judgment by making out third case, thereby completely ignoring the fact that the deed of gift was marked as Ext.3, at that time, no objection was raised by the defendants and the learned Trial Court was also satisfied with the contents of such document. Therefore, the judgment and decree as passed by the learned Appeal Court below is liable to be set aside?

(3) Whether the learned Additional District Judge erred in law by not pointing out, before the parties, regarding the attesting witnesses and the certificate of registration and its entry in the registered book with regard to the registered deed of gift marked as Ext.3, but while delivering judgment the learned Judge had held that in absence of those legal requirements the deed of gift is invalid. It is established principle of law that either of the parties to the appeal could have cured such defects regarding the page on

which attesting witnesses had put their signature in the last page of the registered deed of gift, which could not be produced by him at the time when the order under appeal was passed. The learned Judge also could have considered, while the plaintiff had produced a registered deed of gift (Ext.3) that must have followed the provision as contained in the Registration Act. A presumption would have arisen that there must be a page wherein the attesting witnesses had put their signatures, otherwise an instrument could not be registered under the provision of Registration Act. In the case in hand, although there had been a last page of the deed of gift was not duly placed, defect by taking recourse of due process of law, but without doing so the judgment and decree as appealed against cannot sustain in law and is liable to be set aside.

(4) Whether the learned Additional District Judge erred in law by not dealing with the specific issue No.5 as framed by the learned Court below?

7. All these issues as framed by Hon'ble Division Bench at the time of admission are taken up for hearing.

8. Mrs. Usha Maity learned advocate for the appellant /plaintiff has submitted that admittedly the last page of the deed of gift bearing the signatures of the attesting witnesses as well as the certificate of registration and the entry number in the registered book was not tagged with the deed of gift while it was produced in Court during evidence but the same was exhibited (Ext.3) without raising any objection from the side of contesting respondents / defendants. She has further submitted that had there not been signature of two attesting witnesses under Section 123 of the Transfer of Property Act the registrar would not have admitted said deed of gift for registration and that certificate of registration and the entry number showing its entry in the register book as required under Section 60-61 of the

Registration Act were in the last page of the deed of gift and that learned First Appellate Court should have given opportunity to the appellant /plaintiff to produce certified copy of the deed of gift to show that all the requirements of law as required were fulfilled at the time of execution of said deed of gift.

9. Mrs. Maity learned advocate has further submitted that just on the technical ground learned First Appellate Court allowed the appeal by reversing the judgment and decree of learned Trial Court without discussing other issues. According to her the impugned judgment of the First Appellate Court is not sustainable in view of the defects as submitted above. She has, however, prayed for issuing direction to the learned First Appellate Court for permitting appellant / plaintiff to adduce further evidence under order 41 Rule 27 C. P.C. to prove by producing certified copy of deed of gift that all the legal requirements of Section 123 T. P. Act as well as Sections 60-61 of the Registration Act were fulfilled at the time of execution of the deed of gift, keeping the appeal pending at this end.

10. Learned Advocate for the respondent /defendant, on the other hand, has submitted that admittedly at the time of exhibiting the original deed of gift (Ext.3) the page containing signature of attesting witnesses and certificate of registration and entry number of the register book was missing and that learned Trial Court had no option but to declare the deed of gift invalid in view of those shortcomings. However, learned Advocate for the respondent / defendant is fair enough to admit that there may be an order of remand after setting aside the impugned judgment permitting appellant / plaintiff to adduce further evidence under Order 41 Rule 27 C. P. C. only to the point of compliance of Section 123 T. P. Act as well as Sections 60- 61 of Registration Act at the time of execution of the deed of gift.

11. I have carefully considered the submissions made by learned Advocates of both sides, and perused the impugned judgment and other materials on record.

12. It is true that the original deed of gift (Ext.3) which was produced in the Trial Court during trial did not bear the page whereupon there was signature of two attesting witnesses as well as certificate of registration and the endorsement of entry in the register book, but it has to be presumed under Section 114 (e) of the Indian Evidence Act that official acts have been regularly performed. In other words there was presumption that there was attestation of said deed of gift at least by two witnesses as per requirements of law, and that only thereafter there was registration, and that there was certificate of registration as well as entry of the number of the register books as per usual procedure. When those defects came to the notice of learned First Appellate Court, he should have given an opportunity to the appellant / plaintiff to remove those defects by producing the certified copy of the deed of gift and proving the same as per law by invoking his powers under Order 41 Rule 27 C. P. C. Without resorting to said procedure learned First Appellate Court preferred to allow the appeal on the technical ground without even discussing other issues. Admittedly, First Appellate Court is the last Court of finding of facts. He should have discussed other issues particularly issue No.5 as to whether there was any bonafide mistake in the deed of gift dated 14.07.1973 regarding plot No.1481 which was purportedly written as 1581.

13. In view of the aforesaid discussions I am of the opinion that the impugned judgment of learned First Appellate Court is not sustainable in law and should be set aside by this Court of Second Appeal with an order of remand directing the First Appellate Court to take the required evidence

under Order 41 Rule 27 C. P.C. as stated above, by the said Court and not by transferring the same to Learned Trial Court and then to rewrite the judgment, after giving opportunity to parties for further argument, if any, touching all relevant issues particularly issue No.5. As a result, the appeal succeeds.

14. The appeal is hereby allowed on contest but without costs.

15. The impugned judgment and decree dated 24th May, 2002 and 1st June, 2002 respectively passed by learned Additional District Judge, Midnapur in Title Appeal No.95 of 2001 are hereby set aside. Learned First Appellate Court, Midnapur (East) is hereby requested to dispose of the appeal within three months from the date of communication of this judgment as said appeal of 2001 arose out of an old case of 1995.

16. Parties are hereby directed to appear before learned 1st Appellate Court on 17.09.2010 to receive further order.

17. Office is hereby directed to send down Lower Court records along with a copy of the judgment by a special messenger.

(Tarun Kumar Gupta, J.)

