
(2015) 09 GAU CK 0065
In the Gauhati High Court
Case No : RSA No. 170 of 2006

Amrit Kakoti and Others

APPELLANT

Vs

Karuna Patgiri and Others

RESPONDENT

Date of Decision : 10-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (2015) 5 GLT 99

Hon'ble Judges : Arup Kumar Goswami, J.

Bench : Single Bench

Advocate : Sheeladitya, Advocate, for the Appellant; R. Sarma, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Arup Kumar Goswami, J.—Heard Mr. Sheeladitya, learned counsel for the appellants. Also heard Mr. R. Sarma, learned counsel appearing for the respondents. This appeal is directed against the judgment and decree dated 24.04.2006, passed by the learned Civil Judge (Sr. Diva), Barpeta in Title Appeal No. 6/2005, affirming the judgment and decree dated 29.09.2004, passed by the learned Civil Judge (Jr. Divn.), Bajali, Pathsala in Title Suit No. 25/1996, decreeing the suit of the plaintiffs and dismissing the counter-claim.

2. The second appeal was admitted to be heard by an order dated 19.01.2007 on the following substantial questions of law:

"1. Whether the learned Court below erred in law in holding the Ext-1 as a fraudulent document in absence of specific pleadings and proof to that effect as required under the law?

2. Whether the Court below was justified in setting aside the judgment passed by the learned trial Court and the counter claim filed by the defendant appellant without having specific reference to that effect?"

3. The learned counsel for the parties agreed that in substantial question of law No. 1, "Ext.-1" is wrongly recorded in place of Ext.-"ga" and accordingly, arguments had been advanced on that basis.

4. Mr. Sheeladitya, learned counsel for the appellants also has not argued on the substantial question of law No. 2 and this aspect of the matter is recorded in the order dated 05.08.2015.

5. The pleaded facts in the plaint, inter-alia, are that one Bahrain Patgiri had 4 Bigha 2 Katha 13 Lecha of land covered by Dag No. 113 of K.P. No. 114 described in Schedule A of Village-Haguriagaon of Uttar Bajali Mouza. He had 2 (two) sons, namely, Ghanashyam Patgiri and Dhaniram Patgiri. During his lifetime, Baliram Patgiri had sold 1 Bigha 2 Katha 10 Lecha to one Basanta Das from Schedule A land and thus on his death, he left behind 3 Bigha 0 Katha 3 Lecha land described in Schedule B. Ghanashyam Patgiri and Dhaniram Patgiri were born through the first wife of Baliram Patgiri. Plaintiff Nos. 1 to 6 and 14 to 19 are sons and daughters of Late Ghanashyam Patgiri and plaintiff Nos. 7 to 11 are sons and daughters of Late Dhaniram Patgiri. Plaintiff Nos. 12 and 13 are wives of Ghanashyam Patgiri and Dhaniram Patgiri, respectively. Defendant No. 2 is the son of Smti. Uttarabala Das, arrayed as defendant No. 3. Uttarabala Das is the daughter of Baliram Patgiri through his second wife (it appears that her name is Sumitra Bala Patgiri). The Schedule B land was in possession of the plaintiffs through Ghanashyam Patgiri since the death of his father. Defendant No. 2 Madhab Kalita instituted a Title Suit being T.S. No. 133/1984 in the Court of Munsiff No. 1, Barpeta against the plaintiffs praying for declaration of right, title and interest and injunction in respect of present Schedule B land. Prayer for temporary injunction made by him was rejected by the learned Munsiff. On receipt of summons and on perusal of the plaint and the case record, for the first time they came to learn that defendant No. 3 fraudulently executed a registered gift deed No. 2098/72 gifting 2 Bigha 2 Katha 10 Lecha within Schedule B land in favour of her son, defendant No. 2 and that by an order dated 23.02.1984, 2 Bigha 3 Katha 10 Lecha was mutated in favour of the defendant No. 2. Title Suit No. 133/1984 was withdrawn in collusion with defendant No. 1 of the present suit on 27.06.1986. But prior to that, on 04.06.1986, defendant No. 2 executed a sale deed in favour of the present defendant No. 1 Amrit Kakoti in respect of 1 Bigha 3 Katha 10 Lecha. On 16.05.1986, the plaintiffs had also come to learn that by a registered sale deed No. 2306 (should have been Gift Deed) dated 16.08.1968, Baliram had gifted 2 Bigha 3 Katha 10 Lecha to Sumitra Bala. It is averred that Sumitra Bala did not accept the gift and never attempted to possess the suit land in respect of which mutation was continuing in favour of the plaintiffs from 27.07.1968 till 24.02.1984 when the suit land was mutated in favour of the defendant No. 2. Name of Sumitra Bala was mutated vide order dated 22.11.1970 in respect of Dag Nos. 102, 104, 108, 110, 126, 127 and 135 of KP No. 114 as land in the aforesaid Dags fell in her share. Subsequently, name of defendant No. 2 was mutated in respect of the said Dags on 27.11.1976 in place of Sumitra Bala.

6. It is pleaded that the gift deed executed by Baliram is a fraudulent gift deed, made at a time when Baliram was of very old age and when he had suffered from lack of consciousness. Ghanashyam Patgiri and Dhaniram Patgiri continued to remain in possession. On 02.06.1986 and 02.11.1986, the defendants entered into suit land and therefore, plaintiffs had to file the suit praying for right, title and interest over the suit land and also for declaring that defendants have no title thereon, confirmation of possession of the plaintiffs, permanent injunction against the defendants to restrain the defendants from entering into the suit land, declaration of the mutation order dated 23.02.1984 as illegal, nullity and inoperative.

7. The defendant No. 1 filed a written statement. Apart from various legal pleas taken, it was pleaded by him that the legally married second wife of Baliram was in possession of the gifted land and thereafter, Sumitra Bala gifted the suit land to her grandson, defendant No. 2, by executing gift deed No. 2098/72 (dated 16.11.1972) and delivered possession to him and since then, he was in possession of the suit land. Defendant No. 2 had to institute Title Suit No. 133/1984 as the plaintiffs of the present suit interfered with the peaceful possession of the plaintiff (defendant No. 2 herein) of Title Suit No. 13/1984 and subsequently, such interference having ceased, suit was withdrawn. It is pleaded that he had purchased the suit land and possession was delivered to him by the defendant No. 2. A counter-claim was also lodged by him for declaration of right, title and interest over the suit land by virtue of registered sale deed No. 727/1986 and for confirmation of possession.

8. On the death of the original defendant No. 1, his 8 (eight) legal heirs were substituted. It appears that on 09.05.2002, name of one son, Nipen Kakoti was struck off. The substituted defendants, barring Nipen Kakoti, numbering 7 (seven), describing themselves to be defendant Nos. 1 to 7 had also filed a written statement and counter-claim on 13.7.2001 reiterating the stand of their predecessor Amrit Kakati.

9. The suit proceeded ex parte against defendant Nos. 2 and 3.

10. On the basis of the pleadings, learned Trial Court framed the following issues:--

- "1. Whether there is any cause of action for the suit?
2. Whether the suit is barred by law of limitation?
3. Whether the suit is under valued?
4. Whether the plaintiff got right, title and interest over the suit land?
5. Whether on 2.11.86 the defendant dispossessed plaintiff from the suit land?
6. Whether defendant is estopped to claim the suit land in view of T.S. No. 133/86?

7. Whether plaintiff is entitled to get the decree as prayed for?

8. To what relief or reliefs if any the parties are entitled?

Additional Issues:

9. Whether possession of the suit land was delivered to Sumitra and later on to Madhab and whether they accepted the gift from donor?

10. Whether the defendant No. 1 has right, title and interest and possession over the suit land?

11. Whether the defendant No. 2 has sold out the suit land to the defendant No. 1 vide regd sale deed No. 727/86?

12. Whether the suit is fatal for non-joinder and mis-joinder for necessary parties?

13. Whether the defendants entitled for decree as per counter claim?"

11. The plaintiffs examined 5 (five) witnesses, namely, Karnadhar Patgiri (PW-1), Kandarpa Patgiri (PW-2), Chandra Kakoti (PW-3), Soniram Talukdar (PW-4) and Dhiren Sarma (PW-5) and exhibited 2 documents - (i) certified copy of Chita Jamabandi (Ext-1) and (ii) Revenue Paying Receipt (Ext-2).

12. Defendants examined 6 (six) witnesses, namely, Chabiranjan Kakati, though recorded by the Trial Court as Talukdar in place of Kakati (DW-1), Dharjya Nath Kalita (DW-2), Khitish Baishya (DW-3), Madhab Kalita (DW-4), Probhat Kakoti (DW-5) and Dimbeswary Bayan (DW-6), Kishore Nath (DW-7) and exhibited a number of documents including registered gift made by Baliram to Sumitra as Ext-Ga.

13. By judgment and order dated 23.12.2002, the suit of the plaintiff was dismissed without cost and the counter-claim of the defendants was decreed by declaring right, title and interest in respect of 1 Bigha 3 Katha 10 Lecha of land and confirming their possession.

14. Against the said judgment and decree, an appeal was preferred by the plaintiffs in the court of learned Civil Judge (Senior Division), Barpeta and the appeal was registered as Title Appeal No. 9/2003. The learned Appellate Court remanded the suit by a judgment and order dated 12.05.2004 with a direction to frame the following issue:

"Whether Gift Deed No. 2306 dated 16.08.1968 executed by Baliram in favour of Sumitra Kakati is forged one?"

15. The learned lower Appellate Court while remanding the suit, also directed the learned Trial Court to give opportunity to both the parties to adduce evidence on the said issue.

16. On remand, in terms of the judgment of the learned lower Appellate Court,

an issue was framed as Issue No. 14. Defendants re-examined DW-2 and also examined one Jogendra Nath Roy as DW-8.

17. By a judgment dated 29.09.2004, the learned Trial Court decreed the suit of the plaintiffs by holding that Gift No. 2306/68 is fraudulent. At the same time, the counterclaim was also dismissed.

18. An appeal was preferred being Title Appeal No. 6/2006 in the Court of learned Civil Judge (Senior Division), Barpeta and by a judgment and decree dated 24.04.2006, the appeal was also dismissed.

19. Mr. Sheeladitya, learned counsel for the appellants has submitted that both the courts below committed manifest error of law in declaring the gift deed, Ext-ga, to be void and illegal, being a fraudulent document, even though there was practically no pleading with regard to fraud. It is submitted that the plaintiffs had also not prayed for declaration of the gift deed, Ext-ga, as illegal. He has submitted that Baliram had executed a gift deed when he was around 98 years of age for the upkeep of his second wife. The said gift deed was proved by examining PW-2 and PW-8 who were attesting witnesses to the gift deed. Baliram Patgiri, the donor, was also known as Baliram Kakati and in the gift deed, names in the form of both Baliram Patgiri and Baliram Kakati had appeared. Learned counsel submits that signatures of the donor in the gift deed was not identical which is not unusual because of his ripe old age of 98 years and as he was barely literate who could only sign. It is only on the counts that signatures are not tallying, though attesting witnesses had deposed that he had signed in their presence, and names had varied, the gift deed, Ext-"ga" was held to be fraudulent. It is submitted by him that it is not a case put forward by the plaintiffs that somebody else had impersonated Baliram. The learned counsel has placed reliance in the cases of Khushalchand Swarup Chand Zabak Jain, Jalgaon Vs. Sureshchandra Kanhaiyalal Kochar and Another, , Brij Raj Singh [dead] by L.Rs. and Others Vs. Sewak Ram and Another, and Shanti Budhiya Vesta Patel and Others Vs. Nirmala Jayprakash Tiwari and Others, .

20. Mr. R. Sarma, learned counsel for the respondents has supported the impugned judgments and submits that no case is made out for interference in this appeal.

21. I have considered the submissions of the learned counsel for the parties and have perused the materials on record.

22. PW-1, in his evidence, had stated that his father, namely, Ghanashyam, had mutation in respect of the suit land during the lifetime of Baliram. In his cross-examination, he stated that Baliram died in the year 1972 and Ganashyam and Dhaniram expired about 10/12 years before his date of examination, i.e., 24.02.2002. In another portion, he had mentioned that Ghanashyam and Dhaniram had died about 15/20 years back. In his evidence-in-chief, he had also stated that defendant No. 1 could not take possession of the suit land and defendant No. 2 had also sold the land without having any possession.

23. PW 2, who was an "adhiar", deposed that the suit land was in the possession of the plaintiffs. In his cross-examination, he stated that when there was a talk going around that Baliram had gifted the suit land to Sumitra, Baliram was alive. PW 2 further stated that Ghanashyam died about 20 years after the death of Baliram and Sumitra was taken by Uttara to her residence after about 10 years of the demise of Baliram. Sumitra was in the house of Uttara for about 3 months.

24. PW 3, Chandra Kakati, had deposed that he was not aware that the suit land was gifted by Baliram to "Uttarabala", though the case of the plaintiffs was that gift deed to Sumitra Bala was fraudulent.

25. PW 4, Soniram Talukdar, deposed that the suit land was in the possession of the plaintiff and he was not aware of any gift deed executed by Baliram to Sumitra. In his cross-examination, which had taken place on 22.07.2002, he stated that Baliram died about 32 years back and Ghanashyam and Dhaniram died about 20 years after the death of Baliram. Sumitra also died about 10 years after the death of Baliram.

26. PW 5, Dhiren Sarma, who is a Revenue Kanungo, stated in his cross-examination that by an order dated 27.07.68, on the basis of relinquishment in Dag Nos. 113, 116, 118 and 119 of KP No. 114, names of Ghanashyam and Dhaniram were mutated in place of Baliram, but there was no copy of any deed of such relinquishment.

27. DW 1 exhibited his sale deed as Ext.-"ka" and the gift deed, executed by Sumitra Bala in favour of her grandson, defendant No. 2, as Ext.-"kha". DW 1 is the son of Late Amit Kakoti, the original defendant No. 1. The gift deed executed by Baliram in favour of Sumitra, was exhibited by him as Ext.-"ga". In cross-examination, DW 1 stated that after the purchase made by his father, when the plaintiff sought to take possession forcefully, his brother Nipen instituted one 145 Cr.P.C. proceeding where possession was declared in their favour. It is also stated by DW 1 that his father, and, thereafter, his substituted legal representatives had possession over the suit land.

28. DW 2, Dhairyanath Kalita is nephew of Sumitra as Sumitra was a younger sister of his mother. DW 2 was a witness of the gift deed, Ext.-"ga". He stated that Baliram signed in his presence and he put the signature, Ext.-"ga"(3). He also proved the signature of Baliram, which he knew, as Ext.-"ga"(1). He stated that Sumitra had accepted the gift and had taken possession of the land measuring 5 Bigha 16 Lecha, which was gifted to her. DW2 stated that at the time of execution of the gift deed, Baliram was about 98 years old. DW 2 was re-examined after remand and he proved Ext.-"ga"(2) to be signature of Baliram and also proved Ext.-"ga"(3) as his signature as a witness and Ext.-"ga"(4) and Ext.-"ga"(5) as his signatures as identifier. DW2 also deposed that one Jogen Roy was another witness of the gift deed and he proved his signature as Ext.-"ga"(6). He also stated that the scribe of the gift deed was one Bipin Khatoniar and that he knew his handwriting as both of them had worked as pleaders" clerk in the

office of the Patacharkuchi Sub-Registrar. DW 2 proved Ext.-"ga"(7) and "ga"(8) to be signatures of Bipin Khatoniar. He has further deposed that at the time of executing the gift deed, Baliram was hale and hearty and, fearing that his second wife, Sumitra, would be deprived by his other heirs, he had executed the gift deed. Ext.-"ga"(4), "ga"(5) and "ga"(7) were under objection. In cross-examination, DW 2 stated that Baliram used the surname of "Kakati" as well as "Patgiri" and in Ext.-"ga"(1) and "ga"(2) Baliram did not use his surname. DW 2 denied the suggestion that Ext.-"ga" was fraudulently manufactured.

29. DW 3 is the son of the witness Ambika Charan Baishya in Ext.-"kha", whose signature was proved by him as Ext.-"kha"(1) under objection. He had also proved his father's signature in Ext.-"bargajho"(1), which is a hand-note, under objection.

30. DW 4, defendant No. 2, had deposed that he sold 4 Bigha of land in favour of Amit Kakoti, vide Ext.-"Modhinnata", which was gifted to him vide Ext.-"kha", by his grandmother, and he was also delivered possession.

31. DW 5 was a witness in Ext.-"ka". In cross-examination, he stated that his house was at a distance of about one furlong from the suit land. He stated that on one corner of the suit land the plaintiffs mother and one nephew were residing and the plaintiffs mother expired about 10/11 years back.

32. DW 6 is an employee of the Sub-Registrar's Office. DW 6, by bringing the Volume Register from the Sub-Registrar's Office, deposed that Ext.-"kha" is a certified copy of the original deed.

33. DW 7, Kishore Nath, another employee of the Office of the Sub-Registrar, at Guwahati, deposed that gift deed Nos. 2603 dated 17.08.68 and No. 2908 dated 16.11.72 were entered into Volume 15/68 and 2/73, respectively and, thereafter, transferred to the office of the Sub-Registrar, Patacharkuchi.

34. DW 8 was examined after remand and he deposed that in the gift deed, Baliram had signed in his presence and he had signed as witness. DW 8 proved his signature as Ext.-"ga"(8). He also identified the signatures at Ext.-"ga"(1) and Ext.-"ga"(2) to be signatures of Baliram. It is also deposed by him that the scribe of Ext.-"ga" was Bipin Khatoniar and that Ext.-"ga"(7) was his signature. In cross-examination, he stated that Baliram used to write "Kakati" as his surname.

35. At this stage, it will be appropriate to extract relevant provisions of the Transfer of Property Act, 1882, and the Indian Evidence Act, 1872.

Transfer of Property Act. 1882:

"3. In this Act, unless there is something repugnant in the subject or context, "attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executants sign or affix his mark to the instrument, or has seen some other

person sign the instrument in the presence and by the direction of the executants, or has received from the executants a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executants; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

"123. For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift or moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered."

Indian Evidence Act, 1872:

"68. Proof of execution of document required by law to be attested.--If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

36. In *Khushalchand* (supra), in absence of any denial of execution of the gift deed, noticing that one of the attesting witnesses, son of another attesting witness and also the son of the scribe of the document had been examined, the Apex Court held that it must be concluded that due execution of the gift deed had been proved.

37. In *Brij Raj Singh* (supra), on the basis of evidence of PW6, who stated that he had signed as a scribe, signed as a witness and signed as an identifying witness and his three signatures having been found in the deed and his evidence having been found to be acceptable and as the document was registered as per the Indian Registration Act, the Apex Court held that there was due execution and attestation of the gift deed.

38. In *Shanti Budhiya* (supra), the Apex Court held that a registered document has a lot of sanctity attached to it and this sanctity cannot be allowed to be lost without following proper procedure. The appellants before the Apex Court having failed to furnish full and precise particulars with regard to the alleged fraud, as required under law, the appeal was dismissed.

39. A perusal of Ext.-"ga" goes to show that it is stated therein that the donor

was about 98 years old, his second wife did not have any male issue, his daughter was already married and his second wife would have no means of livelihood after his death. By the said gift deed, in total 5 Bigha 16 Lecha of land in Dag Nos. 104, 116, 118, 119, 126 and 235, including 2 Bigha 3 Katha 10 Lecha in Dag No. 113 were gifted by Baliram to Sumitra and she was also delivered possession of the land gifted.

40. In the plaint, the plaintiffs have not stated anything in respect of land gifted through the gift deed dated 16.08.1968 other than the land measuring 2 Bigha 3 Katha 10 Lecha. It is nowhere stated by them that Baliram had no such land as indicated in the schedule of the gift deed. On the contrary, it is also stated in the plaint that name of Sumitra Bala was mutated by an order passed on 22.11.1970 in respect of land of certain dags, which fell in her share, meaning thereby that apart from the 4 Bigha 2 Katha 13 Lecha in Dag No. 113, as mentioned in Schedule A, Baliram had other tracts of land. It also defies comprehension how names of Ghanashyam and Dhaniram came to be mutated by an order dated 27.07.1968 in respect of certain plots of land in various dags including in Dag No. 113, during the lifetime of Baliram. There could not have been any such mutation on the basis of alleged relinquishment as the concept of relinquishment is not at all attracted. It is also admitted by PW-5 that there was no such deed of relinquishment either. In paragraph 8 of the plaint, it is, however, stated that land belonging to Baliram were divided amongst the legal heirs based on which Dhaniram Patgiri and Ghanashyam Patgiri got the suit land on the basis of which their names were mutated by an order passed on 27.07.1968. The evidence of witnesses of the plaintiffs themselves go to show that Baliram died on or about the year 1972, much later than the date of mutation on 27.07.1968. During lifetime of Baliram, no settlement in the manner suggested could have legally taken place. Though the plaintiffs had feigned ignorance about the gift deed, Ext.-"ga", it has come out from evidence of PW-2 that even while Baliram was alive, news of Baliram gifting suit land to Sumitra Bala was in circulation.

41. Even in the suit filed, the plaintiffs had not prayed for any declaration to declare the gift deed, Ext.-"ga" to be illegal and void, save and except praying for a declaration that defendants had no title on the suit land. By Ext.-"kha", Sumitra Bala had gifted the entire property she received vide Ext.-"ga" to the defendant No. 2. Except for the statement to the effect that the registered gift deed dated 16.08.1968 is a forged deed or obtained fraudulently from Late Baliram at his old age when he suffered from lack of consciousness, there is no other allegation of fraud. Side by side, plea was also taken by the plaintiffs that Sumitra Bala never accepted gift, thereby, allowing Ghanashyam Patgiri and Dhaniram Patgiri to remain in possession.

42. In the instant case, the learned Lower Appellate Court held that as the suit land was not mutated in the name of Sumitra Bala, it can be said that Late Baliram did not execute the gift deed in favour of Sumitra Bala. It was also held that the property left behind by Late Baliram was divided amongst the legal heirs

and the suit land fell in the share of Ghanashyam and Dhaniram. It was also held that there is doubt regarding the genuineness of the gift deed, Ext.-"ga" and, at the same time, it was opined that the learned Trial Court rightly held the gift deed No. 2308/68 to be forged one.

43. Although there was no admission, the learned Trial Court recorded that during the lifetime of Baliram the property was equally divided between the heirs from two sides. The learned Trial Court held that it is quite unbelievable that a man, who is illiterate, could sign and could move about at the age of 98 years. Ext.-"ga" was rejected on the ground that names of Ghanashyam and Dhaniram were entered into the records of right prior to the gift deed. It is an established proposition of law that records of right do not create or extinguish title. The learned Trial Court also noted that name of Baliram was written differently in four places with different spellings and held the same to be a circumstance against valid execution of Ext.-"ga". Coupled with that it was also emphasized that the alphabet "ra" had not been written as per Assamese "ra", but was written as per Bengali "ra".

44. It is on record that Baliram was illiterate, who could barely sign and, therefore, his apparent mistakes in writing his name will not be of much consequence when there is categorical and unimpeachable evidence of PW 2 and PW 8, who were attesting witnesses to the gift deed, Ext.-"ga". Use of alphabet "ra" as in Bengali by a 98 years old person, in the year 1968, cannot be a ground to reject Ext.-"ga". A registered document cannot be held to be invalid on that count. It is worthwhile to note that the plaintiffs were raising issue only with regard to the land in Dag No. 113 of the gift deed, measuring 2 Bigha 3 Katha 10 Lecha, whereas by the gift deed, 5 Bigha 16 Lecha of land in various Dags had been gifted. Mutation of the names of Ghanashyam and Dhaniram, on the face of it, was not in accordance with law.

45. In the facts and circumstance of the case, the plea raised by the plaintiffs that the gift was not accepted is without any merit. Even if the plaintiffs also had some possession, it must not be forgotten that Sumitra Bala was the step-mother of Ghanashyam and Dhaniram. Such possession, if any, will not extinguish the right, title and interest of a lawful owner. The gift deed, Ext.-"ga", was not challenged in the suit. No prayer for cancellation of the gift deed or for declaration of the gift deed, Ext.-"ga", as void had been made and there was also no effective pleading regarding fraud and the same assumes importance in view of the fact that collaterally a question was sought to be raised with regard to the legitimacy of the gift deed, Ext.-"ga" after more than 38 years of execution of the said registered deed, when evidence of PW 2 discloses that during the lifetime of Baliram Das, execution of the gift deed, Ext.-"ga", by Baliram in favour of Sumitra Bala was very much in the news.

46. In view of the above discussion, substantial question of law No. 1 is answered in favour of the appellants. The impugned judgments and decrees of the learned courts below, whereby the suit of the plaintiff is decreed, is set aside.

47. The appeal is allowed as indicated above. No cost. Registry will send back the records.