

(1957) 01 PAT CK 0015
In the Patna High Court
Case No : A.F.A.D. No. 2204 of 1949

Bishwanath Raut and Others

APPELLANT

Vs

Babu Ram Ratan Singh and Others

RESPONDENT

Date of Decision : 03-01-1957

Acts Referred:

Transfer of Property Act, 1882 — Section 3

Citation : AIR 1957 Patna 485

Hon'ble Judges : Rai, J;Kanhaiya Singh, J

Bench : Division Bench

Advocate : Kailash Ray and B.K. Sharma, for the Appellant; Lalnarain Sinha and Balbhadra Prasad Singh, for the Respondent

Judgement

This Judgment has been overruled by : Nagulapati Lakshmamma Vs. Mupparaju Subbaiah, (1998) 3 AD 557 : AIR 1998 SC 2904 : (1998) 2 CTC 408 : (1998) 3 JT 253 : (1998) 119 PLR 528 : (1998) 2 SCALE 705 : (1998) 5 SCC 285 : (1998) 2 SCR 723 : (1998) AIRSCW 2254 : (1998) 3 Supreme 614

Rai, J.—This appeal by defendants 1 to 3 is directed against the judgment and decree passed by the Additional Subordinate Judge, 4th Court, Saran, reversing those of the Additional Munsif, 1st Court, Siwan.

2. The plaintiff instituted the present suit for redemption of the usufructuary mortgage bond dated the 11th October, 1933, executed by Dharichah Rai in favour of defendants 1 and 2 in respect of 1 bigha 2 kathas of land appertaining to khata No. 8 village Hariharpur Lalgah, district Saran. The plaintiff further prayed for a declaration that the deed of gift dated the 13th June, 1944, alleged to have been executed by Dharichhan Rai in favour of his daughter Ramratia, defendant No. 3, was ante-dated and in effective in law. The plaintiff had also claimed mesne profits the account of which was set out at the foot of the plaint.

3. The case of the plaintiff was that Dharichhan Rai sold to him the properties in suit by means of a registered sale deed dated the 24th August, 1944, which was

registered compulsorily on the 23rd December, 1044. After the registration of the deed of sale the plaintiff tendered the rehan money to defendants 1 and 2 but they refused to accept the same. He thereafter deposited the money in accordance, with the provisions of section 83 of the Transfer of Property Act and instituted the present suit. His case further was that the alleged deed of gift in favour of Mt. Ramratia, defendant No. 3, had been brought into existence by antedating the same in order to harm the cause of the plaintiff. He asserted that he had every right to redeem the rehan.

4. The suit was contested by defendants 1 and 3. Defendant No. 1 pleaded in his written statement that after a partition between himself and defendant No. 2 the zarpeshgi bond in suit had fallen to his share. According to him, defendant No. 2 had no concern with the zarpeshgi bond on the relevant date. He challenged the genuineness of the sale deed in favour of the plaintiff and asserted that the deed of gift executed by Dharichhan Rai in favour of his daughter was a valid document. According to him, the daughter had come in possession of the properties covered by the deed of gift and had redeemed the rehan bond in suit. According to this defendant, the rehan bond was not in existence after redemption of the same by defendant No. 3. Defendant No. 3 also supported the cause of defendant No. 1. She challenged the genuineness of the sale deed in favour of the plaintiff and asserted that the deed of gift executed by her father was, a genuine document and had validly passed the properties to her. On these and other pleas both the defendants asserted that the suit was fit to be dismissed.

5. The Title suit was heard ,by the Additional Munsif. 1st Court Siwan. The learned Munsif recorded the following findings: The plaintiff had paid no consideration for the sale deed. The sale deed had been brought into existence after the execution of the deed of gift. The sale deed set up by the plaintiff was not a genuine document and was not for consideration. The deed of gift executed by Dharichhan Rai in favour of his daughter, defendant No. 3, was not antedated. The deed of gift was, however, not properly attested and was not operative in law. On these findings the suit was dismissed.

6. The plaintiff thereafter went in appeal before the District Judge of Saran. The appeal was heard by the Additional Subordinate Judge, 4th Court, Chapra who agreed with the learned Munsif that the deed of gift was inoperative as it was not properly attested in accordance with law. The learned Subordinate Judge, however, held that the contesting defendants were not competent to challenge the passing of consideration under the sale deed when the same had not been challenged by Dharichhan Rai himself who was alive on the date of the institution of the suit. According to him, the plaintiff had every right to redeem the rehan bond which would not be deemed to have been extinguished by the alleged redemption by defendant No. 3. On these findings the appeal was allowed with costs. He also held that the plaintiff was entitled to recover mesne profits from the date of the deposit up to the date of recovery of possession the amount of

which was to be determined in a subsequent proceeding. Defendants 1 to 3 came up in second appeal before this Court.

7. Mr. Kailash Ray, who appeared for the appellants, contended that the courts below had erred in holding that the deed of gift was not properly attested. The validity of the attestation of the deed of gift arose under the following circumstances. Out of the two attesting witnesses one of them, namely, Jagarnath Ahir was illiterate but his signature was affixed on the deed of gift by the scribe himself. The courts below were of opinion that only literate persons could have validly attested the deed of gift. In support of his contention that even an illiterate person can validly attest a document. Mr. Kailash Ray referred us to the decision in the cases of Maikoo Lal and Another Vs. Santoo and Others, . Dinamoyee Debi Vs. Bon Behari Kapur . Govind Bhikaji v. Bhau Gopal Lal ILR 41 Bom. 384 (AIR 1916 Bom 123) (C). Dahu and Another Vs. Jamadar Rai and Others, , and the decision of another Division Bench of this Court in Second appeal No, 1460 of 1949, D/-28-9-1956 (Pat) (E).

8. Mr. Lalnarain Sinha, on the other hand, contended that the definition of the word "attested" given in Section 3 of the Transfer of Property Act suggests that only literate persons can be attesting witnesses. The definition of the expression "attested" as given in Section 3 of the Transfer of Property Act runs thus:

"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 executant 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 executant, or has received from the executant 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 executant; 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."

8. He vehemently contended that the definition contemplates two different modes of signatures in case of the executant and in case of the attesting witnesses. According to him, the Legislature permitted the executant to sign or affix his mark to the instrument or get it signed by somebody else, but the attesting witnesses were expected to sign themselves the instrument in presence of the executant. This, according to him, excludes the possibility of any illiterate person being an attesting witness according to the definition quoted above. In support of his contention he referred to the decisions in the cases of Fernandes v. Alves ILR 3 Bom 382 (F). Nitye Gopal Sircar v. Nagendra Nath Mitter ILR 11 Cal. 429 (G) and Kambhan Chenchayya Vs. Bandarupalli Bapayya and Others, .

9. In my opinion, the contentions raised on behalf of the appellants are well founded in law and must prevail. The decisions in the case of ILR 3 Bom. 382 (F), and in the case of ILR 11 Cal. 429 at 431 (G), were considered in the Full Bench decision of the Allahabad High Court cited by Mr. Rau, In the Full Bench

case their Lordships of the Allahabad High Court had followed a later Division Bench decision of the Madras High Court in the case of Kachi Kadambi Krishnamachariar Vs. T. Jagannadha Nayudu and Others, (P. Besides this, the decision of our own Court in the case of Dahu v. Jamadar (D) mentioned above completely supports the argument of Mr. Kailash Ray. In my opinion, the deed of gift was properly attested and the decision of the courts below contrary to this must be set aside.

10. Mr. Lalnarain Sinha argued in the alternative that in case his contention on the question of attestation was not accepted the case ought to be remanded to the court of appeal below for recording a finding as to whether the deed of, gift had been ante-dated or not. I agree with Mr. Lal Narain Sinha on this point. I am, however, of the opinion that the court of appeal below should reconsider the question of the passing of consideration under the alleged sale deed as well as its genuineness. The defendants had asserted that the sale deed relied upon by the plaintiff was ante-dated. The trial court had recorded a finding to the effect that the sale deed had been brought into existence after the deed of gift but the lower appellate court has recorded no finding on this point.

11. The result is that the judgment and decree passed by the court of appeal below are set aside and the case is remanded to that court for decision in accordance with law and in accordance with the observations made above. The costs in this Court will abide the result after remand.

Kanhaiya Singh, J.

12. I agree.