
(2008) 10 PAT CK 0002
In the Patna High Court
Case No : S.A. No. 109 of 2008

Chaturbhuj Narain Missir @ Mishra and Others	APPELLANT
Vs	
Rampati Devi and Another	RESPONDENT

Date of Decision : 24-10-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11

Citation : (2009) 1 PLJR 536

Hon'ble Judges : S.N. Hussain, J

Bench : Single Bench

Advocate : R.S. Dwivedi, for the Appellant; Nityanand Mishra for the Respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Hussain, J.—Heard learned counsel for the appellants and learned counsel for respondent No. 1. This second appeal has been filed by defendants-respondents-appellants against the judgment and decree of the learned court of appeal below.

2. The matter arises out of Title Suit No. 190 of 1989, which was filed by the sole plaintiff-appellant-respondent No. 1 for declaration that the two deeds of gift dated 8.2.1989/1.3.1989 (Exts. B and B/1) executed by Ramkali Kuwar in favour of defendants No. 1 to 4 were forged and fabricated and not binding on the plaintiff and for other ancillary reliefs.

3. The said suit was dismissed on contest with cost by the learned Munsif, Gopalganj vide judgment and decree dated 17.12.2005. Against the said judgment and decree of the trial court the plaintiff filed Title Appeal No. 13 of 2006 (26/07), which was allowed on contest with cost by the learned 1st Additional District Judge, Gopalganj setting aside the judgment and decree of the trial court and decreeing the suit filed by the plaintiff vide judgment and decree dated 20.3.2008. Against the aforesaid judgment and decree of the court of

appeal below the instant second appeal has been filed.

4. The admitted case of the parties is that the suit land totally measuring 37 Bighas belonged to one Kailashpati Mishra, who died in the year 1982 leaving behind a widow Ramkali Kuar (defendant No. 5) and a daughter Rapati Kuar (plaintiff). The claim of the defendants No. 1 to 4-appellants is that defendant No. 5 executed two registered deeds of gift dated 8.2.1989/ 1.3.1989 (Exts. B and B/1) in favour of defendant Nos. 3 and 4 as well as defendant Nos. 1 and 2, respectively with respect to 30 Bighas out of the lands left by her husband. It is also claimed that defendant Nos. 1 to 4 are the sons of Rajeshwar Mishra, who was the full brother of Kailashpati Mishra. It is further stated by defendant Nos. 1 to 4 that defendant No. 5 also executed another registered deed of gift dated 15.12.1988 (Ext. B/2) in favour of plaintiff with respect to 7 Bighas of land left by Kailashpati Mishra. They also averred that defendant No. 5 made the said transfers on the basis of a will dated 8.2.1981 (Ext. G), which was executed by Kailashpati Mishra in favour of his wife (defendant No. 5).

5. On the other hand the claim of plaintiff-respondent No. 1 is that Kailashpati Mishra, the exclusive owner of the suit property, having admittedly died in the year 1982, his property devolved upon his widow (defendant No. 5) and his daughter (plaintiff), who were his only heirs and hence they had half share each in the said property totally measuring 37 Bighas and as such defendant No. 5 had no right to transfer 30 Bighas of suit land to defendant Nos. 1 to 4 and in fact she did not execute any such deed of gift and Exts. B series are forged and fabricated documents. Defendant No. 5 also appeared in the suit and filed her written statement claiming that she had not executed any deed of gift in favour of defendant Nos. 1 to 4. It is also claimed on behalf of the plaintiff-respondent that the defendants-appellants having not pleaded any partition between the two heirs of Kailashpati Mishra, namely, his widow (defendant No. 5) and daughter (plaintiff), the gift of undivided interest by one of them is not permissible in law. It is also claimed on behalf of the plaintiff-respondent that the alleged will (Ext. G) produced by defendant Nos. 1 to 4 claiming to have been executed by Kailashpati Mishra in favour of defendant No. 5, was an unprobated will which cannot confer any right, title or interest in favour of defendant No. 5 and hence on its basis she had no right to execute such deeds.

6. Considering the averments made by learned counsel for the parties, their pleadings and materials, it is quite apparent that it is not in dispute that Kailashpati Mishra died in 1982 leaving behind a widow (defendant No. 5) and a daughter (plaintiff) as his only heirs and legal representatives. It is also not in dispute that Kailashpati Mishra left behind only 37 Bighas of land, as defendants neither pleaded nor could bring on record any material to show that he had left behind other properties also. So far the will dated 8.2.1981 (Ext. G) produced by defendant Nos. 1 to 4 is concerned, it is said to have been executed by Kailashpati Mishra with respect to the suit lands in favour of his wife (defendant No. 5) but the same is an unprobated will due to which neither it can confer any

title in favour of defendant No. 5, nor it can be admitted in evidence to prove that defendant No. 5 got the entire suit land, specially when there is no other material to support the said claim. In the said circumstances, it is quite apparent that the said Kailashpati Mishra owned the suit property till his death in 1982 whereafter it devolved upon his heirs and legal representatives, namely, defendant No. 5 and plaintiff, who inherited half share each in the said property measuring 37 Bighas.

7. So far the two deeds of gift dated 8.2.1989/1.3.1989 (Exts. B and B/1), which is said to have been executed by defendant No. 5 in favour of defendant Nos. 1 to 4 with respect to 30 Bighas of suit land, are concerned the most competent witness on the point of execution of the said deeds of gift was defendant No. 5 herself, but she in her written statement had specifically stated that she had not executed any deed of gift in favour of defendant Nos. 1 to 4. Furthermore, when the said defendant No. 5 deposed as D.W.1 she was cross-examined only by the plaintiff whereas defendant Nos. 1 to 4 did not even cross-examine her. The learned court of appeal below has specifically found that the said defendant No. 5 in her deposition had not stated about the execution of the deeds of gift dated 8.2.1989/1.3.1989 (Exts. B and B/1) in favour of defendant Nos. 1 to 4. Furthermore, defendant No. 5 was admittedly a very old lady aged more than 88 years at the time of her deposition and hence there are some variations in her statements, which have to be ignored in view of the clear denial made by her at relevant places. Furthermore, since the defendants were basing their claim on the aforesaid deeds of gift (Exts. B and B/1), execution of which were denied by defendant No. 5 who had stated in paragraph-7 of the written statement that she had not put her thumb impression on the deeds of gift, it was incumbent upon defendant Nos. 1 to 4 to get the admitted thumb impression of defendant No. 5 compared with her thumb impression on the impugned deeds of gift but although an expert was examined by defendant Nos. 1 to 4 as D.W. 32 but he was not asked to compare the thumb impressions of defendant No. 5 on the disputed deeds of gift with her admitted thumb impression. In addition to it, the only witness produced by the defendants to prove the execution of the impugned deeds of gift was D.W.10 Ramadhar Dubey but he did not state in his evidence that the contents of the deeds of gift were read over and explained to defendant No. 5 nor any other attesting witness or the deed writer of Ext. B series were examined. Hence the learned court of appeal below rightly held that the due execution of the impugned deeds of gift have not been proved in view of the decisions in case of Bhagabat Prasad Das Vs. Haimabati Devi and Others, and in case of Kuma Dei Vs. Md. Abdul Latif, and accordingly the said deeds of gift were inadmissible in evidence.

8. So far the defendants' claim that the impugned deeds of gift (Exts. B series) were executed by the consent of the plaintiff in proof of which she had signed on the said deeds as attesting witness and hence she cannot now challenge the genuineness of those gifts, is concerned the plaintiff who was examined as P.W. 3 clearly stated in her evidence that neither the said deeds of gift were executed

with her consent nor she had signed on it as attesting witness. Furthermore, there is no evidence at all to show that the contents of said deeds of gift were known to the attestators or were ever read over and explained in presence of the plaintiff. In the said circumstances, the learned court of appeal below rightly relied upon the decisions of this court in case of Rameshwar Prasad Singh & Ors. vs. Gaya Prasad Sahi & Anr., reported in 1985 P.L.J.R. 481 and also in case of Ramanand Pandit alias Tulshan Pandit Vs. Jangali Pandit and Others holding that the said attestation cannot create any estoppel against the plaintiff in challenging the said deeds of gift and the impugned deeds of gift cannot legally be held to be binding upon the plaintiff. In the said circumstances, the learned court of appeal below held that the execution of impugned deeds of gift (Ext. B series) not having been proved, the same are illegal, forged and fabricated and not binding upon the plaintiff. After considering the aforesaid facts, materials and findings, this court does not find any illegality in the impugned judgment and decree of the learned court of appeal below nor does it find any substantial question of law involved in the instant second appeal, which is accordingly dismissed at this stage of hearing under Order XLI Rule 11 of the Code of Civil Procedure.