
(2019) 06 CAL CK 0012

In the Calcutta High Court

Case No : Civil Second Appeal (SA) No. 596 Of 2008

Dinabandhu Mondal & Ors

APPELLANT

Vs

Laxmi Rani Mondal & Ors

RESPONDENT

Date of Decision : 17-06-2019

Acts Referred:

Evidence Act, 1872 — Section 68
Transfer Of Property Act, 1882 — Section 122, 123
Registration Act, 1908 — Section 17
Code Of Civil Procedure, 1908 — Order 6 Rule 4

Citation : (2019) 06 CAL CK 0012

Hon'ble Judges : Bibek Chaudhuri, J

Bench : Single Bench

Advocate : Bholanath Mukherjee, Mukteswar Maity, Ashish Sanyal, Pratip Kumar Chatterjee

Final Decision : Allowed

Judgement

Bibek Chaudhuri, J

1. The defendants of Original Suit No.115 of 1995 are in appeal challenging the legality and validity of the judgment and decree of reversal dated 7th February, 08 passed by the learned Civil Judge (Senior Division), Kandi, Murshidabad in Title Appeal No.3 of 2004.

2. The respondents as plaintiffs filed Original Suit No.115 of 1995 stating, inter alia, that their father Durgadas Mondal since deceased was the original owner of the suit property and after his death, the said property was inherited by their deceased mother Jagomaya Dasi and the plaintiffs and defendant No.3, being the daughters of the said Durgadas Mondal. Jagomaya died on 23rd Poush, 1400 BS. Prior to her death she was suffering from various diseases continuously for about three months and was absolutely bedridden. She lost her senses about three days before her death and never regained her sense. The plaintiffs visited their mother who used to stay in the house of the defendants on 20th Poush 1400 BS

and found her completely senseless. She had no normal understanding due to her illness on the date when the plaintiffs last visited her before her death. After the death of their mother they came to know that the defendants No.1 and 2 who are the sons of defendant No.3 in collusion with some questionable persons manufactured some deed in respect of the suit property. It is pleaded by the plaintiffs that the said deed is void, inoperative and right, title, interest of the suit property was not transferred by virtue of the said deed in favour of the defendants No.1 and 2. The plaintiffs were present at the time of Shradh ceremony of their mother. The defendants or their mother did not state anything about execution of any such deed. The plaintiffs somehow collected a copy of said purported deed and it was revealed to them that the defendants No.1 and 2 manufactured a void and inoperative deed of gift by practicing fraud. The said so-called deed was not executed by Jagomaya Dasi, since deceased. On the date of alleged execution of the said deed, the donor had no sense and capacity to execute the said deed. The defendants did not acquire any right, title and interest over the suit property by virtue of the said deed. Therefore, the plaintiffs prayed for a decree for setting aside the said deed of gift being fraudulent, void and inoperative and permanent injunction restraining defendants No.1 and 2 from claiming title over the suit property on the basis of the said deed and other consequential reliefs.

3. The defendants No.1-3 contested the said suit by filing written statement wherein they denied all allegations made out against them by the plaintiffs in their plaint. Specific case of the defendants is that Jagomaya Dasi, since deceased was the recorded owner of the suit property and her name was duly recorded in RS and LR Record of Rights. She executed a deed of gift in favour of defendants No.1 and 2 on 5th January, 1984 which was registered subsequently after her death. On the date of execution of the deed, the said donor transferred the suit property in favour of the defendants/donees and they accepted the gift. It is further pleaded by the defendants that during her life time, Jagomaya Dasi used to stay with the defendants. After her death, the defendants performed her last rituals in their house. The plaintiffs did not perform any rituals after the death of their mother. The said Jagomaya Dasi executed the deed of gift while she was physically fit and mentally alert. It is absolutely false that she was suffering from various diseases due to her old age and lost her sense about three days prior to her death. Accordingly the defendant prayed for dismissal of the suit.

4. The suit was dismissed on contest by the learned trial judge by a judgment and decree dated 31st April, 2003.

5. The plaintiffs preferred an appeal assailing the judgment and decree of dismissal passed by the trial court before the learned Civil Judge (Junior Division), Kandi, Murshidabad which was registered as Title Appeal No.3 of 2004. The learned Judge in 1st Appellate Court allowed the appeal filed by the plaintiffs/appellants meaning thereby the judgment and decree of dismissal passed by the

learned trial judge was set aside and suit was decreed in favour of the plaintiffs.

6. In this second appeal, the judgment and decree passed by the learned Judge in 1st Appellate Court is assailed.

7. This court while admitting the instant appeal for hearing on 24th September, 2008, framed the following substantial question of law-

"Whether the learned 1st Appellate Court committed substantial error of law in declaring that the deed bearing No.213 of 1994 is void and thus setting aside the same and decreeing the suit in favour of the plaintiffs."

8. Mr. Bholanath Mukherjee, learned Advocate for the defendants/appellants submits that the learned Judge, 1st Appellate Court failed to consider that the respondents made out a case to the effect that the deed of gift in question was not executed by Jagomaya Dasi. On the contrary it was pleaded that the defendants No.1 and 2 in collusion with some interested persons of crooked nature manufactured the said deed of gift. It was further stated by the plaintiffs that Jagomaya Dasi was senseless for about three days prior to her death and she had no physical capacity or mental alertness to execute any deed of gift in favour of defendants No.1 and 2. However, in cross examination, the plaintiff No.2 (PW1) stated that their mother used to stay under the care of the defendants at village Augram. She specifically stated on oath that she did not know as to what was done by her mother at the instigation defendants No.1 and 2. She stated further that the defendants got a deed executed in respect of the suit property from their mother. According to the learned Counsel for the appellants, PW1 had deviated from the plaint case in course of her evidence. In the plaint the plaintiffs pleaded that the defendants No.1 and 2 manufactured a purported deed of gift after the death of Jagomaya Dasi with the help of some local interested persons. On the contrary, in her evidence she admitted execution of deed of gift by her mother in favour of the defendants. However she objected to the authenticity of the said deed on the ground that it was executed under the instigation of the defendants. Thus, according to the learned Counsel for the appellants the execution of the deed of gift by the said Jagomaya Dasi was admitted by PW1 during cross examination and therefore, the plaint case to the effect that the defendants in collusion with some local interested persons manufactured a fake deed of gift after the death of Jagomaya Dasi was given go bye. In other words, it is submitted by the learned Advocate for the appellants that the plaintiffs failed to produce any evidence in support of their pleading and secondly, evidence of PW1 to the effect that the defendants got the deed of gift executed by undue influence upon Jagomaya Dasi was not pleaded by the plaintiffs.

9. Mr. Mukherjee further submits that the plaintiffs alleged that the defendants got the deed of gift in question manufactured by practicing fraud. Order 6 Rule 4 of the Code of Civil Procedure requires that complete particulars of fraud shall be stated in the pleadings. Whenever a party wants to put forth a contention of

fraud, it has been specifically pleaded and proved. In the instant case, no particular with regard to the allegation of fraud against the defendants was pleaded by the plaintiffs. There is absolutely no evidence on the allegation of fraud made by the plaintiffs in the matter of execution of deed of gift. They disputed the genuineness of the deed of gift raising allegation of fraud, subsequent manufacturing of document etc against the defendants only because Jagomaya Dasi died three days after execution of the said deed of gift and it was registered after her death.

10. Learned Advocate for the appellants also submits that since the plaintiffs/respondents claimed that the deed of gift was manufactured with the help of some interested persons by the defendants and alternatively, it was created by practicing fraud upon the donor, burden of proof lies upon the plaintiffs to prove their case. But the learned Judge in 1st Appellate Court wrongly placed burden upon the defendants to prove the negative. Mr. Mukherjee refers to the provision of Section 102 of the Indian Evidence Act and submits that the burden of proof in a suit or proceeding lies on the person who would fail if no evidence at all were given on either side. When the plaintiffs specifically pleaded that a deed of gift is vitiated by fraud and it was manufactured by the defendant after the death of the donor, initial burden lies upon the plaintiffs to prove the said fact. Learned Judge in 1st Appellate Court wrongly placed the onus upon the defendant to prove that the deed of gift in question was a genuine document executed by the donor when she was physically fit and mentally alert.

11. Mr. Ashish Sanyal, learned Advocate for the respondents, on the other hand, submits that Jagomaya Dashi was the original owner in respect of the suit property. Admittedly, she used to stay in the house of the defendants under their care. Defendants No.1 and 2 are the grandsons of the said Jagomaya Dasi. During her old days, it is very natural and probable that Jagomaya Dasi was dependent upon the defendants/appellants and the defendants had every scope and opportunity to dominate the will of Jagomaya Dasi. Under such circumstances, there is every probability that the deed of gift in question was obtained by the defendants by exerting undue influence on the said Jagomaya Dashi.

12. Secondly, the learned counsel for the respondent urged that the said deed was allegedly executed on 5th January 1994. Jagomaya Dasi died on 8th January 1994. If the oral evidence of DW1 and DW2 is believed, Jagomaya was physically fit and mentally alert on the date of execution of the said deed of gift. According to DW2 who is the deed writer and one of the attesting witness of the said deed, Jagomaya was sitting on the verandah of the house of the defendants when he went there to prepare the draft deed of gift. He also found the said Jagomaya mentally alert. If that be the condition of health of Jagomaya, there is no explanation as to what prevented her to attain the local registration office for presenting the deed for registration. There is also no explanation as to why the said deed of gift was presented by the donee for registration on 18th January,

1994 after the death of Jagomaya Dasi. It is needless to say that the said Jagomaya was an illiterate lady. She was fully dependent upon the defendants regarding the affairs concerning her properties. Therefore, the learned Judge in 1st Appellate Court considering such dominant and impelling circumstances held that execution of the deed of gift was shrouded by suspicion and applying the rule of preponderance of probability, it cannot be said that the suit property was transferred by the donor in favour of the donees on her free will. It is also submitted by Mr. Sanyal that general rule for onus of prove in case of a plea of fraud, misrepresentation or undue influence is upon the party who pleads fraud, misrepresentation or undue influence but in certain circumstances there may be reversal of such onus in case of active, confidential or fiduciary relationship. In the instant case the defendants of course were standing in a fiduciary relation to the donor and they had a duty to protect the interest of the donor with due course. Under such circumstances, if it is found that the donor allegedly executed a deed of gift depriving her natural heirs and successors just three days before her death and the deed was not presented for registration on the date of execution or immediately thereafter and the donees waited till the death of the donor to present the said deed for registration, such impelling circumstances led the learned Court in First Appeal to hold that the deed of gift was not executed under free will of the donor and there is a probability that it was manufactured after her death, the court did not commit any illegality in holding that the defendants were bound by reverse onus to prove that the deed of gift in question was executed voluntarily by the said Jagomaya. When the defendants failed to prove the said fact, the learned judge in 1st Appellate Court rightly allowed the appeal and decreed the suit filed by the plaintiffs.

13. Lastly, Mr. Sanyal concludes saying that no substantial question of law is involved in the instant appeal and the same should be dismissed with cost.

14. Section 122 of the Transfer of Property Act, 1882 defines "Gift" in the following words:-

"122. "Gift" defined.-"Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made.-Such acceptance must be made during the lifetime of the donor and while he is still capable of giving."

15. If the deed of gift satisfies the requirement of Section 122 of the Transfer of Property Act read with Section 17 of the Registration Act, there is no scope to say that the said deed of gift is invalid. During the trial of the suit the deed of gift in question was marked as exhibit-"Ga". It is found from the said exhibit that it was executed on 5th January, 1994. The recital of the deed states that the donees were grand-sons (sons of one of the daughters) of the donor. It is not disputed that before her death the donor used to reside in the house of the

donees. They used to look after the donor during her old age. Precisely due to such reason, Jagomaya Dasi transferred the suit property in favour of the appellants by executing a deed of gift on 5th January, 1994. Section 123 of the Transfer of Property Act stipulates that a deed of immovable property can be made only for transferring the right, title and interest by the donor to the donee by a registered instrument signed by or on behalf of the donor and must be attested by at least two witnesses. The pre-existing right, title and interest of donor thereby stand divested in the donee only when the gift deed is duly registered and thereafter the donor would lose title to the property, provided the donee had accepted the property gifted over under the instrument.

16. In the instant case the deed of gift was executed by Jagomaya Dasi under the pen of one Bamacharan Das who was the scribe and one of the attesting witnesses of the said deed of gift.

17. The said Bamacharan Das deposed in the suit as DW2. It is found from the evidence that he is a deed writer by profession. He drafted the deed of gift in question under the instruction of Jagomaya Dasi in her residence. After drafting, the said deed of gift was read over and explained to the donor and she put her LTI thereon under the pen of DW2 admitting the contents of the said deed of gift to be correct. One Manobendra Saha and Moslem Momen were also witnesses to the said deed of gift. DW2 further deposed that when the said deed of gift was drafted, Jagomaya was physically fit she was sitting on the varanda and instructed DW2 to write down the said deed of gift. Therefore, preparation and execution of deed of gift by Jagomaya Dasi with the help of DW2 was amply proved from the evidence of DW1 and DW2.

18. The respondents have raised serious doubt over the authenticity of the said deed of gift because of the fact that it was registered after the death of the donor. However, well established is the law that it is not necessary for the validity of a deed of gift that it should be registered by the donor himself. In *Bhabotosh vs. Soleiman* reported in 33 Cal 584, a Hindu man executed a deed of gift in favour of his wife and died, and the deed was subsequently registered at the instance of the widow-donee. Validity of the deed of gift was challenged on the ground that it was registered subsequent to the death of the donor. This Court held that subsequent registration of a deed of gift after the death of the donor at the instance of the donee did not offend the provisions of Section 123 of the Transfer of Property Act. The post-mortem registration of a deed of gift by the legal representative of the donor has the same effect as its registration by the donor himself during his lifetime.

19. I have already stated that the plaintiffs/respondents made out two alternative and self-contradictory cases in their pleadings and evidence. In the plaint, they clearly pleaded that the donor had no physical capacity to execute any deed of gift in favour of the present appellants three days before the date of her death. It is also alleged that the defendants/appellants manufactured the said deed of gift in collusion with some unscrupulous and interested persons.

There is absolutely no evidence adduced by the plaintiffs/respondents in support of their pleading during trial of the case. However, in course of evidence PW1 stated that she did not know if the defendants had got the deed of gift in question executed exerting undue influence or by practicing fraud upon her mother Jagomaya Dasi.

20. Learned Counsel for the respondents strenuously argued that as a general rule, in case of a plea of fraud or undue influence in the matter of execution of a document, burden is upon the party who pleads fraud or undue influence. I am, of course, in conformity with the learned Counsel for the respondents that in certain circumstances there may be reversal of such onus. The issue was aptly dealt with by the Hon'ble Supreme Court in *Subash Chandra vs. Ganga Prasad* reported in AIR 1967 SC 878. It was held by the Hon'ble Apex Court that the court trying the case of undue influence must consider two things to start with, namely, (1) Are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor? and (2) Has the donee used that position to obtain an unfair advantage over the donor? Upon the determination of this issue, a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

21. However, the above principle of law relating to burden of proof is not applicable under the facts and circumstances of the instant case because the plaintiffs/respondents did not plead execution of deed of gift in question by the donor being unduly influenced or that it was got to be executed by the appellants by practicing fraud upon the donor. It is needless to say that merely because the parties are nearly related to each other or the donor was old and infirm, no presumption of undue influence or fraud can arise. The decision of the Hon'ble Supreme Court in the case of *M. Rangasamy vs. Rangammal* reported in (2003) 7 SCC 683 may be relied on in this regard.

22. Section 68 of the Indian Evidence Act prescribes that if a document is required by law to be attested, it shall not be used in evidence until one attesting witness at least called for the purpose of proving its execution. Section 123 of the Transfer of Property Act mandates that a gift deed pertaining to immovable property must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. Section 17 of the Registration Act also requires that the instruments of gift of immovable property shall be registered. Thus due execution and attestation of the gift deed by at least two witnesses are required to be proved to admit a deed of gift in evidence. In the instant case, both the execution and attestation of the deed of gift were proved by DW2. Evidence of DW2 was all along consistent on the point of preparation, execution and attestation of the deed of gift and was never tilted during cross examination. I have already held that a deed of gift cannot be said to be invalid only because it was registered after the death of donor.

23. For the reasons stated above, I have no other alternative but to hold that the learned Judge in 1st Appellate Court failed to arrive at a correct decision on the basis of evidence on record and substantially erred in law by wrongly shifting the onus upon the defendants/appellants to prove that the deed of gift in question was not a product of undue influence or fraud. Without considering the pleading of the plaintiffs/respondents, the learned Judge in 1st Appellate Court also erred substantially in law in declaring the deed of gift in question void.

24. In view of above discussion, the judgment and decree passed by the learned Judge in 1st Appellate Court is liable to be set aside and the instant Second Appeal deserves to be allowed.

25. Therefore, this appeal be and the same is allowed on contest, however without cost. The judgment and decree passed by the learned Civil Judge (Senior Division), Kandi, Murshidabad in Title Appeal No.3 of 2004 is set aside and the judgment and decree of dismissal of the suit passed by learned Civil Judge (Junior Division), Kandi, Murshidabad in Original Suit No.115 of 1995 is restored.

Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.