

(2015) 10 GAU CK 0004
In the Gauhati High Court
Case No : RSA Nos. 3 and 11/2007

Habibur Rahman and Others

APPELLANT

Vs

Sirajuddin Choudhury and Others

RESPONDENT

Date of Decision : 09-10-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2

Evidence Act, 1872 — Section 67

Transfer of Property Act, 1882 — Section 122, 123, 129

Citation : (2015) 10 GAU CK 0004

Hon'ble Judges : Arup Kumar Goswami, J.

Bench : Single Bench

Advocate : B.K. Purkayastha, Advocate, for the Appellant; S.P. Choudhury, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Arup Kumar Goswami, J.—Heard Mr. B.K. Purkayastha, learned counsel for the appellant in RSA No. 3/2007 and Mr. P.K. Kalita, learned counsel for the appellant in RSA No. 11/2007. Also heard Mr. S.P. Choudhury, learned counsel for the respondents.

2. RSA No. 3/2007 is preferred against the judgment and decree dated 17.3.2006 passed by the learned Civil Judge (Senior Division) No. 1, Cachar at Silchar in Title Appeal No. 17/2001 dismissing the appeal and affirming the judgment and decree dated 21.5.2001 passed by the learned Civil Judge (Junior Division), No. 1, Cachar at Silchar in Title Suit No. 88/1997. RSA No. 11/2007 is preferred against the judgment and decree dated 17.6.2006 passed by the learned Civil Judge (Senior Division), No. 1, Cachar at Silchar in Title Appeal No. 15/2001 dismissing the appeal and affirming the judgment and decree dated 21.5.2001 passed by the learned Civil Judge (Junior Division), No. 1, Cachar at Silchar in Title Suit No. 88/1997.

3. RSA No. 3/2007 is preferred by the defendant No. 14 and RSA No. 11/2007 is

preferred by the defendant No. 2.

4. Both the second appeals were admitted to be heard by separate orders passed on 12.4.2007 on identical substantial questions of law, which are as follows:

"1. Whether the learned court below erred in decreeing the suit of the respondents/plaintiffs in respect of the land covered by Dag Nos. 175 and 176 said to have been conveyed by gift deed Ext. 1 though the said document confines the transaction to the land covered by Dag No. 174 and 175?

2. Whether the learned court below erred in law in decreeing the suit of the respondents/plaintiffs by leaving out of consideration the fact that they had failed to prove the statutory prescribed essentialities of a valid gift under the Mohamadan Law?

3. Whether the learned court below erred in law in decreeing the suit of the respondents/plaintiffs on the face of the evidence on record that at the time of purported acceptance of the gift the original plaintiff was a minor and that the same had been accepted by his mother, which is impermissible in law?"

5. During the course of hearing, on 5.10.2015, after hearing the learned counsel for the parties, another substantial question of law was framed which is as follows:

"4. Whether in absence of any challenge to the sale deed, Ext. A, executed in favour of the defendant No. 14 by some of the defendants, the learned courts below could have decreed the suit of the plaintiff declaring his right, title and interest as well as recovery of possession?

6. The plaintiff filed the suit for declaration of right, title, interest and confirmation of possession and injunction over the suit land. The plaintiff had also prayed for a declaration that he is entitled to have mutation over the suit land. The plaint was amended later on. The aspect relating to amendment of the plaint will be dealt with later.

7. The case of the plaintiff is that the predecessor of the defendants and grandfather of the plaintiff, late Hazi Abdul Aziz Choudhury donated the suit land along with some other land measuring 8 bigha 6 chatak to him as the father of the plaintiff, Mufiz Uddin Choudhury, who was the son of Hazi Abdul Aziz Choudhury, had expired during the lifetime of his father and as the plaintiff would not otherwise inherit any property of Hazi Abdul Aziz Choudhury in view of law of inheritance of Mahomedan Law. The plaintiff accepted the gift and got delivery of possession. In connection with the gift, a gift deed dated 26.4.1958 was executed and registered by Hazi Abdul Aziz Choudhury. It is pleaded that in the gift deed, Dag No. 175 was mentioned inadvertently in place of Dag No. 174 in respect of 2nd R.S. Patta No. 7 and Dag No. 176 was wrongly mentioned in place of 175 in respect of 2nd R.S. Patta No. 109. Total land in the aforesaid two dags comprises of 4 bigha 5 katha 6 chatak and both the dags, though in different pattas, are contiguous and was bounded by the boundary as described in the

Schedule to the plaint. It is also averred that in 2nd R.S. Patta No. 7, there was no Dag No. 175 and in reality, Dag No. 174, which was gifted, comprises of an area of 3 bigha 1 katha 2 chatak and the entire land in Dag No. 174 was gifted. Dag No. 175 of 2nd R.S. Patta No. 109 is situated to the north of Dag No. 174 of 2nd R.S. Patta No. 7. In view of the mistake in mentioning the dag numbers in the gift deed, no mutation was effected though the plaintiff alone was possessing the land. However, taking advantage of the discrepancies, the defendants are trying to dispossess the plaintiff. Number of "Bichars" were held but with no success.

8. The defendant Nos. 1, 2, 4, 5 and 6 filed a written statement on 19.9.1997 asserting that no land was gifted by Abdul Aziz Choudhury to the plaintiff. It is denied that Dag No. 174 of 2nd R.S. Patta No. 7 and Dag No. 175 of 2nd R.S. Patta No. 109 were contiguous. They also generally denied the allegations of the plaintiff. It is averred that the alleged deed of gift is illegal and the same was never acted upon by the so called donor or by the plaintiff himself and that, in fact, it was never executed by Hazi Abdul Aziz Choudhury. There was no gift and therefore there was no question of acceptance of the gift by and delivery of possession to the plaintiff. It is also averred that the plaintiff, who was aged about 4/5 years in 1958, being a minor, could not have accepted the gift. If the gift deed was executed by Hazi Abdul Aziz Choudhury, he would have rectified the mistakes as he died only in the year 1971 and he would have also arranged for mutation of the name of the plaintiff. The plaintiff serves in the Office of the District Judge, Cachar and if actually he was given any land by way of gift, he would also have taken necessary steps for mutation of his name in the suit patta. It is further pleaded that land left behind by the deceased was inherited by the legal heirs and their names were mutated in the suit patta, which was to the knowledge of the plaintiff and the plaintiff never objected to such mutation raising dispute that there was a gift deed in his favour. It is also stated that the plaintiff did not possess any land and he purchased an area of 1 bigha 12 katha 9 chatak being the 1/4th share of Khatun Bibi towards the eastern part of Dag No. 174 by a registered Kabala dated 28.4.1973, belying the contention of the plaintiff that there was a gift deed in his favour in respect of the said Dag. Another son of Hazi Abdul Aziz Choudhury, namely, Sahabuddin Choudhury, the defendant No. 3, purchased land in Dag Nos. 175 and 176 of 2nd R.S. Patta No. 109 by registered sale deed dated 25.10.1970. It is also pleaded that one Habibur Rahman is in possession of the suit property, he having purchased the same from the defendants by way of a registered sale deed dated 5.5.1997, after obtaining sale permission from Deputy Commissioner, Cachar and was cultivating paddy thereon.

9. An amendment to the plaint was made, which was allowed by an order dated 20.5.1998 whereby northern boundary was amended indicating that land on the northern side was possessed by Abdul Noor and others. When the plaint was originally filed, Maiz Uddin was stated to be on the northern side. By the said amendment effected on 20.5.1998, defendant No. 14 was also impleaded as

party defendant in the suit. Later on, another amendment was brought in whereby the plaintiff pleaded that he was dispossessed during pendency of the suit by the defendant No. 14 on 15.8.1999.

10. A separate written statement was filed by the defendant No. 3 and defendant No. 14 on 14.9.1998 more or less on the same averments and taking a similar stand as taken by the defendant Nos. 1, 2, 4, 5 and 6. It is specifically pleaded in the said written statement that the defendant No. 14 is in possession of the suit land.

11. On the basis of the pleadings, followings issues were framed:

"1. Is there any course of action for the suit?

2. Is the suit bad for defect of necessary parties?

3. Whether late Hazi Abdul Aziz Choudhury, grandfather of the plaintiff as well as predecessor of the defendants gifted the suit land in favour of the plaintiff by executing registered gift deed No. 2656, dated 26.4.1958 and delivered possession?

4. Whether the plaintiff acquired right, title, interest and possession over the suit land on the basis of gift deed No. 2656?

5. Whether the defendants threatened the plaintiff to dispossess him, out of the possession of the suit land illegally?

6. Is the plaintiff entitled to a decree as prayed for?

7. To what other relief/reliefs, the parties are entitled to?"

12. Subsequently, an additional issue was also framed which is as follows:

"1. Is the suit maintainable in law as well as in fact?"

13. The plaintiff had examined three witnesses and exhibited nine documents. Defendants examined three witnesses and also exhibited five documents. The deed of gift was exhibited as Ext. 1 and a document was also marked as "X".

14. The learned trial court recorded a finding that at the relevant point of time when Ext. 1, Gift Deed, was executed, the plaintiff was a minor child. On the basis of the evidence of witnesses, including an attesting witness who was examined as PW 2, the learned trial court held that the evidence is unimpeachable that Ext. 1 was executed by the grandfather of the plaintiff and Ext. 1 was duly proved as required under Section 67 of the Evidence Act and besides, the same is a thirty year old document produced from proper custody. The learned trial court also rejected the contention advanced on behalf of the defendants that the plaintiff being a minor child could not have accepted the gift under Section 122 of the Transfer of Property Act by holding that it was the mother of the plaintiff who had accepted the gift. Argument advanced by the defendants that it was not the pleaded case of the plaintiff that his mother had

accepted the gift was negated by the learned trial court by relying on Order 6 Rule 2 CPC and holding that existence of the gift deed and its acceptance was pleaded in the plaint and how he accepted the gift is a matter of evidence. It was held by the learned trial court that there is ample evidence on record that the mother of the plaintiff gave the same to an adhiar, PW 2, who was cultivating the land. From Ext. 5, a Settlement Survey Map, the learned trial court held that land in Dag No. 174 of 2nd R.S. Patta No. 7 and Dag No. 175 of 2nd R.S. Patta No. 109 are adjacent Dags as deposed by the plaintiff. The trial court also held that Ext. 9, a sale deed of one Motiur Rahman in respect of Dag No. 173, proves that in the northern side, the boundary man was the plaintiff. The learned trial court held that the possession of the plaintiff is in Dag No. 174, is further strengthened by Ext. 2, a certified copy of the gift deed, executed by donor of Ext. 1 in favour of his son Sahab Uddin Choudhury, DW 3, which was admitted by DW 1 in his cross-examination. Ext. 2 demonstrates that the land of plaintiff was in Dag Nos. 174/175, which goes to show that the donor had earlier gifted and delivered possession to the plaintiff in the said dags. It is to be noted that the defendants did not produce the original of the said gift deed despite being directed to produce the same. It was recorded that land described by specific boundaries in Ext. 1 is the same land as described in the schedule to the plaint. The suit land was well demarcated and there was no confusion with regard to the identity of the land and it was a case of mis-description. The trial court noted that defendant No. 14 purchased from defendant Nos. 1 to 6 vide Ext. A, sale deed dated 5.5.1997, 2 bigha 14 katha 7 chataks of land in Dag No. 174 apart from some land in Dag No. 21/22. On the basis of Ext. 5, it was held that Dag No. 174 is situated at a distance from Dag Nos. 21/22 intervened by many plots of land in different dags and therefore, both the plot of lands cannot be sold by a single boundary and the boundary given in Schedule A refers to a completely different plot of land. The learned trial court held that the plaintiff is entitled to get a decree as prayed for. Accordingly, the learned trial court held that the plaintiff has right, title and interest in the suit land by virtue of the gift deed though there were some discrepancies in mentioning the dag numbers in Ext. 1.

15. The learned lower appellate court concurred with the findings of the learned trial court. On appraisal of the evidence, the learned lower appellate court held that Ext. 1 was duly executed by Hazi Abdul Aziz Choudhury in favour of the plaintiff and that the plaintiff had accepted the gift through his mother. The learned lower appellate court reiterated the finding of the learned trial court that despite mis-description of dag numbers in Ext. 1, the plaintiff had proved his title over the suit land. No written statement having been filed by the defendants after the plaint was amended alleging dispossession of defendant No. 14 on 8.5.1999, the learned lower appellate court held that the plaintiff was dispossessed by the defendant No. 14. It was held that claim of defendant No. 14 by virtue of Ext. A over Dag No. 174 is not sustainable as dag No. 174 is situated at a distance from dag Nos. 21/22, intervened by many plots.

16. Mr. P.K. Kalita, learned counsel for the appellant in RSA No. 11/2007 has

submitted that the plaintiff failed to prove acceptance of the gift and delivery of possession, which are essentials of a valid gift under the Mahomedan Law. The plaintiff had also not taken any steps for rectification of the dag numbers which he claimed to have been wrongly described during the lifetime of the donor. No objection was also taken by him when the names of the defendants were mutated in respect of the suit land. The defendants had inherited the suit land from their predecessor-in-interest and out of such inheritance, some of the defendants had executed the sale deed, Ext. A, in favour of defendant No. 14. The plaintiff was never in possession and the suit was filed inventing a cause of action alleging threatened dispossession. It is further submitted that Ext. A specifically mentioned that 2 bigha 14 katha 7 chatak land was sold to defendant No. 14 in Dag No. 174 and in absence of any challenge to the sale deed, Ext. A, no right, title and interest could have been granted in favour of the plaintiff in spite of a specific stand taken in the written statement regarding the sale made to defendant No. 14 in respect of part of the suit land. The plaintiff did not amend the plaint and therefore, no decree could have been passed in favour of the plaintiff. He has also submitted that in absence of any challenge to Ext. A, the learned courts below committed manifest error of law in trying to find out whether the vendors could have sold land in Dag No. 174 and Dag Nos. 21/22 with boundary as indicated therein. It is further submitted that the plaintiff being a minor at the time when the gift was made, in any view of the matter, he could not have accepted the gift. Under Mahomedan Law, the mother could not have accepted the gift on his behalf, and at any rate, acceptance of the gift by the mother was also not the pleaded case of the plaintiff. Reliance is placed by Mr. Kalita in the case of Mahboob Sahab Vs. Syed Ismail and Others, to support his contention that mother cannot accept gift on behalf of a minor.

17. Mr. B.K. Purkayastha, learned counsel for the appellant in RSA 3/2007, while adopting the arguments of Mr. Kalita, submits that for nearly 40 years the plaintiff did not take any steps to correct the dag numbers in the gift deed, if at all any gift was given to him, and the suit was filed only after Ext. A was executed in favour of the defendant No. 14. He also submits that without there being any prayer for cancellation of Ext. A on the strength of which defendant No. 14 is in possession in Dag No. 174, the learned courts below could not have ordered recovery of khas possession from defendant No. 14.

18. Mr. S.P. Choudhury, learned counsel for the respondents submits that execution of the gift deed is duly proved and no interference is called for with regard to finding recorded by the courts below as regards execution of Ext. 1. He submits that the learned courts below had passed the impugned judgment on the basis of evidence on record and no interference is called for in the second appeal. In view of the gift deed, Ext. 1, the vendors did not have any saleable right in respect of the property gifted in favour of the plaintiff and in that view of the matter, Ext. A is not sustainable in law. It is submitted by him that absence of challenge to Ext. A by way of relief claimed to cancel the same will not in any way impair the right of the plaintiff to get a decree in respect of the suit land. In

support of his submission Mr. Choudhury, has placed reliance on the judgment of the Apex Court in the case of Gulamhussain Kutubuddin Maner Vs. Abdulrashid Abdulrajak Maner and Others, .

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

20. Section 122 of the Transfer of Property Act, 1882, (for short, "the TP Act") defines gift as a transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called a donor to another, called a donee, and accepted by or on behalf of donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

21. Section 123 of the TP Act lays down the manner in which gift of immovable property may be effected. It reads thus:

"123. Transfer how effected - 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 of movable 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."

22. Thus, section 123 of the TP Act provides that 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 donor, attested at least by two witnesses.

23. Section 129 of the TP Act is relevant and the same is quoted hereinbelow:

"129. Saving of donations mortis causa and Mohammedan Law - Nothing in this Chapter relates to gifts of movable property made in contemplation of death or shall be deemed to affect any rule of Mohammedan Law."

24. Section 129 , thus, provides that nothing in Chapter VII of TP Act relates to gift of movable property made in contemplation of death or shall be deemed to affect any rule of Mahomedan Law.

25. Therefore, in case of a gift by a Mahomedan, provisions of the TP Act will not be applicable and the gift will be governed by his Personal Law. However, it is seen from the judgments of the learned courts below that argument was advanced with regard to provisions relating to gift under the TP Act and the same was also considered, without however, noticing that TP Act is not applicable in respect of a gift under the Mahomedan Law.

26. At this stage, it will be appropriate to take note of the concept of gift under Mahomedan law. Chapter XI of Mulla's Principles of Mahomedan Law (20th Edition) is devoted to gifts and it says that a Hiba or a gift is a transfer of property, made immediately, and without any exchange, by one person to

another, and accepted by or on behalf of the latter. Every Mahomedan of sound mind and who is a major may dispose of his property by gift. Three essentials of a gift are recognized by Mahomedan Law and the same are delineated under Section 149 of Principles of Mahomedan Law. Section 149 reads as follows:

"149. The three essentials of a gift - It is essential to the validity of a gift that there should be (1) a declaration of gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee as mentioned in Section 150. If these conditions are complied with, the gift is complete."

27. Section 150 deals with delivery of possession and it provides that it is essential to the validity of a gift that there should be delivery of such possession as the subject of the gift is susceptible of. The taking of possession of the subject-matter of the gift by the donee, either actually or constructively, is necessary to complete a gift.

28. Gift under Mahomedan Law is not required to be in writing and consequently, need not be registered under the Registration Act, 1908. On proof of fulfillment of essential conditions, the gift becomes complete and valid. The donee may choose to record the transaction in writing but merely because the gift is reduced to writing by a Mahomedan instead of it having been made orally, such writing does not become a formal document or instrument of gift. The nature and character is not changed because of the gift having been made by a written instrument or document.

29. In the instant case, there is no evidence of any oral gift. Both the courts below had held that the gift deed, Ext. 1, to be duly executed by the donor, who was the grandfather of the plaintiff. The gift deed also indicated the purpose for which the gift was made, namely, the plaintiff would not have inherited any property of the donor as the plaintiff's father had expired during the lifetime of the donor and as under the Mahomedan Law, son of a pre-deceased son is not entitled to inherit ancestral property. The plaintiff and PW 2, the attesting witness, had deposed towards execution of the gift deed by the grandfather of the plaintiff and their evidence is not impeached in any manner and as such, it must be held that the gift deed was duly executed by the grandfather of the plaintiff. With regard to acceptance of the gift and delivery of possession, I am inclined to uphold the view taken by the learned courts below that mother of the plaintiff had accepted the gift and taken delivery of possession. I am unable to accept the submission advanced by Mr. Kalita and Mr. Purkayastha that acceptance of the gift by the mother of the plaintiff was an afterthought, merely because in the plaint, the said fact was not expressly mentioned. Absence of any recital in the gift deed that gift was accepted and delivery of possession was given will not be of any consequence in respect of a gift under the Mahomedan Law. The learned courts below, on the basis of Ext. 2 and Ext. 9, came to the conclusion that the aforesaid deeds established that plaintiff was delivered possession of the property pursuant to the gift. A finding was also recorded by

the learned courts below that the suit land as described in the plaint conforms to the boundary given in Ext. 1 and that Dag No. 174 of 2nd R.S. Patta No. 7 and Dag No. 175 of 2nd R.S. Patta No. 109 are adjacent dags. In that view of the matter, the learned courts below were justified to hold that there was mis-description with regard the dag numbers in the gift deed.

30. When there is no doubt as to the identity of the land and there is only mis-description that could be treated as a mere irregularity. If no boundaries had been given in the gift deed, matter would have been different. But in the instant case, both boundaries and dag numbers are mentioned and in the circumstances of the case, mistakes in the dag numbers must be treated as a mere mis-description not affecting the identity of the property gifted.

31. In Mahboob Sahab (supra), it was held that the mother cannot act as a property guardian when the father is alive. The said decision does not lay down the proposition that a Mahomedan mother cannot accept the gift on behalf of her minor son when the father is no more.

32. In Gulamhussain (supra), one of the questions that arose for consideration was as to whether under the Mahomedan Law, the mother can be appointed to act as guardian of her minor son during the lifetime of the minor's father and the Apex Court held that when the father of the minor is alive, the mother cannot act as a guardian of the minor to accept gift on his behalf.

33. In the instant case, the father of the minor was no more and the gift was made by the grandfather and so, the grandfather, being the natural guardian, could not have accepted the gift, he himself being the donor. The gift was made for the benefit of the minor and well-being of the minor is of paramount importance. In such circumstances, mother, who was in charge of the minor, can accept the gift. Acceptance of the gift by the mother does not mean that the mother was dealing with the property of the minor because till the acceptance of the gift on behalf of the minor, the property does not belong to the minor. It is not that the mother had in any way at any point of time sought to dispose of the property belonging to the minor.

34. However, there is another facet of the matter. Even if the plaintiff was entitled to have right, title and interest on the basis of the gift deed, the question arises as to whether in absence of any challenge to the sale deed, Ext. A, on the basis of which the defendant No. 14 had taken possession over a part of the suit property, the plaintiff would be entitled to the reliefs prayed for in the suit.

35. The plaintiff by way of amendment prayed for recovery of khas possession without challenging the sale deed. The learned lower appellate court before which the question was raised that the plaintiff would not be entitled to the reliefs as prayed for in absence of the challenge made to the sale deed, skirted the issue and did not give any decision on the question posed.

36. In Md. Noorul Hoda Vs. Bibi Raifunnisa and Others, , the Apex Court had

laid down that when the plaintiff seeks to establish his title to the property which cannot be established without avoiding a decree by a court or an instrument that stands as an insurmountable obstacle in his way, the plaintiff has to seek a declaration and have the decree or the instrument cancelled or set aside. Similar view is taken by the Apex Court in the case of Abdul Rahim and Others Vs. SK. Abdul Zabar and Others, .

37. In the facts of the case, a prayer for cancellation of Ext. A as a consequential relief was necessary to enable the plaintiff to get a decree declaring his right, title and interest. It was incumbent upon the plaintiff to have challenged the sale deed. It must not be forgotten that suit land was mutated in the names of the vendors of the sale deed by way of inheritance and there was no objection by the plaintiff to such mutation. That apart, dag numbers were also wrongly given in the gift deed, Ext. 1 and the same were not corrected and rectified. Without there being any challenge to Ext. A, the learned courts below proceeded to embark upon an enquiry to find out legality and validity of the sale deed and whether the defendant No. 14 could have taken possession of land in Dag No. 174 by virtue of such sale deed. The exercise undertaken by the courts below was impermissible in law. In absence of a declaration that the sale deed is invalid in law, which was not sought for, learned courts below could not have granted a decree declaring right, title and interest in favour of the plaintiff and for recovery of khas possession from the defendant No. 14 in respect of the land which was sold to him through the sale deed, Ext. A.

38. In view of the above discussion, I am of the considered opinion that the appeals deserve to be allowed. Accordingly, the impugned judgments and decrees are set aside. The substantial questions of law are answered in terms of the above. No cost.

39. Registry will send back the LCR.