

(1998) 11 GAU CK 0039

In the Gauhati High Court

Case No : Second Appeal No. 19 of 1996

Lareli Das @ Malani Das and Others

APPELLANT

Vs

Jadav Chandra Sakia and Others

RESPONDENT

Date of Decision : 26-11-1998

Acts Referred:

Evidence Act, 1872 — Section 68

Transfer of Property Act, 1882 — Section 123

Citation : (1999) 1 GLT 145

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : A.C. Sarma and U. Bhuyan, for the Appellant; B.K. Goswami, T. Goswami and I. Goswami, for the Respondent

Judgement

J.N. Sarma, J.—This second Appeal is almost concluded by concurrent findings of fact by both the courts below. This is an appeal by the Defendant.

2. The case of the Plaintiffs was that they purchased the suit land described in Scheduled A and B to the plaint from Proforma-Defendant by a registered sale deed. Prior to that Late Suryya Kumar Bora purchased the same from Proforma-Respondent Pradip Ch. Das and Badan Chandra Das, who are sons of late Saruram Das, the predecessor-in-interest of Defendant-Appellant late Saruram Das gifted the suit land to his those two sons, that is, Pradip Ch. Das and Badan Chandra Das. After such purchase the Plaintiff/Respondents got possession over the suit land and their names were also mutated against the same. On 24.4.84 the Defendant dispossessed the Plaintiff from the land and forcibly occupied the suit land and as such this suit was filed. The Defendant took up various defence, but the only defence which is material for the disposal of the appeal is whether the deed of gift executed by Saruram in favour of his sons were approved as required by law. u/s 68 of the Evidence Act. In the plaint in Paragraph-2 it was stated that Saruram Das by a registered deed of gift No. 620 dated 6,2.79 gifted the suit land alogwith some other land to his two sons and subsequently that was

sold in favour of the Plaintiff. That statement made in paragraph-2 has been referred to as Paragraph-11 of the written statement, inter-alia, as follows:

11. That these Defendants do not admit that the Defendant No. 1 gifted away the suit land along with some other land to the Defendant No. 2 and 3 by a registered deed of gift and delivered possession to them.

3. The question is whether there is specific denial of the gift as required under the proviso of Section 68 of the Evidence Act. The proviso to Section 68 of the Evidence Act provides as follows:

Provided that it almost necessary to call the witness is done away with in the case of a document (not being a will registered)" unless its execution by the person by whom it purports to have been executed is "specifically denied".

4. I have heard Shri Sarma, learned Advocate for the Appellants and Shri Goswami, learned Advocate for the Respondents. Shri Sarma strenuously contended that paragraph-11 is a specific denial and it will be covered by the proviso of Section 68 of the Evidence Act. The law is that if the execution of a registered document required by law to be registered and attested is specifically denied then the attesting witness must be called for to prove it. Section 123 of the Transfer of Property 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 the donor and attested by at least two witnesses. So if execution of a registered document required by law to be registered and attested and is to be specifically denied. But if the execution is not specifically denied then it is not necessary to call the attesting witness to prove it. Specifically denial means unambiguous a categorical statement denying the execution of it. An ambiguous denial is not governed by the proviso of Section 68 of the Evidence Act. This aspect of the matter came up for consideration before the Privy Council as reported in 1939 PC 117 (Kumvar Surendra Bahadur Singh and Ors. Appellants v. Thakur Behari Singh and Ors. Respondents), there the main question was the deed of mortgage and there the denial was in the following terms:

The contesting Defendant does not admit the execution and completion of the document sued on, nor is receipt of any consideration of the same admitted.

And it was urged that this is not specific denial. The Privy council did not accept this contention and the Privy Council has held as follows:

Learned counsel for the Appellants relied upon the terms of Section 68, Evidence Act, and especially upon the Proviso, and submitted that it was not necessary for the Plaintiffs at the trial to call an attesting witness," in as much as the mortgage deed had been registered and the execution thereof by Mt. Jama Kunwar had not been specific denied by Lachman Singh. Their lordships cannot accept that contention. It is clear that Lachman Singh in his written statement pleaded that he did not admit the execution of the mortgage deed, and it appears from the

judgment of the Subordinate Judge that at the trial the pleader who appeared for Lachman Singh "hotly contended that the execution and due attestation of the mortgage bond in suit was not proved against his client." In these circumstances, in their Lordships' opinion, it must be held that the execution of the mortgage deed by Mt. Jamna Kunwar was in fact specifically denied by Lachman Singh.

5. So two things must be there, that is, (i) execution must be specifically denied, (ii) The question must be raised in the Trial Court. If this is not raised in the trial Court, that cannot be raised in the Appellate Court as will be evident from the judgment of the Privy Council quoted above. That also is the law as laid down by the Supreme Court in *Kuppuswamy Chettiar Vs. A.S.P.A. Arumugam Chettiar and Another*, wherein the Supreme Court considering such a document required attention and in paragraph 2 and 5 the Supreme Court took up into consideration that argument which was made with regard to Ext. B(1) in that case it was urged that it was not proved as required u/s 68 of the Evidence Act. The Supreme Court pointed out as follows:

The point was not raised in the Court. There is nothing to show. This can not be raised subsequently in appeal.

6. In this particular case also this question was not agitated either before and Trial Court or in the appellate Court and it is for the first time in the Second Appeal that Shri Sarma wanted to urge it. This cannot be done as per decision of the Privy Council and Supreme Court. Accordingly there is no merit and it is dismissed. Stay order, if any passed earlier shall stand vacated.