
(1973) 01 GAU CK 0008
In the Gauhati High Court
Case No : Second Appeal No. 17 of 1969

Mt. Jabeda Khatun

APPELLANT

Vs

Moksed Ali and others

RESPONDENT

Date of Decision : 12-01-1973

Acts Referred:

Evidence Act, 1872 — Section 91

Citation : AIR 1973 Guw 105

Hon'ble Judges : M.C. Pathak, J;Baharul Islam, J

Bench : Division Bench

Advocate : K. P. Sen, for the Appellant; Sulaiman, for the Respondent

Final Decision : Dismissed

Judgement

Baharul Islam, J.—This appeal is directed against the Judgment and decree passed by the Assistant District Judge, Dhubri in Title Appeal No. 34 of 1966.

2. The plaintiff brought a suit for declaration that she was one of the heirs of late Noor Mohammad and was entitled to share of the property left by her father. Defendant No. 1 was the "adopted son" and defendant No. 2 was the "domestic son-in-law" of late Noor Mohammad. They filed a written statement. Their material plea was that the entire property had been gifted to them by late Noor Mohammad during his lifetime and therefore the plaintiff had nothing to inherit from her father. Defendants Nos. 3 and 4 also filed written statements and supported the case of defendants 1 and 2.

3. During trial defendants 1 and 2 (who will hereinafter be referred to as "the defendants") and their witnesses stated that there was a deed of gift. The learned Munsif dismissed (decreed) the plaintiffs suit on the ground that the plaintiff (defendants) had failed to produce the deed of gift. On appeal by the plaintiff (defendants) the Assistant District Judge dismissed the suit and accepted the plea of defendants on the ground that although the plaintiff (defendants) failed to produce the deed of gift, the gift was proved by oral evidence.

4. The only point raised before us by Shri K. P. Sen. learned counsel appearing for the appellant, is that in view of Section 91 of the Evidence Act, the oral evidence of gift adduced by the defendants is not admissible.

5. The material portion of Section 91 of the Evidence Act may be quoted

91. When the terms of a contract, or of a grant or any other disposition of property, have been reduced to the form of a document,..... no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Shri Sen submits that the gift is a disposition of property and as according to the defendants themselves, the gift was created by a deed of gift oral evidence was barred u/s 91 of the Evidence Act. The point to be decided, therefore, is whether the deed of gift under the Mahomedan Law creates disposition of property.

6. Under the Mahomedan Law three things are necessary for the creation of a gift. They are-(i) a declaration of gift by the donor, (ii) an acceptance of the gift, express or implied, by or on behalf of the donee, and (iii) delivery of possession of the subject of the gift by the donor to the donee. A deed of gift is immaterial for creation of gift under the Mahomedan Law. A gift under the Mahomedan Law is not valid if the above-mentioned three essentials are not fulfilled, even if there be a deed of gift or even a registered deed of gift. In other words even if there be a declaration and acceptance of the gift, there will be no valid gift under the Mahomedan Law if there be no delivery of possession, even though there may be a registered deed of gift. Therefore, in the instant case, had the defendants produced the deed of gift, at best it would have proved a declaration of the gift by the donor and an acceptance thereof by the donee; but in addition, the defendants would have to lead independent oral evidence to prove delivery of possession, in order to prove a valid gift under the Mahomedan Law. That being the legal position a deed of gift under the Mahomedan Law does not create "a disposition of property" and therefore oral evidence led by the defendants to prove the gift is not hit by Section 91 of the Evidence Act.

Interpreting Section 91 of the Evidence Act the Supreme Court in the case of Bai Hira Devi and Others Vs. The Official Assignee of Bombay, has held as follows:-

Section 91 is based on what is sometimes described as the "best evidence rule". The best evidence about the contents of a document is the document itself and it is the production of the document that is required by Section 91 in proof of its contents. In a sense, the rule enunciated by Section 91 can be said to be an exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act

... ..

What Section 91 prohibits is the admission of oral evidence to prove the contents of the document. Whether or not the terms of a document could be varied by proof of an oral agreement is a matter which is not covered by Section 91 at all.....

Shri Sen takes reliance on this decision. In our view this decision of the Supreme Court does not help the appellant. What the Supreme Court has held is that if the document itself creates a contract or a grant or any other disposition of property, then the terms of that contract or grant or disposition of property, cannot be proved by oral evidence. But in the instant case, as we have held above; under the Mahomedan Law the contents of the document cannot prove a gift under the Mahomedan Law. The oral evidence led by the defendant is therefore not hit by Section 91 of the Evidence Act.

7. In the result this appeal has no substance and is dismissed. But in the facts and circumstances of the case we leave the parties to bear their own costs.