

(2012) 04 GAU CK 0094

In the Gauhati High Court

Case No : Regular Second Appeal No. 33 of 2001

Paschim Singhicherra Gram Panchayat

APPELLANT

Vs

Sri Sailendra Kumar Bhattacharjee and Sri Prahalad Chandra
Das

RESPONDENT

Date of Decision : 23-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 80
Specific Relief Act, 1963 — Section 31, 34
Transfer of Property Act, 1882 — Section 25, 26

Citation : (2012) 04 GAU CK 0094

Hon'ble Judges : Swapan Chandra Das, J

Bench : Single Bench

Advocate : Sankar Deb and Mr. S. Datta, for the Appellant; D.K. Biswas, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Das

1. This second appeal, u/s 100 of the CPC 1908, is directed against the judgment & decree, dated 17.08.2001 and 18.08.2001 respectively, passed by learned Additional District Judge, Khowai (for short ADJ) in Title Appeal No. 34/1998, whereby, the learned ADJ set aside the judgment and decree, dated 11.06.1998 and 12.06.1998 respectively passed by learned Civil Judge (Jr. Divn.), Khowai in Title Appeal No. 6/1992.

The second appeal has been admitted for hearing on the following substantial questions of law :

"1. Whether the land given by way of exchange of a Gift Deed can be reverted to the doner when the gift is made without such a condition?

2. Whether the suit is maintainable u/s. 34 of the Specific Relief Act, 1963 in view of the written registered instrument of Deed of Gift.

3. Any other question of law that may be argued by the parties at the time of hearing"

Heard learned senior counsel, Mr. Sankar Deb, assisted by learned counsel, Mr. S. Datta for the appellants and learned counsel, Mr. D.K. Biswas for the respdt. No. 1.

2. Respdt. No. 2 has chosen to remain absent.

3. Brief facts, necessary for disposal of this second appeal, may be recapitulated as under:

Respdt No. 1, as plaintiff, instituted Title Suit No. 6/1992 in the Court of Civil Judge (Jr. Divn.), Khawai seeking cancellation of a deed of gift, dated 30.07.1986 executed by him with consequential relief for Khas possession of gifted land etc. It is inter alia pleaded by the plaintiff that the defendants (appellants and respdt. No. 2) approached him for donating his land measuring 6.06 acres, described in the schedule of the plaint, for construction of a stadium. On such approach, with a view to develop sports in the sub-division, plaintiff executed a registered gift deed, in favour of defendant No. 1, Paschim Singicherra Gram Panchayat, subsequently, named as Barabill Gram Panchayat, on 30.07.1986 and thereby gifted 6.06 acres of land specifically for construction of a stadium thereon and handed over possession of the land to the donee (defendant No. 1) and defendant No. 2, the then Pradhan of the Panchayat accepted the gift and taken over the physical possession of the gifted land. It is alleged by the plaintiff, that the defendants did not construct a stadium in terms of deed of gift, rather constructed a house for Panchayat office, a Garden attached to the same, defying the protest of the plaintiff. He requested the defendant No. 2, Pradhan of the Panchayat to remove the Panchayat office and to construct a stadium thereon but the defendant turned a deaf ear and hence he issued notice u/s 106 of Panchayati Raj Act to the defendant on 16.03.2012 and thereafter, instituted the suit seeking cancellation of the gift deed and consequential relief for khas possession etc.

Defendants in their written statement inter alia stated that it is a clear gift voluntarily made by the plaintiff vesting all right, title, interest and possession, to use the gifted land for construction of a stadium and for free use of the same at full option of the donee. There is no condition in the gift deed that if the stadium is not constructed within a specified time, the gift will stand revoked or will be revoked at the will of the donor. In view of the averments made in the gift deed, the defendant Panchayat become absolute owner of the gifted land and by that time, the defendants have excavated a tank in the land for using it as a swimming pool. They have also constructed some office rooms for use by the sports officials and some other constructions and also done leveling of the land, by earth cutting, spending about Rs. 6,00,000/-. They have placed requisition for fund to the Government for construction of stadium and sports complex. They denied the allegation that they are not willing to construct the stadium on the

gifted land.

Based on the pleading of the parties, the trial Court framed following issues :

- "(1) Is the suit maintainable in its present form?
- (2) Whether the deed of gift executed by the plaintiff on 30.07.1986 is liable to be cancelled?
- (3) Is the suit within limitation?
- (4) Whether the prayer of the plaintiff for recovery of khas possession of the suit land is tenable?
- (5) Whether the plaintiff is entitled to any other relief/reliefs and if so up to what extent."

4. The plaintiff-appellant examined himself as PW.1 and also examined two more witnesses namely, PW.2, Sailendra Ch Debroy and PW.3, Sri Giridhan Gope and also proved a copy of the gift deed, dated 30.07.1986. On behalf of the defendants" one witness, namely PW.1, Sri P K Sen, BDO, Khawai, is examined as DW.1. No documentary evidence adduced.

Learned trial Judge decided issue Nos. 1 and 3 in affirmative, in favour of the plaintiff-respdt, but decided issue No. 2 in negative against the plaintiff-respdt and consequently, decided issue Nos. 4 and 5 and dismissed the suit.

5. The plaintiff preferred Title Appeal No. 34/1998 in the Court of ADJ, Khawai against the decree of dismissal of the suit and that appeal as allowed by the impugned Judgment and decree which is challenged in this second appeal. Learned ADJ in Para 9, 10, 11 and 12 of the judgment has held thus :

"9. I have perused the plaint, written statement, deposition of the witnesses, documents and judgment passed by the Ld. Court below.

On perusal of the deed of gift I find that the doner has gifted the land to the defendant-respondents only for the sole purpose of construction of stadium therein and that the deed of gift was executed in the year 1986, 15 years back. The defendant-respondents in their written statement as well as in their deposition has admitted that stadium has not yet constructed. The defendant-respondents have also admitted that a panchayat office has been constructed therein and Anganwadi School is running on the gifted land. From the gift deed it revealed that the deed of gift was conditional for construction of stadium therein. But from the admission of the defendant-respondents that they have constructed a panchayat office and running an Anganwadi school therein goes to show that the defendant-respondents deviated from the condition imposed by the plaintiff-appellant in the deed of gift. It further revealed from the evidence on record that though the plaintiff-appellant has gifted the land 15(fifteen) years back but within this 15 years the defendant-respondents did not start the construction work nor they have submitted any paper before the Court to show that plan for

construction of stadium has been approved or fund for the same has been placed.

10. In view of the above it appears to me that the defendant-respondents are not interested to construct the stadium therein immediately. The submission of the Ld. G.P that no specific time has been given by the plaintiff-appellant for construction of stadium cannot be accepted as the doner who has gifted the land for construction of a stadium certainly entertaining a desire to see that a stadium has been constructed on the gifted land. The plaintiff-appellant is an old man of 73 years as revealed from his deposition. So at the fag-end of his life he will certainly desire to see that the stadium has been constructed in the land gifted by him to the defendant-respondents, but by not constructed a stadium on the gifted land and by constructing other buildings, it appears that, defendant-respondents deviated from the condition laid down in the deed of gift.

11. I have perused the Judgment of the Learned Lower Court and find that he has dismissed the plaintiff's suit only on the ground that there was no default clause in the deed of gift to the effect that in default of construction of stadium on the gifted land the same will be returned to the doner.

12. The said findings of the Court below appears to me to be not correct as because admittedly the land was gifted to the defendant-respondents only for the purpose of construction of stadium and admittedly no stadium has been constructed even after 15 years of the execution of the gift-deed and though there was no defaulting Clause for returning of the gifted land to the doner in default of the construction of stadium. But Learned Court below ought to have held that the defendant-respondents cannot be allowed unlimited period for construction of stadium in the gifted land as the doner certainly was entertaining a desire to see that stadium has been constructed in his gifted land."

6. Section 100 of the CPC 1908, has introduced a definite restriction on the exercise of jurisdiction in a second appeal so far as the High Court is concerned. The High Court in exercise of this power should not undertake the task of re-appreciation of evidence and record findings different than those recorded by the appellate Court merely, because another view is possible. In a second appeal, a finding of fact even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court will be within its jurisdiction to deal with the issue.

7. The Hon"ble Apex court in the Case of Gurdev Kaur & Ors. Vs. Kaki and Ors. reported in AIR 2006 SCW 2404 has held thus :

"Even prior to amendment, the consistent position has been that the Courts should not interfere with the concurrent findings of facts. After 1976 Amendment, the scope of S. 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under S. 100, C.P.C only in a case where substantial questions of law are involved and those

questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was; (i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved; (ii) The substantial question of law to precisely state such question; (iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal; (iv) Another part of the Section is that the appeal shall be heard only on that question."

The Court further held:

"In judicial hierarchy finality is absolutely important because that gives certainty to the law. Even in the interest of litigants themselves it may not be unreasonable to draw a line in respect of the two different categories of litigation where procedure will say at a certain stage that questions of facts have been decided by the lower Courts and the matter should be allowed to rest where it lies without any further appeal. This may be somewhat harsh to an individual litigant; but, in the larger interest of the administration of justice, this view is juristically sound and pragmatically wise."

8. Now, turning to the case at hand, let us consider the first substantial question of law formulated in this appeal.

Learned senior counsel, Mr. Deb assailed the finding of the first appellate Court, firstly, on the ground that there was no condition stipulated in the gift deed specifying any time limit for construction of stadium and that the defendants have taken some steps towards construction of stadium as intended by the donor. In the absence of any such time limit, specified in the deed of gift, the finding of the appellate Court that the defendants deviated from the conditions of the gift and that they are not willing to construct a stadium, is a perverse finding and is liable to be interfered.

Per contra, learned counsel, Mr. D.K. Biswas, has submitted that the plaintiff donated the land with the sole and only object of construction of a stadium but the defendants constructed a Panchayat Office, Anganwadi School and a Garden and also excavated a tank which is admitted by DW.1, the B.D.O of the Block, and they did nothing towards construction of a stadium. No scrap of paper produced that any positive action taken towards construction of a stadium and therefore, the defendants deviated from the purpose for which the gift is executed. The intention of the donor is very clear in the recitals of the gift deed

that it is executed for the sole purpose of construction of a stadium presumably, immediately after the gift deed is executed but the defendants constructed Panchayat office, Anganwadi Centre and a Garden and also excavated a Tank thereon, defying the protest raised by the plaintiff for which the plaintiff issued notice to the defendants, as per the Panchayat's Act and thereafter, instituted the suit. Though there is no time limit specified in the deed, the intention of the plaintiff is clearly spelt out in the recitals of deed that construction of a stadium would be done immediately and not in uncertain future and that fact has been properly appreciated by the appellate Court.

9. Learned counsel, Mr. Biswas, at this juncture, further argued that the first substantial question of law "Whether land given by way of exchange of a gift deed can be reverted to the donor when the gift is made without such condition"..... is a question of fact which has already been decided by the appellate Court, critically examining the evidence on record and the pleadings of the parties and the finding thereof cannot be interfered in the second appeal since it cannot be termed as a substantial question of law. On the other hand, learned senior counsel, Mr. Deb, refuted the argument stating that it is the most debatable question in the suit and appeal answer to which has a material bearing as to the rights of the parties and hence it should be termed as a substantial question of law for decision in the second appeal.

10. On the context of the rival submission, let us first have a glimpse to the material part of the deed of gift, English version of it stipulates thus :

"... I am the owner in possession of the land in rayoti right. As there is requirement of land for construction of one stadium at Paschim Singicherra Gram Panchayat, I do hereby make gift of my said 6.06 acres of land in favour of Paschim Singicherra Gram Panchayt relinquishing all my rights over the land. From this day you become rightful title holder over the gifted land of mine in place of me. You are to pay land revenue and mutate your names in respect of the land and construct stadium therein and use the land in your own way as you like and I or my heirs and the descendants have no objection thereto...."

There is no time limit stipulated in the deed specifying that stadium should be constructed within a particular time from the date of execution of the deed. Though there was no time limit specified, the appellate Court considering the facts that the defendants constructed Panchayat office, Angangwadi Centre, Garden and excavated tank etc. and further considering that no step taken towards construction of a stadium has held that the intention of the donor was deviated by the defendants and since the defendants failed to utilize the land for the purpose it was donated the appellate Court decided issue No. 2 in favour of the plaintiff.

11. A gift is a recognized form of transfer of property, as prescribed in the Transfer of Property Act, which is different from the other forms of transfer of property as recognized by law. It is a transfer without consideration and the

transferee/donor voluntarily makes it for a definite purpose. It is a voluntary giving away of all right, title and interest and possession of a property for a particular vision or mission. Such vision or mission of donor, in a transfer by dint of a gift, therefore, is of paramount importance. It has to be kept in mind that the donor while executing the deed of gift reflected his intention in the document which the donee is bound to follow, strictly, while accepting the gift with such terms. The gift deed was drafted by a Mafassal deed writer in a sub-division and it is very concise but reflecting the real intention of the donor whereby he has made it clear that with a view to construction of a stadium, simply, he donated the land and while for some other purpose the gifted land is utilized he raised objection, issued notice and when found that no positive steps is taken towards construction of the stadium he filed the suit praying for cancellation of the gift deed and for possession of the gifted land. It is made clear that it is a conditional gift and while it is such a conditional gift, the terms stipulated has been given due importance and the appellate Court, therefore, seems to have correctly appreciated the fact and law thereof and the finding therefore, on this count, does not deserve interference.

In the case of Subbegowda (Dead) by Lr. Vs. Thimmegowda (Dead) by Lrs., the Supreme Court has held - though called a settlement deed, what was the intention of the executant behind executing the deed? The question of construction of a document is to be decided by finding out the intention of the executant, firstly, from a comprehensive reading of the terms of the document itself.

12. Let us now see what is a substantial question of law. In the context of Section 100 C.P.C any question of law which effects the final decision in a case is a substantial question of law as between the parties. A question of law which arises instantly or collaterally having no bearing in the final outcome will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law by the Supreme Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law. A substantial question of law arises when a question of law, which is not finally settled by the Apex Court or by the concerned High Court and which arises for consideration in a given case.

13. In the case of Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd., the Apex Court has held - "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties, and if so, whether it is either a open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussions or alternative view. If the question is settled by highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is

palpably absurd the question would not be a substantial question of law."

In the case of *Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs.*, the Apex Court has held that an entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will therefore, depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not; the paramount over all consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

In the case of *Hero Vinoth (minor) Vs. Seshammal*, the Apex Court has held that an inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

The Apex Court further held that the High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of the parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

14. In the case at hand, admittedly, the plaintiff executed the gift deed donating the land for the purpose of construction of a stadium. The trial Court and the first appellate Court held that the defendants constructed a Panchayat office, an Anganwadi Centre, a Garden on the suit land and also excavated a Tank. The trial Court held that the gift deed, since did not specify any time limit for construction of the stadium decided issue No. 2 against the plaintiff but the first appellate Court, taking into consideration the facts and circumstances and the evidence on record, has held that the defendants deviated from the condition of the gift and since did not take any step towards construction of the stadium within 15 years i.e from the date of execution of the deed till the passing of the judgment by the appellate Court, held that the time limit though not specified exposed the intention of the defendants and, therefore, decreed the suit. There is nothing in law that unless the time limit is specified in the recitals of the deed, in the given facts and circumstance of a case, the Court should consider a conditional gift for

an uncertain future time. Under such circumstances, the argument of learned counsel, Mr. Biswas that first substantial question of law, as formulated cannot be termed as substantial question of law, cannot be accepted. It was definitely a substantial question of law but in the facts and circumstances of the case the decision of the appellate Court does not deserve interference.

Gift was executed on 30.07.1986. The Title suit was decreed on 11.06.1998. The first appeal was filed on 07.09.1998 and the judgment and decree was passed on 17.08.2011 and 18.08.2001 respectively. During this period of 15 years the defendants did not take effective step for construction of stadium. No scrap of paper produced before the trial Court and the appellate Court that any plan of action, allotment of fund was made for the purpose of construction of a stadium. Under such circumstances, the decision taken by the appellate Court does not warrant interference.

15. Learned counsel, Mr. Biswas heavily relied on the ratio of the decision of the Apex Court in the case of State of U.P. Vs. Bansi Dhar and Others,). In the reported case an affluent man called Dubey donated Rs. 30,000/- to the collector of the District for construction of a Women's Hospital in memory of his wife on the basis of a matching contribution by the Government. The gift was accepted by Collector but after the Collector's transfer, subsequent collector took some steps but ultimately the matching share was not provided by the government and the hospital was never constructed as desired by the donor.

In Para 17 of the judgment the Court Observed thus :

17. Let us have a close look at the terms and conditions of the donation and spell out their legal effect. The law of gift is, in a sense, a collection of equitable principles but crystallised for India under the British from Anglo-Saxon jurisprudence. Since Independence collections from the public have escalated and in India to-day popular contributions to public charitable purposes are a new dimension of community involvement in developmental activities. And so the rule of law must rise to this rule of life by facilitating the fulfillment of benevolent objects but vigilantly guarding against perversion, diversion, subversion, inaction and unjust enrichment, where public donations have been raised. The law of charitable trusts must undergo an evolutionary adaptation to Indian social environs, illumined of course by the well-settled rules in this branch of jurisprudence developed over-the centuries by great English judges. Maitland's remark is valid even now for us: "Of all exploits of Equity the largest and most important is the invention and development of trust."

In Para 34 and 35 of this judgment the Court observed thus:

34. In the law of real property the vesting of an estate can be made to depend on a condition precedent and the transfer fails if the condition is not fulfilled (c.f.Ss. 25 & 26, T.P. Act). We may sum up the situation now. If the donation by Dubey was conditional the Government was a mere custodian of the cash till the condition was complied with and if the performance thereof was defeated by

Government, the gift did not take effect.

35. The factual findings, as already set out, leave no doubt in our mind that the transaction was not a gift simpliciter but was subject to the matching grant from Government, building having to be made with such augmented amount by Shri Dubey, etc. Assuming substantial compliance as sufficient in law, the defendant has no case that any of the conditions has been carried out, not even the equal contribution, from the State exchequer without which the construction of the hospital would have been a half-done project. Thus the conditions failing, the charity proved abortive, and the legal consequence is a resulting trust in favour of the donor. The State could not keep the money and the suit was liable to be decreed. The Kannauj community, as the happy sequel to this unhappy litigation has turned out, has now got a bigger hospital and a memorial college.

The ratio of the above decision may fairly be applied in this case. The defendant-Panchayat while failed to construct a stadium, as intended by the donor, for which the land was gifted, the donor is entitled to get the decree.

16. Now, let us turn to the substantial question of law formulated in this appeal.

Learned senior counsel Mr. Deb argued that the defendant No. 4, B.D.O., Khawai, was made a party in the suit but no notice u/s 80 of the C.P.C, was served and therefore the suit was not maintainable against defendant No. 4 and the appellate Court did not consider the issue and hence the judgment was bad in law. It was also argued that notice u/s 106 of Panchayati Raj Act alleged to have served on the defendants was of no consequence in respect of defendant No. 4 is concerned and therefore, the judgment and decree passed by the appellate Court should be interfered and set aside.

Learned counsel, Mr. Biswas, on the contrary, has argued that the respondent No. 1 the concerned Panchayat, in whose favour the gift was made and the Pradhan of the Panchayat, defendant No. 2 are the principal defendants to whom notice u/s 6 of the Panchayat's Act was served. Non-service of notice on respondent No. 4, who was not a necessary party, is of no consequence in the suit. In support of his contention, learned counsel, Mr. Biswas referred the case law reported in Ghulam Rasool and Another Vs. State of Jammu and Kashmir and Another, .

In the case at hand, plaintiff executed the deed of gift in favour of Paschim Singicherra Gram Panchayat and the Pradhan of the Gram Panchayat (defendant No. 2) accepted the gift. A Panchayat is a statutory body and according to the Panchayat's Act, it is a juristic person. The plaintiff made the B.D.O, as party to the suit, who was neither a party to the gift nor was responsible to implement the terms and conditions of gift, nor was responsible for execution or non-execution of the terms of the gift. In the case at hand the Pradhan of the Panchayat did not adduce any evidence. B.D.O who was not a party to the gift deed was only examined and adduced evidence. In the particular facts and

circumstances of this case non-service of notice u/s 80 of CPC on defendant No. 4, the B.D.O, is of no consequence at all since the notice, which is legally required, as prescribed by the Panchayats Act, was served on the principal-defendant i.e. the Pradhan of the Gram Panchayat. The ratio of Gulam Rasul (supra) may, therefore, be applied in this case. In that reported case, notice to the State u/s 80 was served but no notice was served on B.D.O and that point was raised before the Apex Court while the Apex Court has held that where suit filed against the State impleading the concerned public authority, as States agency, held, notice u/s 80 issued by the plaintiff to the State cannot be challenged in the suit on ground of failure to issue notice on such authority.

17. Learned counsel, Mr. Deb further argued that the plaintiff filed the suit u/s 34 of S.R Act whereas the suit ought to be one u/s 31 of the said Act. While the suit was filed after the 6 years of the execution of the deed it was barred by limitation irrespective of the plea of limitation was taken or not. Learned counsel, Mr. Biswas submitted that the suit was instituted u/s 31 and remedy was also sought u/s 34 and from the date of service of notice u/s 106 of the Panchat's Act the suit was within the time of limitation.

I have already noted above the issues framed in the suit. Issue Nos. 1 and 3 relates to maintainability and limitation. While deciding these issues the trial Court held -

"At the time of argument neither side pressed on these two issues. However, on perusal of the case record as well as the evidence therein I find nothing to affect the maintainability of this suit in any way. I also find that the suit is within the prescribed period of limitation. In view of the above, I hold that the suit is maintainable in the present form and it is within the period of limitation. Both these issues No. 1 and 3 decided accordingly in the affirmative and in favour of the plaintiff."

The above decision of the trial Court on issue Nos. 1 and 3 is not challenged by either of the parties before the first appellate Court. While the issues not challenged before the first appellate Court by the defendants/appellants they cannot raise this point in the second appeal before this Court. Conclusion about limitation is a finding of fact and is not open for interference in the second appeal.

18. Further the plaintiff instituted the suit - "for cancellation of the deed of gift, dated 30.07.1986 and consequential relief of Khas possession".

The plaintiff sought for the following relief:

"a) that a decree be passed declaring the deed of gift dated 30.07.1986 as cancelled.

b) that a copy of the decree be sent to the Khowai S.R. Office for necessary action.

c) that a decree be passed for khas possession of the suit land by evicting the

defendants therefrom.

d) that a decree be passed for any other relief or reliefs to which the plaintiff is deemed entitled under Law and Equity.

e) that a decree be passed awarding caused of the suit in favour of the plaintiff.

In view of the construction of the suit and relief sought by the plaintiff it is clear that the suit is brought u/s 31 seeking cancellation and also for declaration u/s 34 of the Act. The appellate Court decreed the suit accordingly directing the cancellation of the gift deed and for restoration of the possession of the gifted land to the plaintiff. The decision, therefore, is rightly arrived at by the appellate Court and deserves no interference.

19. At the conclusion of his argument, learned counsel, Mr. Deb, referring to the case law reported in Abid Hatim Merchant Vs. Janab Salebhai Saheb Shaifuddin and Others, submitted that doctrine of cy-pres may be drawn and applied in the facts and circumstances of this case and the gifted land may be permitted to be utilized for charitable purpose including that of construction of a stadium there on.

learned counsel, Mr. Biswas submitted that the defendants violated the terms and conditions and did not construct the stadium during last 25 years, for which the plaintiff executed the gift deed and doctrine of cypress is not applicable here since the plaintiff is living and he himself prayed for revocation of the gift deed and that ratio of that decision, therefore, cannot be applied in this case.

Let us quote here Para Nos. 2, 3, 4 and 5 of Abid Hatim (supra) reads thus :

"2. Incidentally, be it noted that the expression "cy-pres" in common English acceptation means and implies "as near as possible" (to the testator's or donor's intentions when these cannot be precisely followed)

3. In Halsbury's Laws of England (4th Edn., Vol.5-B) "cypres" doctrine has been referred to as below :

In cy-press doctrine - Where a clear charitable intention is expressed, it will not be permitted to fail because the mode, if specified, cannot be executed, but the law will substitute another mode cy-pres, that is, as near as possible to the mode specified by the donor.

An application cy-pres results from the exercise of the court's ordinary jurisdiction to administer a charitable trust of which the particular mode of application has not been defined by the donor. Where he has in fact prescribed a particular mode of application and that mode is incapable of being performed, but he had a charitable intention which transcended the particular mode of application prescribed, the court, in the exercise of this jurisdiction, can carry out the charitable intention as though the particular direction had not been expressed at all.

The primary rule to be observed in the application of the cy-pres doctrine is that the donor's intention must be observed as far as possible. Thus, if the donor names a particular object which is capable of taking effect, any application cy-pres that becomes necessary must be restricted within the limits of that object, and the mode of application must as far as possible coincide with his wishes.

A charity may be cy-pres to the original object even though it seems to have no trace of resemblance to it, if no other can be found which has a nearer connection, but objects nearer the donor's intention will always be selected in preference to those whom more remote.

4. The doctrine of cy-pres as noticed by this Court in *Ratilal Panchanand Gandhi V State of Bombay* and as developed by the Equity Courts in England stands adopted by our Indian courts since a long time past. B K Mukherjea, J. (as his Lordship then was) speaking on behalf of the Bench stated :

"When the particular purpose for which a charitable trust is created fails or by reason of certain circumstances the trust cannot be carried into effect either in whole or in part, or where there is a surplus left after exhausting the purposes specified by the settler, the court would not, when there is a general charitable intention expressed by the settler, allow the trust to fail but would execute it "cypres" that is to say, in some way as nearly as possible to that which the author of the trust intended. In such cases, it cannot be disputed that the court can frame a scheme and give suitable directions regarding the objects upon which the trust money can be spent".

5. Subsequently, this Court in *N.S. Rajabathar Mudaliar V. M.S. Vadivelu Mudaliar* observe : (SCC p.14, Para 6).

"The cy-press doctrine applies where a charitable trust is initially impossible or impracticable and the court applies the property cypress, viz., to some other charities as nearly as possible, resembling the original trust"".

The doctrine of cy-pres cannot be applied in the facts and circumstances of this case for the reason that it is a gift made for a particular purpose and the donor himself prayed for revocation of the gift when that purpose was not fulfilled by the donee. Under such circumstanced the doctrine cannot be applied in the facts of this case and I find no relevance of this argument advanced by learned senior counsel, Mr. Deb.

20. The appeal accordingly stands dismissed and in the circumstances with cost. Send back the LC records along with a copy of this judgment.