

(2008) 11 AHC CK 0133
In the Allahabad High Court
Case No : Second Appeal No. 256 of 2007

Shambhu Dayal Dubey

APPELLANT

Vs

Sunderlal Dubey And Others

RESPONDENT

Date of Decision : 14-11-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10
Transfer of Property Act, 1882 — Section 122, 123

Citation : (2008) 11 AHC CK 0133

Hon'ble Judges : Pankaj Mithal, J

Final Decision : Dismissed

Judgement

Pankaj Mithal, J.—The undisputed facts giving rise to this Second appeal are that one Ram Das was having lease hold rights in the suit land which had devolved upon his son Sunder Lal who subsequently got it free hold. The said Sunder Lal executed a giftdeed dated 27.12.1990 of the said land/house in favour of his son Sambhoo Dayal Dubey and his wife Smt. Pushpa Devi. He thereafter transferred the same very property to Nirmal Kumar Jain vide saledeed dated 9.12.1997. Before making the sale deed he instituted a suit for cancellation of the gift deed dated 27.12.1990 on the ground that it was never acted upon and was not accepted by the donees i.e. his son Sambhoo Dayal Dubey and his wife Smt. Pushpa Devi. The suit was decreed by the Court of first instance which decree has been affirmed in appeal.

2. Aggrieved by the judgments, orders and the decree passed by the Courts below cancelling the gift deed dated 27.12.1990 defendants Sambhoo Dayal Dubey and Smt. Pushpa Devi have preferred this second appeal.

3. I have heard Sri Piyush Misra, learned counsel for the defendant appellants at length and Sri K.K. Dubey learned counsel for the respondent.

4. Sri Misra has made only one submission that in view of the admitted possession of the defendant appellants over the property in dispute, it cannot be said that the gift deed was not accepted. He has relied upon a Division Bench

decision of this Court reported in AIR 1932 All 444, Mt. Anandi Devi v. Mohan Lal and others, wherein it has been ruled that acceptance of gift may be express or implied and the possession of donee is proof of acceptance. In reply to the above argument it has been submitted that in view of the pleadings and the evidence on record the above implied acceptance of the gift deed is not established.

5. The provisions of Sections 122 and 123 of the Transfer of Property Act, 1882 read together provides for a mode of transfer by way of gift deed and the procedure for executing a valid gift. The aforesaid provisions stipulate that a gift has to be made voluntarily without consideration by one person and accepted by the another in whose favour it is made and the transfer has to be made by a registered instrument signed by or on behalf of the person making it and attested by at least two witnesses or by delivery. Therefore, one of the basic conditions for a valid gift is its acceptance by or on behalf of the donee i.e., a person in whose favour it is being made. However, there is no specific mode provided for acceptance of the gift. Therefore, acceptance of a gift can be express or by implication and the implication can be drawn from the surrounding facts and circumstances.

6. Admittedly, in the present case there is no express acceptance of the gift. Therefore it is to be seen if there is sufficient evidence to prove implied acceptance of the above gift by the donees.

7. In paragraph 5 of the plaint it has been specifically stated that the plaintiff had made the Instrument of gift on 27th December, 1 990 in favour of the defendants at the behest of his sister Smt. Vimla Devi and her husband Rangji Lal and had got it registered. The averments made in paragraph 5 are reproduced herein below :

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8. In paragraph 5 of the W.S., the contents of paragraph 5 of the plaint have not been Accepted by the defendants, meaning thereby they denied the execution of the gift deed. The contents of paragraph 5 of the written statement are reproduced herein below :

9. Once they denied the execution of the gift deed it does not appeal to logic as to how they could be permitted to allege that it has been accepted or to adduce evidence to show that such a gift deed has been accepted by them. They cannot be permitted to approbate and probate at the same time.

10. A perusal of the written statement which has been filed as Annexure 3 to the stay application further reveals that the defendant appellants therein have pleaded that the suit property was a joint Hindu Family property which was acquired by the grand father Ram Das as a lease from the State Government on 1 8. 1 2. 1 957 whereupon a house was constructed. Therefore, defendant/appellant No. 1 has equal share with his father in the same. The properties left behind by Ram Das including the suit property was divided by mutual family

settlement wherein the suit property had come to the share of defendant/appellant No. 1 exclusively. The suit property is in use and possession of the defendant appellants alone. The respondent Sundar Lal had no right whatsoever to make a gift of the aforesaid property, as it has already fallen into his share by way of family settlement. The defendant appellants have never refused to accept the gift deed. He continues to be in possession of the same since before the execution of the same. They also stated that previously original suit No. 11/91 was instituted by them for permanent injunction against the plaintiff and certain other persons who were alleging to be the purchasers of the same. The said suit is pending therefore the present suit is not maintainable and its proceedings are liable to be stayed under Section 10, CPC.

11. Thus, the tenor of the written statement indicate that the .defendants/appellants basically claimed rights over the suit property by inheritance and partition and not on the basis of the gift deed which in the alternative they say was never refused by them without making a positive statement of acceptance and assertion that their possession is now also on the basis of the gift.

12. It may not be out of context to point out that the defendants alleged that they are continuing in possession of the suit property even before the execution of gift deed. They nowhere pleads that subsequent to the execution of the gift deed their possession is also on the basis of the gift amounting to its acceptance. In the absence of such specific pleadings even though the defendant/appellants continue to be in possession of the suit property but such possession was never pleaded to be in furtherance of the gift deed.

13. It may be noted that in the earlier suit No. 111/91 which was instituted by the defendant/appellants they have moved an application for adinterim injunction supported by an affidavit. To the said affidavit a reply was filed by the present plaintiff/respondent to which a rejoinder affidavit dated 6.3.1991 was also filed on behalf of the defendant/appellants. In the rejoinder affidavit dated 6.3.1991 no reference had been made to the aforesaid gift deed or to the effect that such a gift deed, if any, had been accepted or that the possession of the defendant appellant over the suit property has been converted into that in pursuance of the gift deed.

14. There is no quarrel over the proposition that possession of the donee over the property gifted is a proof of acceptance provided such possession is in pursuance thereof but it cannot be applied in cases where there is no pleading or material to show that the donee is in possession of the property on the basis of the gift deed or in pursuance thereof.

15. In view of the aforesaid pleadings of the parties on record it has been clearly established that the defendant/appellants on one hand have denied the execution of the gift deed and on the other hand alleged to have accepted the same. They have expressed complete ignorance of the same as is evident from the rejoinder affidavit dated 6.3.1991, which was filed subsequent to the

execution of the gift deed. Lastly, the possession of the defendants over the suit property which is continuing from the date prior to the date of execution of the gift deed continues to be independent of the gift deed and there is neither any pleading or material to show that it is in pursuance of the gift deed. Therefore, the conclusion is inevitable that the defendants have not even impliedly accepted the gift deed and their possession over the suit property in the present set of circumstances cannot be a proof of .even implied acceptance of the gift deed.

16. In view of the aforesaid, the authority relied upon by the defendant appellants is of no help to them and is distinguishable on facts.

17. Accordingly, the appeal lacks merit and fails. It is accordingly dismissed " with no order as to costs.