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**(2007) 08 PAT CK 0017**  
**In the Patna High Court**  
**Case No : S.A. No. 311 of 2001**

Shanker Singh and Another

APPELLANT

Vs

Anirudh Singh

RESPONDENT

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**Date of Decision :** 07-08-2007

**Acts Referred:**

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 — Section 13, 3, 31, 32, 4A

**Citation :** (2007) PLJR 269

**Hon'ble Judges :** S.N. Hussain, J

**Bench :** Single Bench

**Advocate :** Mahesh Prasad-II and Rewati Kant Raman, for the Appellant; V. Nath, for the Respondent

**Final Decision :** Dismissed

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## Judgement

S.N. Hussain, J.—This Second Appeal has been filed by the plaintiffs-appellants against the judgment and decree of affirmation. Title Suit No. 128 of 1995 was filed by the plaintiffs-appellants for a declaration that the deed of gift dated 25.7.1994 executed by the plaintiffs in favour of the sole defendant with respect to the suit property was forged, illegal and inoperative and also for a declaration that the order of mutation dated 27.10.1994 passed on the basis of the aforesaid deed of gift was also illegal and inoperative. The said suit was dismissed by the learned Subordinate Judge, IV, Sasaram by his judgment and decree dated 22.12.1997 which was challenged by the plaintiffs-appellants in Title Appeal No. 13 of 1998. The said Title Appeal was also dismissed by the learned Additional District Judge, Vth Rohtas by his judgment and decree dated 23.8.2001 which has been challenged by the plaintiffs-appellants in the instant Second Appeal.

2. It appears from the records of the case that the plaintiffs-appellants had challenged the said deed of gift on the following three grounds:--

(i) That the defendants-respondents got the said deed of gift in question executed by the plaintiffs-appellants by playing fraud upon them;

(ii) That the defendant-respondent got the aforesaid deed of gift executed by the plaintiffs-appellants by exercising coercion upon them and

(iii) That the said deed of gift was not without consideration, rather it was executed by the plaintiffs-appellants for consideration.

3. After considering the pleadings and evidence of the parties, both the learned courts below came to the following concurrent findings:--

(a) The plaintiffs-appellants miserably failed to substantiate their stand that the defendant-respondent has got the deed of gift in question executed by playing fraud upon them;

(b) The plaintiffs-appellants miserably failed to prove their stand that the defendant-respondent got the deed of gift in question executed on the point of gun and by exercising coercion on them;

(c) The deed of gift was not executed for any consideration money;

(d) The deed of gift in question had been duly registered;

(e) The deed of gift in question was filed in the court from the custody of the sole respondent which proved that the respondent had accepted the deed of gift;

(f) The plaintiffs-appellants have completely failed to substantiate their joint possession over the suit property;

(g) The deed of gift had been acted upon and defendant-respondent is in possession of the subject matter of the gift which is the suit property;

(h) The plaintiffs-appellants had executed the deed of gift in question with respect to the suit property in favour of the defendant-respondent voluntarily after understanding the contents of deed out of their own free will without any fraud and coercion and hence the said deed of gift is legal, valid, effective and operative and it has been acted upon by the parties as the defendant-respondent is in possession of the suit property;

(i) Neither any right, title or interest of the plaintiffs-appellants are left in the suit property, nor they have any possession over it and hence they have got no valid cause of action to file the instant suit against the defendant-respondent.

4. From the aforesaid paragraphs, the pleadings of the parties and judgments of courts below, it is quite apparent that all the points raised by the plaintiffs-appellants before the learned trial court as well as before the learned lower appellate court were points of facts with respect to which the learned courts below arrived at concurrent findings of facts and rejected their claims after full and exhaustive consideration of the materials on record and the evidence adduced by both the parties. It, appears that realising the said position the plaintiffs-appellants has raised a new issue in the instant second appeal that the deed of gift in question was bad, ab initio according to the provision of Section 32 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act,

1956 (hereinafter referred to as the "Act" for the sake of brevity).

5. Learned counsel for the appellants has submitted that declaration under the provision of Section 3 of the Act was notified by the State Government with respect to the village in question in the year 1973, where after the draft consolidation scheme with respect to the village in question was confirmed under the provision of Section 13 of the Act on 31.3.1988. Learned counsel for the appellants has further averred that although the State Government cancelled the aforesaid notification issued u/s 3 of the Act with respect to only those villages which were not yet confirmed by denotification order dated 2.11.1993 issued under the provision of Section 4A of the Act, but with respect to villages already confirmed, the notification u/s 3 of the Act was cancelled by the State Government subsequently by order of denotification dated 27.7.1998 issued under the provision of Section 4A of the Act. In the said circumstances, he has submitted that since the village in question, in which the suit land is situated, was denotified under the provision of Section 4A of the Act on 27.7.1998, no deed of transfer could have been legally executed before that date without taking the sanction of the authorities concerned under the provision of Section 5 of the Act. In this connection he has relied upon a decision of Division Bench of this Court in case of Bhaiya Ram Singh and Others vs. Director of Consolidation, Bihar, Patna and Others, reported in 1987 PLJR 120, in which it was held that according to the provision of Section 5 of the Act sanction of the authorities was necessary for executing the deed of gift after the initiation of the consolidation proceeding and hence any deed of gift executed without such sanction is illegal and void. Learned counsel for the plaintiffs-appellants has also submitted that in that view of the matter the deed of gift in question dated 25.7.1994 was clearly illegal and void and on that basis their suit should have been decreed.

6. On the other hand, learned counsel for the defendant-respondent has submitted that the aforesaid point was never raised by the plaintiffs-appellants at any earlier stage and hence they should not be allowed to raise this issue at this stage of second appeal. He has further stated that the dates given by the plaintiffs-appellants, as aforesaid, are confusing and misleading and they are not completely true. He has also averred that the instant case comes under the exception provided u/s 31 of the Act, according to which no person shall transfer, whether by sale, gift or exchange, any part of a plot. which is a fragment situate in a consolidated area except to a raiyat which has a plot continuous to the land sought to be transferred provided if the transfer is of the entire plot which is a fragment it may be in favour of any raiyat. He has further stated that the donee is also a raiyat of the plot continuous to the land transferred by the deed of gift and hence on the basis of the said provision of law the doner was fully entitled to execute the deed of gift. He has also submitted that knowing this fact full well, the plaintiffs-appellants did not raise this question in the learned courts below, which were courts of facts and could have verified the said pleadings and would have found the falsity of the plaintiffs-appellants' claim. Hence, he submitted that this issue cannot be allowed to be raised at this stage.

7. After considering the pleadings of the parties, the materials on record, including the impugned judgments of the learned courts below, it is quite apparent that the date of issuance of order of denotification u/s 4A of the Act cancelling the declaration of the State Government u/s 3 thereof is in dispute. Learned counsel for the plaintiffs-appellants has stated that the said order of denotification u/s 4A of the Act was issued on 27.7.1998 and not on 2.11.1993, but the plaintiffs-appellants has failed to substantiate their said claim by producing any material whatsoever as they had neither produced as evidence the notification u/s 3 of the Act of the year 1973, nor they have produced any order of confirmation of the draft consolidation scheme u/s 13 of the Act, nor even they have produced the orders of denotification u/s 4A of the Act dated 2.11.1993 or dated 27.7.1998. It is quite apparent that unless the said documents are produced and proved it cannot be legally presumed that the consolidation proceeding was continuing on the date on which the deed of gift in question was executed or that the provision of Section 32 of the Act was applicable in the instant case.

8. In the aforesaid facts and circumstances, the issue raised by the plaintiffs-appellants is clearly a mixed question of fact and law which was admittedly not raised by them nor any evidence with respect to it was ever produced before the courts of facts, namely the trial court and lower appellate court, nor the plaintiffs-appellants could give any explanation, much less a satisfactory one, whatsoever as to why this question was not agitated earlier by them either in their pleadings or in their evidence. Hence the appellants cannot be legally allowed to raise such question at this stage before this court in a second appeal.

9. This view clearly finds support from a decision of the Hon'ble Apex Court in case of Gurucharan Koeri and Others Vs. Bibi Shamsunissa, as well as a decision of this court in case of Pradip Narain Singh & Others vs. Brij Nandan Prasad & Others, reported in 1987 PLJR 207.

10. So far the case law relied by the learned counsel for the plaintiffs-appellants, namely Bhaiya Ram Singh & Others [supra], is concerned, it is only held therein that according to Section 5 of the Act after the initiation of Consolidation Proceeding sanction from the authorities was necessary for executing the deed of gift, but this issue is not in dispute in the instant case. The question in issue is only as to whether the consolidation proceeding was continuing on the date on which the deed of gift was executed.

11. Having found that the aforesaid sole question raised by the plaintiffs-appellants in this second appeal was neither pleaded by them in their plaint, nor was supported by any evidence, oral or documentary, nor any issue was framed with respect to that question, nor even it was raised before any of the two learned courts below and this question was neither raised before the learned courts below, nor any ground is made out as to why the said question was not agitated earlier, the plaintiffs-appellants cannot be allowed to raise this question, which is mixed question of facts and law, for the first time before this court at

the fag end of the litigation as the defendants-respondents will be clearly prejudiced thereby. In this view of the matter, I do not find any merit in the contentions raised on behalf of the plaintiffs-appellants, nor do I find any substantial questions of law involved in this second appeal. As a result this second appeal fails and is accordingly dismissed, but in the circumstances of the case, there shall be no order as to cost.