

(2005) 09 GAU CK 0033

In the Gauhati High Court

Case No : Regular Second Appeal No. 54 of 2002

Smt. Nur Bhanu and Others

APPELLANT

Vs

Abdul Amin Bhuinya and Others

RESPONDENT

Date of Decision : 30-09-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 3, 100
Evidence Act, 1872 — Section 101, 65, 68
Limitation Act, 1963 — Article 59, 3
Transfer of Property Act, 1882 — Section 123

Citation : AIR 2006 Guw 27 : (2006) 1 GLR 538

Hon'ble Judges : Anima Hazarika, J

Bench : Single Bench

Advocate : K.N. Bhattacharjee, R. Debnath and S. Acharjee, for the Appellant;
B. Das and S. Das, for the Respondent

Final Decision : Dismissed

Judgement

Anima Hazarika, J.—This appeal being Regular Second Appeal No. 54 of 2002 has been preferred against the judgment and decree dated 30-7-2002 passed by the learned Additional District. Judge, Sonamura, in Title Appeal No. 11 of 2001. (renumbered as Title Appeal No. 1 of 2002), affirming the judgment and decree dated 17-1-2001 passed by the learned Civil Judge (Sr. Div.) Court No. 2, West Tripura, Agartala In Title Suit No. 65 of 1981.

2. The plaintiffs f\\infodata\\test\\Vendors\\Baract-linking\\2008\\Alfa-2\\April'08\\April'08\\09-Apr'08\\gh2005iled Suit No. 65 of 1981 in the Court of Civil Judge (Sr. Div.), West Tripura, Agartala, against the defendants, seeking a decree for partition, declaring the share of each of the plaintiffs as 7/64 in the suit property as per law, for passing a preliminary decree for partition and for declaration of the alleged gift deed No. 1-3461 dated 21-8-1976 is fraudulent. According to the averments in the plaint, the land measuring 1.98 Acre of Jote No. 27 was originally belonged to Amjad Ali. Amjad Ali died, leaving behind two sons, Ajgar Ali Bhuinya and Ahmud Ali Bhuinya and they accordingly succeeded

to the said property in equal shares. Ajgar Ali Bhuinya died leaving behind him the daughters, who are the plaintiffs and defendant No. 4 in the suit. They were from the 1st wife of late Ajgar AH Bhuinya. After the death of 1st wife, Ajgar Ali Bhuinya married for the second time and defendants Nos. 1 and 2 are the heirs succeeding to all the properties left, by him. The said Ajgar Ali Bhuinya on 21-8-76 executed a deed of gift in favour of his son which is forged, because the said Ajgar Ali was mentally imbalance at the relevant, time and hence the suit as aforesaid.

3. The defendant Nos. 1 and 2 resisted the suit contending inter alia, that during the lifetime of their father Ajgar Ali Bhuinya, he distributed land measuring 1 Kani 13 Gandas each to all his daughters with a direction that they will not get any property left by him. Thereafter, he gifted the property by executing a deed of gift to his son and therefore the allegation of forged deed is denied and after the execution of deed of gift, no property left for partition and hence prayed for dismissal of suit.

4. Separate written statement has been filed by the defendant No. 4, Smt. Joynab Bibi, the sister of the plaintiffs, contesting the claim of the plaintiff, in regard to the allegation of mental imbalance of Ajgar Ali Bhuinya, at the time of execution of deed of gift and averred that Ajgar Ali Bhuinya was mentally sound at the relevant time and denied the pleadings of the plaintiffs that the gift deed was forged and all other averments made in the plaint has been denied.

5. The trial Court on the basis of the pleadings framed the following issues :

- 1) Whether the suit is maintainable in law?
- 2) Whether Ajgar Ali Bhuinya was mentally and physically sound at that time and capable of normal understanding ?
- 3) Is the suit barred by law of limitation and hit by principle of estoppel, acquiescence and waiver ?
- 4) Is the deed of gift executed by the late father of the defendant No. 1 valid and enforceable ?
- 5) Are the plaintiff entitled to get a decree of declaration that the deed of gift was obtained by exercising fraud ?
- 6) Are the plaintiffs entitled to the decree of partition ?

6. The learned Trial Court on the basis of oral and documentary evidence found that admittedly the deed of gift was executed on 21-8-76 and the said deed was sought to be declared as forged in the year 1981 and until and unless the said deed of gift is declared as void, the plaintiffs cannot seek a partition of the suit property since they do not have any right, title and interest on the suit land and hence determined issue No. 1 in the negative and against the plaintiffs holding that the suit is not maintainable.

In regard to the issue No. 2 the Trial Court has found after discussing the evidence on record that the executor of the deed of gift was mentally sound and capable to execute the deed of gift as it would reveal from the deposition of D.W. 2 and therefore held the issue against the plaintiff.

The Trial Court while deciding the issue No. 3 in regard to limitation for filing a suit seeking a declaration of any document to be forged, found that in the pleadings of the plaintiffs in paragraph No. 5 of the plaint that around the middle of August, 1976, the plaintiffs came to know about the attempt of their father to execute a deed of gift, therefore it is not believable, that they came to know after a lapse of 4 (four) years about the execution and the suit is filed after a lapse of 5 years, which is barred u/s 56 of the Limitation Act and hence held that the suit is barred by limitation.

The other two issues also have been answered against the plaintiffs and dismissed the suit.

7. The plaintiffs being aggrieved with the judgment and decree dated 17-1-2001 passed by the learned Civil Judge (Sr. Div.), West Tripura, Agartala, in T.S. No. 65 of 1981, preferred an appeal before the learned Additional District Judge, Sonamura, West Tripura, being Title Appeal No. 1 of 2002. Before the first appellate Court, the appellants argued that under Order 2, Rule 3 of the Code of Civil Procedure, the relief can be sought for partition of the shares, including the declaration that the gift deed was forged. In support of their contentions two decisions have been cited viz. Kanailal Das and Another Vs. Jiban Kanai Das and Another, and Mst. Ramdayee Vs. Dhanraj Kochar and Others, The appellate Court while dealing with the issue, has come to a finding that the appellants have no existing right, title and interest in the suit property for partition and the declaration of invalidating the gift deed will not automatically invite partition of the shares in the suit land. The appellate Court has further decided that the decision cited has no application in the case and therefore affirmed the decision in regard to issue No. 1,

In regard to issue No. 2, the appellate Court has held taking into totality of evidences on record that the donor was mentally and physically sound and capable of normal understanding at the time of execution of deed of gift land hence affirmed the findings of the learned lower Court.

While contending the question of limitation, which is available at issue No. 3, the appellate Court has referred paragraph No. 5 of the plaint, but during deposition before the trial Court, the P.Ws. were silent in this regard and hence held that the plaintiffs have failed to prove that they came to know about the gift deed in question only on 6-9-1980 and therefore the suit (seeking relief having brought beyond the period of limitation is barred as held by the trial Court and dismissed the appeal.

8. The plaintiff being aggrieved and dissatisfied with the judgment and decree dated 30-7-2002 passed in Title Appeal No. 1 of 2002 by the Additional District

Judge, Sonamura, West Tripura, affirming the judgment and decree dated 17-1-2001 passed in Title Suit No. 65 of 1981 by the Civil Judge (Sr. Div.), Court No. 2, West Tripura, Agartala have landed before this Court u/s 100 of the Code of Civil Procedure, being Regular Second Appeal No. 54 of 2002, questioning the legality and validity of the judgment and decree passed by the learned lower Courts below.

9. This Court has framed the substantial question of law as under :

When the plaintiffs laid claim on two foundations regarding two plots of the suit land, whether the learned Courts below could dismiss the suit wholly in deciding one foundation alone.

10. Advancing the argument on behalf of the appellants, Sri K. N. Bhattacharjee, Senior Advocate, assisted by Mr. R. Debnath laid emphasis that the original gift deed has not been produced for scrutinising the contentions raised, relating to forgery. Though an application for production of original gift deed was filed in the year 2000 which was dismissed on 12-9-2000 and therefore on this ground alone the appeal under challenge to be allowed. He further contended that since the original deed has not been produced during the trial, there was no occasion to identify the thumb impression (LTI) of the donor since deceased, except D.W. 2 attesting witness. Apart from the said question of law, Sri Bhattacharjee urged that Article 59 of the Limitation Act is applicable and the suit having been filed within three years from the date of knowledge, it cannot be thrown out on the ground of limitation and on this ground the findings of the lower Court below are perverse and requires interference by this Court, in exercise of power u/s 100 of the Code of Civil Procedure. Another question raised by Sri Bhattacharjee is that Schedule 3 land in the plaint is beyond the purview of the Schedule 2 land of the gift deed and therefore the appellants are entitled to get the partition according to Mahammedan Law with regard to Schedule 3 land.

11. Resisting the argument advanced by the counsel of the appellant, Mr. B. Das, Senior Advocate, assisted by Mr. S. Das, Advocate, the counsel of the defendants argued that, the plaintiffs filed the suit in the year 1981, seeking the relief for declaration that the alleged deed of gift No. 1-3461 dated 21-8-1976 is fraudulently created piece of paper and is illegal, inoperative and void. The written statement was filed on behalf of the defendant Nos. 1 and 2 denying the averments made in the plaint and a certified copy of the deed of gift was produced which has been accepted by the Court and accordingly issues were framed and evidences were led and the application for production of original gift deed was sought in the year 2000. after 19 years from the institution of the suit and contended that the dismissal of the said application on 12-9-2000 cannot be find fault, in the facts and circumstances of the case and contended that the trial Court is justified in rejecting the said application. In regard to execution of deed of gift by the donor, Mr. Das contended that, D.W. 2 was examined during the trial who deposed that, at the time of execution of the gift deed, he was present and he was an attesting witness of the deed of gift in question. He has further

confirmed that the scribe Sri Abdul Kedar read over the contents of the deed to donor, who then put his L.T.I, in his presence, who told that he gifted his property to his son voluntarily in full sense. The plaintiffs have failed to shaken the evidence of D.W. 2 in cross-examination and therefore this contentions do not deserve to be considered by this Court against the findings of the trial Court, affirmed by the appellate Court, in a Second Appeal. The second contention raised by the counsel of the appellant in regard to the question of limitation, the counsel appearing on behalf of the defendants, argued that the paragraph No. 5 of the plaint coupled with the evidences led by all the Prosecution Witnesses would show that no evidence was led to the knowledge of deed of gift and therefore both the Courts held that the suit has been brought after three years from the date of execution of the deed of gift and therefore, the suit is barred by limitation. Moreso, it is the burden of the plaintiff u/s 101 of the Evidence Act to prove that the fact of gift deed came to their knowledge only in the year 1980. In reply to the third contention, the counsel refuted the contentions that the written statements filed by the defendants Nos. 1, 2 and 4 would show that no property has been left out by the deceased father after the execution, of deed of gift and hence the question of share in schedule 3 of the plaint as claimed would not. be available to the plaintiff.

12. This Court considered the submission made by the parties. The first question regarding the mental capacity of the donor at the time of execution of deed of gift, is a question of fact and both the Courts below have held, after going through the evidences on record, that the donor was mentally sound and capable of executing the deed which he had done so in sound mind, therefore, this Court held that this is not a question to be agitated in Second Appeal, the same being question of fact.

13. Corning to the second contention, in regard to validity and/or otherwise of the deed of gift, this Court has gone through the plaint and the written statements filed by the parties and the evidences on record. Admittedly, the original deed of gift was not produced during the trial and the reason for doing so is not forthcoming though an application was filed after 19 years from the institution of the suit which was rejected by the trial Court. However, the certified copy has been produced as secondary evidence under Sub-clause (a) of Section 65 of the Evidence Act which is permissible under the law. The gift of immovable property requires transfer, which must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses as provided u/s 123 of Transfer of Property Act. The said Section 123 of Transfer of Property Act further postulates that, for the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument, signed as provided u/s 123, Transfer of Property Act or by delivery. Such delivery may be made in the same way as goods sold may be delivered. Apart from Section 123 of the Transfer of Property Act, Section 3 of the Act deals with the word at tested", which means in relation to an instrument and shall be deemed always to have meant attested by two or more witnesses, each of whom had seen the

executant sign or affix his mark to the instrument or has seen some other person sign the instrument in their presence and by the direction of the executant or has received from the executant a personal acknowledgement of his signature or mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary, that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

14. Now, naturally the question would come up for consideration, as to whether the deed of gift and its execution was validly made. In order to determine the question, Section 68F of the Indian Evidence Act is relevant which is quoted hereunder :

Section 68,-- Proof of execution of document required by law to be attested -- If a document is required by law, to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Provided that, it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.

15. Considering the contentions urged by the counsel of the appellants in regard to the validity of the execution/attestation of the deed of gift, both the Courts below have held that, D.W. 2, who was examined as attesting witness of the deed of gift, has proved the authenticity and validity of the deed and this is a mixed question of fact and law. The proviso to Section 68 of the Evidence Act dispenses with the necessity of calling an attesting witness in proof of any document, except a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908. Therefore, this Court held that the execution of deed of gift which was registered under the Registration Act has been proved properly as held by the learned trial Court and affirmed by the learned first appellate Court.

16. In regard to bar of suit under the Limitation Act, the plaint has disclosed that during the month of August 1976, a conspiracy was made to execute the deed of gift at Sonamura and the plaintiffs having come to know this fact, went to Sonamura and objected to such registration and on being objected, the donor came back with the plaintiffs and remained in the residential house of their father for sometime and thereafter the plaintiffs have left to their respective houses. But the registration has been made on 21-8-1976 at Sonamura and the plaintiffs have not adduced any evidence in regard to the knowledge of the execution of deed of gift, which questions have been gone into both by the Courts below and held that the suit has been brought beyond three years as

prescribed under the law of limitation, which is barred by limitation and therefore this Court in Second Appeal do not intend to interfere with the findings arrived at by both the Courts below.

17. That being the position, the case against which the relief is sought for cannot be granted against the concurrent finding of facts in exercise of power u/s 100 of the Code of Civil Procedure, inasmuch as, the Apex Court time and again pointed out that interference with the concurrent findings of the Courts below by the High Court u/s 100 CPC must be avoided unless warranted by compelling reasons.

18. In *Ishwar Dass Jain (Dead) Thr. Lrs. Vs. Sohan Lal (Dead) By Lrs.*, . *Dnyanoba Bhaurao Shemade Vs. Maroti Bhaurao Marnor*, , *Navaneethammal v. Arjun Chetty* AIR 1996 SC 3521 and in a catena of decisions, it was held by the Apex Court that when the findings are well sustained on record by the Courts below, interference by the High Court u/s 100 CPC is not permissible but interference with finding of the fact arrived at by both the Courts below is permissible when material or relevant evidence is not considered, which is not the case in hand.

19. Concurrent findings have been made by both the learned Courts below. In the instant case, both the learned Courts below dealt with the matter exhaustively and made a reasoned finding, there is no infirmity or illegality in the impugned Judgment and decree passed by the learned Courts below. Therefore, the concurrent findings of facts arrived at by the Courts below do not require, to be interfered with.

20. From the reasons, observations and discussions made above, the appellants/defendants could not make out a case to Justify the interference with the impugned judgments and decrees passed by the learned Courts below.

21. The other points raised are not required to be answered in view of the findings arrived at by the courts below.

22. hi the result, the Second Appeal is found to be devoid of merit and accordingly. It is dismissed.

23. The parties are directed to bear their respective costs.