

(1989) 05 PAT CK 0028

In the Patna High Court

Case No : Appeal from Appellate Decree No. 236 of 1982

Sudanis Prasad Keshri and others

APPELLANT

Vs

Tapeshwar Sao and others

RESPONDENT

Date of Decision : 05-05-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 4
Transfer of Property Act, 1882 — Section 123

Citation : (1989) PLJR 819

Hon'ble Judges : S. Ali Ahmad, J

Bench : Single Bench

Advocate : Keshri Singh, Md. Khalil, Sima Ali Khan and Mritunjay Pd. Singh No. 2, for the Appellant; Mazahar Hussain and Jagdish Pandey, for the Respondent

Final Decision : Allowed

Judgement

S. Ali Ahmad, J.—Defendant nos. 4 and 5 have filed this second appeal against the Judgment and Decree passed in Title Appeal No. 70/6 of 1980/81 which arose out of a suit filed by the plaintiffs-respondent contesting the suit for a declaration that the deed of gift dated 26.11.1965 executed by Bhagelu Sao in favour of defendant no. 1 and 2 was illegal, void and inoperative. It is said by the plaintiffs that defendant no. 1 was the concubine of Bhagelu Sao and defendant no. 2 was the illegitimate son of the two. Further according to the plaintiffs Bhagelu Sao was brought under influence of these two defendants and got the deed fraudulently executed. It is said that later on he cancelled the deed of gift by executing another deed dated 29.11.1965. The matters did not end there. The plaintiffs say that another deed was executed on 4.12.1965 cancelling the deed dated 29.11.1905. Then again on 20.12.1965 a third deed of cancellation was executed cancelling the deed dated 4.12.1965. The plaintiffs also alleged that the deed of gift which covers half of the residential house and 19 decimals of land were the ancestral property of the plaintiffs and Bhagelu Sao and as such the deed of gift was not valid. The defendant no. 1 and 2 contested the suit. Their case was that defendant no. 1 was legally married wife of Bhagelu Sao and

there was no fraud or undue influence over Bhagelu Sao in executing the deed of gift. It was also said that the deed of gift was valid, legal and was acted upon. The fact that the suit property was the ancestral property, was also denied. During the pendency of this suit portions of the suit land were conveyed by defendant nos. 1 and 2 to defendant nos. 4 and 5 and they were added as defendants to the suit. These defendants adopted the written statement filed by defendant nos. 1 and 2. Besides, admittedly, issues of maintainability etc. the substantial issues framed by the trial court were with regard to limitation and validity of the deed of gift dated 26.11.1965. The trial court after taking evidence of the parties came to the conclusion that the deed of gift was valid. It also held that the suit was not filed within the period of limitation. It therefore, dismissed the suit. The plaintiffs filed an appeal before the lower appellate court which was allowed and the suit was decreed holding that the deed of gift dated 26.11.1965 was invalid inasmuch as it was not attested by two witnesses as required u/s 123 of the Transfer of Property Act. It also held that article 94 of the Limitation Act applied to the present suit which prescribed a period of 12 years from the date of execution of the document and the suit was filed within 12 years, therefore, the same was in time. The defendant nos. 4 and 5 have thereafter filed this second appeal. Learned Counsel for the appellant contended that the court below has committed an error of record in holding that only one person namely Gulab Chand has attested the deed of gift dated 26.11.1965. He says that Mohan Lal, D.W. 12 was also an attesting witness. The original deed of gift is ext. D and the certified copy of the same is ext. 5. In order to appreciate the argument of learned counsel for the appellant I myself have perused exhibit D. I find that both Gulab Chand and Mohan Lal have signed the document as witnesses. Mr. Mazhar Hussain appearing on behalf of contesting plaintiff-respondents said that in fact there is no attestation by even one person as they have not said that they have attested the deed. They have only signed the document describing themselves as Gawah. Learned counsel, therefore, says that the document is invalid for want of attestation. According to Law Lexicon¹ by Venkataramaiya "to attest is to bear witness to a fact". Therefore, if Mohan Lal and Gulab Chand described themselves as witnesses then it cannot be said that they were not the attesting witnesses. Further it cannot be disputed that in a very substantial number of documents the word attestation is not mentioned. Those who attested the documents described themselves as witnesses and I do not see any infirmity in that. Therefore, in my view, the court of appeal below erred in holding that exhibit D, the deed of gift dated 26.11.1965 was invalid.

2. In view of the fact that I have held on merits against the plaintiffs on the question of validity of exhibit D the question regarding limitation becomes academic. I do not see any necessity of considering the argument advanced on that point by learned counsel for the parties. I may, however, refer to the serious argument of Mr. Mazhar Hussain that only defendant nos. 4 and 5 have preferred appeal to this Court and in case the same has to be allowed then it may be allowed in respect of only the lands conveyed by defendant nos. 1 and 2 in their

favour. Learned counsel very fairly stated that under Order 41 Rule 4 of the CPC this Court has power to give relief even to those who have not preferred appeal against the decree under challenge but he says that this is only an enabling provision which should be exercised in exceptional cases. Learned counsel is quite right. Order 41 Rule 4 is only an enabling provision and ordinarily no relief can be given to a person who has not preferred an appeal. Let us see whether in this case any relief can be given to the appellant without giving relief to those defendants who have not filed appeal. As I have stated earlier these appellants are purchasers from defendant nos. 1 and 2 and defendant nos. 1 and 2 acquired title on the basis of deed of gift dated 26.11.1965 (Ext. D). For giving relief to the appellants it has got to be held that exhibit D is valid otherwise defendant nos. 1 and 2 have no title and as such they could not convey any title to defendant nos. 4 and 5 namely the appellants. Exhibit D as I have held earlier is valid. Now having held exhibit D to be valid it is not possible for me to say that defendant nos. 1 and 2 could convey, good title to defendant nos. 4 and 5 under this exhibit but they themselves have no title under this exhibit. This is conflicting. To avoid contradiction in terms the exceptional power as said by Mr. Mazhar Hussain has to be exercised and the appeal has to be allowed in full. For these reasons I set aside the Judgment and decree passed by the lower appellate court and allow the appeal. Parties will bear their own costs.