

(1996) 05 GAU CK 0014

In the Gauhati High Court

Case No : Second Appeal No. 13 of 1986

Surendra Kr. Paul and Others

APPELLANT

Vs

Pramila Das

RESPONDENT

Date of Decision : 30-05-1996

Acts Referred:

Evidence Act, 1872 — Section 50, 68, 91, 92
Societies Registration Act, 1860 — Section 17
Transfer of Property Act, 1882 — Section 123

Citation : (1997) 3 GLR 17

Hon'ble Judges : H.K.K. Singh, J

Bench : Single Bench

Advocate : S. Dutta, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Singh, J.—This Second Appeal is directed against the Appellants judgment and decree dated 27-5-1986 passed in Title Appeal No. 31 of 1984 by the Additional District Judge, North Tripura, Kailashahar confirming the Trial Court judgment and Decree dated 31-7-1984 passed by the Munsiff, Kailashahar, North Tripura in Title Suit No. 2 of 1983 dismissing the suit.

2. The case of the Plaintiffs is simple. The six Plaintiffs became the owner of the "A"scheduled land as gifted by their father under a registered Gift Deed dated 5.4.1979. The Plaintiffs case was that the Defendant was permitted to reside in the suit land i.e. "B scheduled land which is a portion of "A" scheduled land as a licensee but she did not vacate the same when she was told. Hence the Plaintiffs filed the suit for title and eviction. The Defendant in her written statement contested the suit stating that she acquired title over the suit land ("B" schedule of the plaint) as the same was gifted orally by the original owner i.e. the father of the Plaintiffs. It was also case of the Defendant that she (Defendant) was married to the father of the Plaintiffs and from their wedlock a child was born and she had been living in the suit land as owner thereof. The learned Trial Court

dismissed the suit, *inter alia*, holding that the Plaintiffs failed to prove the execution of the registered gift deed dated 5.4.79 and that the Defendant proved that she was the lawfully married wife of the Plaintiffs father i.e. Suresh Ch. Paul. On appeal the learned Appellate Court confirmed the decree passed by the Trial Court. Hence the present Second Appeal by the Plaintiffs.

3. The substantial question of law formulated at the time of admission of this appeal is:

Whether by the oral gift of immovable property any right, title or interest was transferred as per provisions of law and whether the provisions of Section 91 and 92 of the Evidence Act was violated by allowing oral evidence to be adduced.

4. I have heard Mr. S. Dutta, Learned Counsel appearing for the Appellants. Learned Counsel submitted that the oral gift alleged to have been made by the father of the Plaintiffs Suresh Ch. Paul cannot be acted upon under law for violation of the provisions of Section 123 of the Transfer of Property Act and Section 17 of the Registration Act, 1980. The law on this point is clear. Section 123 of the Transfer of Property Act, 1882 is reproduced below:

For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

Gift of immovable property cannot be made orally. So, the case if oral gift in favour of the Defendant is not sustainable in law, No right, title or interest over any immovable property can be passed or acquired by any oral gift. The Learned Trial Court as well as the First Appellate Court had also rightly held that in execution of the registered gift deed dated 5-4-1979 (Ext.1) alleged to have been executed by Sri Suresh Ch. Paul in favour of the Plaintiffs was not proved in law. Section 68 of the Evidence Act prescribes the method for proving execution of document by law required to be attested. Section 68 of the Evidence Act is reproduced below:

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.

In this case, the registered deed (Ext.1) was only produced by one of the Plaintiff who was examined as P.W. 1 and it was marked Ext. 1 and the signature of the doner was marked Ext. 1/1. But it is far less there proving of the execution of the document as per the requirement of law.

5. In this case the Plaintiffs failed to prove the acquisition of their right by gift and also the Defendant failed acquisition of her right by oral gift. The Courts below dismissed the suit on the ground that the Defendant successfully proved that she was the legally married wife of Suresh Ch. Paul and from their wedlock one son was also born. In this case the learned Trial Court as well as the learned First Appellate Court evaluated the evidence of D. 1, 2, 3 and 4 (Defendant herself being D.W.) and came to the finding that Suresh Ch. Paul and the Defendant were seen living in the suit land as husband and wife and as such came to the finding that Defendant was the legally married wife of Suresh Ch. Paul. Under the provisions of Hindu Marriage Act a widow can marry a widower, hence the marriage of Defendant and the Plaintiffs' father was permissible in law. The learned Counsel for the Appellants strongly submitted that the factum of marriage (second marriage) in the present case, was not proved. Here, Section 50 of the Evidence Act is relevant and the same reproduced below:

50. Opinion on relationship, when relevant. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, if any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact.

In this case the D.Ws. 2, 3 and 4 are the neighbors who deposed that Defendant and Suresh Ch. Paul were seen living as husband and wife for quite a long time. This evidence of the villagers who were well acquainted with the parties, in absence of any other reasons for disbelieving them, clinches the matter. As in this case the question as to whether the Defendant was married with Suresh Paul or not was the point of contention between the parties right from the stage of first hearing even if a specific issue was not framed on this point, the parties were well aware of this point and they led evidence on this point, so, nonframing of issue on this point did not cause any prejudice to the parties. Thus, I have no hesitation in confirming the finding arrived at by the learned Courts below that the Defendant was the legally married wife of Suresh Ch. Paul.

6. Again, from another angle also, even if the Defendant was not the legally married wife of Suresh Ch. Paul, it was proved by legal evidence that from their relationship one son was born. Under the law, children born even from a void or voidable marriage have valid and legal relationship with their parents and they inherit the property of their parents. In the present case the Defendant-mother can stay with her son over the land inherited by the son from his father.

7. From the foregoing reasons I have no hesitation in dismissing the appeal. The appeal is dismissed. No costs.