

CASE NO.:
Appeal (civil) 14913-14 of 1996

PETITIONER:
SURENDRA KUMAR

Vs.

RESPONDENT:
NATHULAL & ANR.

DATE OF JUDGMENT: 02/05/2001

BENCH:
D.P. Mohapatra & Brijesh Kumar

JUDGMENT:

D.P.MOHAPATRA, J.
L...I...T.....T.....T.....T.....T.....T...J

Smt. Chand Bai, widow of Pothulal, was the original owner of the suit property which is a three storied building situated at Sangipada, Sawai Madhopur in the State of Rajasthan. On the third floor of the house some rooms were constructed by the said Smt. Chand Bai. She mortgaged those rooms with possession to Sukan Chand for Rs. 3700/- vide the registered mortgage deed dated 17.2.1950. Thereafter Sukan Chand mortgaged the suit property with possession to Smt. Parsadi and Hanumandas on 28.7.1961 for Rs.2400/- under a registered mortgaged deed. Said Smt. Parsadi and Hanumandas in turn mortgaged the suit property with possession to Nathulal, the respondent no.1 herein. Nathulal is in possession of the suit property.

When the respondent no.1 started demolishing a portion of the suit property, Smt.Chand Bai filed a Civil Suit No.69/70 (4/76) in the Court of the Munsif, Sawai Madhopur for mandatory injunction, for declaration of easementary rights, etc. The suit was decreed and the appeal filed by the respondent no.1 was dismissed. The Second Appeal No.168/91 filed by him is pending in the High Court. During the pendency of the suit, Smt.Chand Bai executed a gift deed on 29.1.1971 in favour of Surendra Kumar, appellant herein. Thereafter the appellant filed a Civil Suit No.140/73/111/74 for redemption of the mortgage. Smt.Parsadi, Hanuman Dass, Nathu Lal, Sukan Chand and Smt.Chand Bai were impleaded as Defendant Nos.1 to 5 respectively in the said suit. It is relevant to state here that in the suit, Nathu Lal was the main contesting defendant. Smt.Parsadi and Hamuman Dass, Defendants 1 and 2 had entered into a compromise with the plaintiff. Sukan Chand and Smt.Chand Bai, Defendants 4 and 5 filed written statement supporting the case of the plaintiff.

The Trial Court, on perusal of the pleadings of the parties, framed ten issues of which issue Nos.2, 7 and 9 are

relevant for the purpose of the present proceeding. The said issues are to the effect that :

2. Whether the plaintiff has got the right to file the suit?

7. Whether the gift-deed is collusive?

9. Whether the plaintiff is entitled to get the possession of the house in dispute?

The trial Court answered all these issues in favour of the plaintiff and decreed the suit vide its judgment dated 15th March, 1978. The operative portion of the judgment reads :

1. Upon the plaintiff paying to the defendant No.3 Rs.2612.25 (Rs.2400/- mortgage amount and Rs.212.25 as expenses for repairs etc.) the plaintiff shall have the right to get the property in dispute redeemed and the plaintiff shall be entitled to get the possession of the disputed property. The plaintiff shall deposit the said amount in the Court on 30.3.78 and on the same day the defendant Nathu Lal shall produce the documents regarding the mortgage in the Court.

2. The plaintiff shall also pay Rs.1300/- to Shri Sujan Chand, defendant No.4.

The appeal, Civil Appeal No.11/78/75/86 filed by the respondent no.1 challenging the judgment/decreed of the trial Court was allowed by the District Judge, Sawai Madhopur and the suit was dismissed vide the judgment dated 11th October, 1989.

The Second Appeals filed by the appellant were dismissed summarily by the Rajasthan High Court vide its order dated 7th August, 1991. The relevant portion of the order is quoted below:

Heard the arguments of the learned counsel for the Appellant in the aforesaid both appeals for admission and perused the Judgments of the Courts below and the material available on the file.

I do not find any question of law on which the decisions of the lower Courts require inference.

Therefore both the aforesaid appeals being without merits are hereby dismissed.

Hence, these appeals. Shri U.N.Bachawat, learned senior counsel, appearing for the appellant contended that the High Court erred in law in summarily dismissing the second appeals filed by the appellant. He further contended that the lower appellate Court in the facts and circumstances of the case, erred in law in holding that the deed of gift was not duly proved since one of the attestors has not been examined in the case. According to Shri Bachawat, the document was rightly received in evidence by the Trial Court and marked as Exhibit-3.

Per contra, Shri Ajay Chaudhary, learned counsel

appearing for the respondent supported the judgment of the lower appellate court and also the summary dismissal of the second appeals by the High Court.

We have considered the contentions advanced by counsel for the respective parties. As noted earlier, the Trial Court answered the three relevant issues in the suit i.e. issue nos.2, 7 and 9 in favour of the plaintiff. The discussions in the judgment show that the trial Court was not impressed by the contention raised on behalf of the contesting defendant that the deed of gift has not been proved by producing any one of the attesting witnesses as required under Section 68 of the Indian Evidence Act, 1872. Accepting the deed of gift the Court held that the plaintiff has neither the right to redeem the suit property nor recover possession. Referring to the evidence of DW1 Nathu Lal, the Court observed that he has not stated even a single word about the collusiveness of the deed of gift and, therefore, there is no basis for holding the deed of gift as collusive. The trial Court further held that since the donor has admitted the genuineness and validity of the deed of gift, any other person cannot be permitted to challenge its genuineness and validity if no prejudice is caused to his interest by virtue of the document. The Court further observed that no such issue has been framed in the suit whether defendant no.5 Chand Bai executed any deed of gift in favour of the plaintiff in respect of the property in dispute or not.

On a perusal of the judgment of the lower appellate Court it is clear that the District Judge has reversed the decision of the trial Court on the ground that the plaintiff has not produced the original deed of gift by which he claims himself to be the owner of the suit property. In the circumstances, the appellate Court held, mere admission of the execution and validity of the deed of gift by Chand Bai in the pleading is not sufficient to entitle the plaintiff to get a decree in the suit.

The High Court, as noted earlier, summarily dismissed the second appeal holding that the case did not involve any substantial question of law.

On a perusal of the written statement filed by defendant no.3, who is respondent no.1 herein, it appears that the assertion in the plaint that Chand Bai has executed a deed of gift in favour of the plaintiff and, therefore, he is entitled to redeem the mortgage property and recover possession of the same was not specifically denied. In paras 5 and 6 of the written statement, there was merely a general denial of the averments in the plaint. Regarding the deed of gift the plea taken in the written statement was that it was a collusive transaction. The further case pleaded by the defendant no.3 was that he has no privity of contract with the plaintiff as he got the property by mortgage from Smt.Parsadi and Hanumandas and, therefore, the plaintiff is not entitled to redeem the mortgage and recover possession of the property.

In the absence of any specific denial of execution of the deed of gift by Chand Bai, the trial Court did not and, in our view, rightly frame any issue regarding the execution and validity of the deed of gift. On the plea that the gift was a collusive transaction, the trial Court observed that no evidence was led on behalf of the defendant no.3 in

support of his case.

Section 123 of the Transfer of Property Act, 1882 provides :

123. Transfer how effected.- 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.

In the present case there exists a registered deed of gift signed by the donor and attested by two witnesses. Therefore, the requirement of the law as incorporated in the Section is satisfied. Section 68 of the Indian Evidence Act, 1872 makes a provision regarding proof of execution of a document required by law to be attested. Therein it is laid down that :

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.

The proviso to the section, which is relevant for the present purpose, reads:

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 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

(Emphasis supplied)

On a plain reading of the proviso, it is manifest that a registered deed of gift can be received in evidence without examining one of the attestors if the person who has executed the deed of gift has not specifically denied its execution. In the present case, the donor Chand Bai has specifically admitted execution of the deed of gift in favour of the appellant. Therefore, the lower appellate Court was in error in holding that the deed of gift has not been duly proved since one of the attestors has not been examined as witness. Indeed the certified copy of the registered deed of gift was produced in the trial Court along with an application filed by the plaintiff in the previous suit, suit No.69/70(4/76) that the same may be called for. The trial Court, being satisfied about the reason for non-production of the original document, marked the certified copy of the deed of gift as Exhibit-3.

The High Court, as noted earlier, dismissed the second appeals on the ground that no substantial question of law arises in the case. We are constrained to hold that the order was passed without due application of mind. The judgment of the lower appellate Court was clearly vitiated by error of law in holding that the deed of gift was not duly proved in the case. In the result, the appeals succeed and they are allowed with costs. The judgment/order passed by the High Court dismissing the second appeals, thereby confirming the judgment of the District Judge are set aside

and the judgment and decree passed by the trial Court is restored.

JUDIS