

**HIGH COURT OF TRIPURA
AGARTALA**

RSA NO.19 of 2022

1. Sri. Nitai Lal Saha,
S/o. Sri. Hari Mohan Saha,

2. Smti. Soma Saha, Age-50 years,
W/o. Sri. Nitai Lal Saha,

Both are Resident of Village: Ashampara,
P.O. Aurangabad, P.S. Suti,
District: Murshidabad,
Pin: 742201, West Bengal.

.....Appellant-plaintiffs

Versus

Sri. Gour Gopal Saha,
S/o. Sri. Hari Mohan Saha,
Resident of Badar Mokam,
Badar Saheb Bari Road,
P.S. Radhakishorepur, P.O. Radhakishorepur,
District-Gomati Tripura, Tripura.
Pin: 799120

.....Respondent-defendant

For Appellant(s) : Mr. B.N. Majumder, Sr. Adv.
Mr. S.C. Sen, Adv,
Mr. S. Dasgupta, Adv

For Respondent(s) : Mr. S.M. Chakraborty, Sr. Adv.
Mr. S. Bhattacharjee, Adv,
Mr. S. Noatia, Adv.

Date of Hearing : 15.02.2024

Date of delivery of
Judgment and Order : 23.02.2024

Whether fit for
Reporting : YES

HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

By means of this appeal under Section 100 of CPC, the present appellants have challenged the judgment dated 23.02.2022 and decree dated 02.03.2022 passed by Learned Additional District Judge, Gomati District, Udaipur in

connection with Title Appeal No.26 of 2017, reversing the judgment and decree dated 28.08.2017 passed by Learned Civil Judge, Senior Division, Gomati District, Udaipur in T.S. 18 of 2016.

02. Before entering into the merit of the case, let us discuss the subject matter of the dispute. The present appellants as plaintiffs filed a suit before the Court of Learned Civil Judge, Senior Division, Gomati District, Udaipur for eviction, recovery of khas possession, for damages and for mesne profits. The case of the appellant-plaintiffs was that the suit land was originally belonged to one Smt. Sikha Rani Saha and said Sikha Rani Saha on 17.04.2009 gifted the suit land in favour of the appellant-plaintiff No.1, Nitai Lal Saha and delivered possession and accordingly, the Gift was accepted by the appellant-plaintiff No.1 and which was duly acted upon and thus, the appellant-plaintiff No.1 became the owner of the suit land and after that, on 18.03.2013 the appellant-plaintiff No.1 executed a Gift Deed in favour of his wife i.e. the appellant-plaintiff No.2, in respect of part of the suit land and thus, both the appellant-plaintiffs became the owners of the suit land. The appellant-plaintiffs allowed Gour Gopal Saha to reside over the suit land with his family members as licensee and thereafter, the appellant-plaintiffs requested the defendant to vacate the suit property but failed and after that on 18.01.2016, the appellant-plaintiffs issued demand notice to the respondent-

defendant to vacate the suit land but as he refused to do the same, so, the appellant-plaintiffs filed the suit.

03. The respondent-defendant contested the suit denying the claim of the appellant-plaintiffs and took the plea that Sikha Rani Saha was the original owner of the suit land, where she has been staying with her old and ill husband and the contesting defendant was also residing over the suit property and in the month of June, 1986 said Sikha Rani Saha verbally allowed the respondent-defendants to occupy land measuring 0.158 acres of the suit property and permitted the respondent-defendant to construct permanent dwelling house therein and accordingly, the defendant constructed building there in and staying therein with separate electric connection and ration card.

Further, according to the respondent-defendant, the appellant-plaintiffs did not acquire any right, title and interest over the suit land by dint of Gift Deed bearing No.676 and on 12.01.2015, said Sikha Rani Saha appeared before the Deputy Collector and Magistrate, Udaipur in the mutation proceeding of appellant-plaintiff No.1 and stated that she did not execute any such Gift Deed and the alleged Gift Deed caused to be executed by plaintiff No.1 without informing her in details about the transfer of property and she was unable to read the contents of the Deed as it was written in English and she intends to distribute the property amongst her all legal heirs and thus, the mutation proceeding was rejected. So, the contesting respondent-

defendant prayed for dismissal of the suit of the appellant-plaintiffs.

04. Upon the pleadings of the parties, Learned Trial Court framed the following issues:

(i) Whether the suit is maintainable?

(ii) Whether the suit land is identifiable?

(iii) Whether the Gift deed No. 676 dated 17-04-2009 is valid or caused to be executed by misrepresentation or otherwise illegally?

(iv) Whether the plaintiffs are owners of the suit land?

(v) Whether the defendant is the licensee of plaintiffs or permissive possessor of one Smt. Sikha Rani Saha?

(vi) Whether plaintiffs are entitled to the relief as prayed for and/or any other relief or reliefs in this case?

To substantiate the issues both the parties have adduced oral/documentary evidences on record.

APPENDIX

(A) Plaintiffs' Witnesses:-

P.W.-1 Sri. Nitai Lal Saha.

P.W.-2 Smt. Soma Saha.

P.W.-3 Sri. Ratan Chakraborty.

(B) Plaintiffs' Exhibits:-

Ext.-1:- Gift deed No. 1-676 dated 17.04.2009 executed by Smt. Sikha Rani Saha.

Ext.-2:- Gift deed No. 1-449 dated 18.03.2013 executed by Nitai Lal Saha.

Ext.-1/1:- Signature of Nitai Lal Saha on Ext. 1.

Ext.-3:- Notice dated 18.01.2016.

Ext.-3(i):- The signature of Nitai Lal Saha on the notice(Ext.3).

Ext.-4:- Envelope of speed post.

Ext.-5:- A.D. Card.

Ext.-6:-Postal receipt dated 18.01.2016.

(C) Defendants' Witnesses:-

D.W.1- Sri Gour Gopal Saha.
D.W.2- Sri Subrata Roy.
D.W.3- Sri Raghunath Saha.
D.W.4- Smt. Sanjushree Roy.
D.W.5- Smt. Anjana Roy.
D.W.6- Smt. Sikha Rani Saha.

(D) Defendants' Exhibits:-

Ext. A series(in ten sheets)- Certified copy of orders passed in proceeding u/s 46 and 81 of TLR & LR Act.

Ext. B(in two sheets)- Certified copy of notice dated 08.01.2015.

Ext. C- Certified copy of application dated 29.01.2015.

Ext. D- Certified copy of report of Tahashildar.

Ext. E- Application of Smt. Sikha Rani Saha, dated 02.02.2015.

Ext. F- Photo copy of Ration Card of Smt. Sikha Rani Saha.

Ext. G- Photo copy of Ration Card of Gour Gopal Saha (defendant).

Ext.H- Electricity bill dated 16-07-2016 with bill payment receipt dated 21-07-2016.

Ext. I- Another Electricity bill dated 16-08-2016 with bill payment receipt dated 22-08-2016.

05. Finally, after hearing both the sides, Learned Trial Court delivered the judgment on 28.08.2017. The operative portion of the judgment of the Learned Trial Court runs as follows:

"In the result, the suit of the plaintiffs is decreed on contest with costs and defendant is directed to vacate the suit land and hand over the khas possession of the suit property of the plaintiffs within 60(sixty) days from today.

The suit is disposed of on contest with cost.

Make necessary entry in the relevant Trial Register.

Prepare decree accordingly and put up before me for signature within 15(fifteen) days from today latest on 12-09-2017."

06. Challenging the judgment, the respondent-defendant preferred first appeal under Section 96 of C.P.C. before the Court of Learned District Judge, Gomati District, Udaipur and thereafter the case was endorsed to Learned Addl. District Judge, Gomati District, Udaipur and Learned First Appellate Court after hearing arguments of both the sides, by judgment dated 23.02.2022 reversed the finding of the Learned Trial Court by setting aside the judgment and decree. The operative portion of the order of the Learned First Appellate Court runs as follows:

"In view of the aforesaid discussions, this Court finds that the learned trial Court was in error and guided by some misconception of law and thereby decreed the suit of the plaintiffs i.e. the present respondents-plaintiffs vide decree dated 12.09.2017 in TS-18 of 2016. Accordingly the judgment and decree dated 12.09.2017 passed by the learned Civil Judge (Sr. Divn.), Gomati District, Udaipur in TS-18 of 2016 is hereby set aside being devoid of merits. Thus the appeal is hereby allowed.

Parties are directed to bear their own costs.

Hence, the appeal is hereby disposed of on contest.

Prepare decree accordingly.

Send back the L.C. Record along with a certified copy of this judgment and decree."

07. Challenging that judgment, the original plaintiffs as appellant-plaintiffs have preferred this appeal before the High Court under Section 100 of C.P.C. At the time of admission of appeal following substantial question of law was framed by order dated 11.05.2022:

"Whether the deed of gift executed by Smt. Sikha Rani Saha in favour of

plaintiff appellant No.1 in respect of the suit property was complete in terms of Section 123 of the Transfer of Property Act, 1882 and passed title over the suit property in favour of plaintiff-appellant No.1?”

08. Heard Learned Senior Counsel, Mr. B.N. Majumder, assisted by Learned Counsel, Mr. S.C. Sen and Mr. S. Dasgupta for the appellant-plaintiffs and also heard Learned Senior Counsel, Mr. S.M. Chakraborty assisted by Learned Counsel, Mr. S. Bhattacharjee and Mr. S. Noatia representing the respondents. At the time of hearing of arguments, Learned Senior Counsel for the appellant-plaintiffs submitted that the present appellant-plaintiffs have filed one suit before the Learned Civil Judge, Senior Division, Gomati District, Udaipur which was numbered as T.S. 18 of 2016 for granting a decree of recovery of khas possession, for damages, for mesne profits and after going through pleadings, taking evidence and also after hearing arguments of both the sides, Learned Court decreed the suit in favour of the present appellant-plaintiffs and challenging that judgment, the present respondents preferred an appeal before the Learned District Judge, Gomati District, Udaipur which was later on consigned to Learned Additional District Judge, Gomati District, Udaipur and after hearing both the sides, Learned First Appellate Court was pleased to set aside the judgment and decree passed by Learned Trial Court which was perverse, without application of proper mind and also not based on any legal reasoning. According to Learned Counsel for the appellant-plaintiffs, the suit property was originally belonged to one Sikha Rani Saha, Wife of Hari

Mohan Saha of Badar Mokam, Badar Saheb Bari Road, P.O. and P.S. Radhakishorepur, Udaipur, Gomati Tripura and said Sikha Rani Saha gifted the suit land in favour of his younger son Sri. Nitai Lal Saha i.e. the appellant-plaintiff No. 1, which was accepted by the appellant-plaintiff No.1 and the Gift was acted upon. Thus, he became the absolute owner of the suit property and after that the appellant-plaintiff No.1, being the absolute owner of the suit property executed and registered a Deed of Gift in respect of 0.174 acres of bastu land in favour of the present appellant-plaintiff No.2.

09. Further, according to Learned Senior Counsel for the appellant-plaintiffs, the respondent was residing in the suit property as a licensee without any license fee and the appellant-plaintiffs, on several times requested the defendant to vacate the suit property but he did not pay any heed to the request. Thereafter, he served one eviction notice but inspite of that he did not deliver khas possession of the suit property and ultimately, the appellants as plaintiffs filed the suit before the Learned Trial Court. The contesting respondent denied the case of the appellant-plaintiffs and further submitted that in the month of June 1986, said Sikha Rani Saha verbally permitted the respondent to occupy the portion of suit land by constructing dwelling hut therein and accordingly, the respondent constructed permanent dwelling building made of bricks with RCC roof consisted of bedrooms, dining room, kitchen and toilet and veranda etc. and since then he has been

possessing the suit land peacefully and the appellants as plaintiffs have/had no right to evict the respondent from the suit land.

10. Learned Senior Counsel also asserted that in para 21 of the written statement, the respondent submitted that the appellant-plaintiffs did not acquire any right, title and interest over the suit land by dint of Gift of Deed in the year 2009 because said Sikha Rani Saha, by appearing before Deputy Collector & Magistrate, Udaipur, Gomati on 12.01.2015 in connection with the Mutation Proceeding stated that she did not execute any such Gift Deed and alleged Deed was caused to be executed by her son, Nitai Lal Saha, plaintiff No.1, without informing her in details about the transfer of the property and that she was unable to read the contents of the Deed as it was written in English and she had intention to distribute her property amongst her all sons and daughters. So, Learned Senior Counsel, in course of hearing of argument submitted that the Learned Trial Court, at the time of delivery of judgment, after elaborate discussions in respect of issue No.3, came to the finding that the suit Deed was a valid one and the contesting respondent failed to prove that the Gift Deed was caused to be executed by misrepresentation or otherwise illegally. Learned Senior Counsel, in addition to his submission further submitted that the contesting respondent in the pleading has failed to mention the allegation of fraud or misrepresentation as required under Order VI, Rule 4 of C.P.C and apart from that

he has also relied upon the provision of Section 122 and 123 of the Transfer of Property Act and submitted that the Gift Deed was duly executed and registered and in respect of Gift, according to Learned Senior Counsel, question of handing over of possession was not required at the time of execution of Deed and further submitted that in this case, the appellant-plaintiffs did not pray for any other relief excepting recovery of khas possession, since the appellant-plaintiffs had a valid title. So, in view of Section 8 of the Transfer of Property Act, no separate relief was required to get the decree. Furthermore, Learned Senior Counsel submitted that the appellants as plaintiffs have complied with the provision of Section 68 of the Evidence Act and he also drawn the attention of the Court the relevant provision of Section 91 of the Evidence Act but the Learned First Appellate Court did not consider all those aspects and ultimately came to an erroneous finding. Finally, Learned Senior Counsel drawn the attention of the Court that the Learned Trial Court below after considering everything delivered the judgment in favour of the present appellant-plaintiffs and urged for setting aside the judgment of the Learned First Appellate Court and relied upon some citations.

11. On the other hand, Learned Senior Counsel, Mr. S.M. Chakraborty assisted by Learned Counsel, Mr. S. Bhattacharjee and Mr. S. Noatia, representing the respondent submitted that the appellants as plaintiffs failed to comply with the provision of Section 67 of the Evidence

Act. The scribe of the document was not produced to prove the contents of the documents. So, legally there was no scope to place any reliance upon Exhibit-1. Learned Senior Counsel further submitted that although the appellant-plaintiffs took the plea of licensee but Section 52(A) of the Easement Act is not adopted in the State of Tripura. So, there was no scope on the part of the appellant-plaintiffs to take this plea that the respondent was a licensee. Learned Senior Counsel further submitted that the appellant-plaintiffs ought to make said Sikha Rani Saha as a party. But the appellant-plaintiffs did not do so. So, the suit was bad for nonjoinder of necessary party. More so, since Exhibit-1 was questioned, so, no separate relief was sought for by the appellant-plaintiffs and as such the appellant-plaintiffs were/are not entitled to get any decree and in this case, no substantial question of law was framed. Since, Sikha Rani Saha as DW-6 denied the execution of any Gift Deed but the Learned Trial Court without referring the same to the hand writing expert gave finding which was erroneous and submitted that Order VI Rule 4 of C.P.C. was not applicable for the respondent as the appellant-plaintiffs did not come before the Court with clean hands. Furthermore, the appellant-plaintiffs have failed to comply with the provision of Section 67 of the Evidence Act. There was no valid acceptance of the Gift by the appellant-plaintiff No.1. Even no possession was handed over as the respondent-defendant was all along in possession of the suit land, which the

Learned Trial Court below did not consider. But the Learned First Appellate Court, after considering all aspects, have rightly and reasonably delivered the judgment by setting aside the judgment of the Learned Trial Court and prayed for dismissal of this appeal for want of substantial questions of law and also Learned Senior Counsel referred few citations.

12. I have heard detailed arguments of both the sides and gone through the records of the Learned Court below. Here, in this case, we are to decide whether Exhibit-1 was valid or not. Learned Trial Court, at the time of delivery of judgment, in deciding issue No.3 came to the observation that suit Deed (Gift Deed No. 1-676 dated 17.04.2009) i.e. Exhibit-1 was a valid one and decreed the suit. But the Learned First Appellate Court, at the time of delivery of judgment came to an observation that the Deed was executed under suspicious circumstances and came to an observation that the judgment of the Learned Trial Court was perverse in respect of determination of issue No.3 and ultimately, set aside the judgment of the Learned Trial Court. In course of hearing, both the parties of this appeal to substantiate the genuineness of the Exhibit-1 made their submission and counter-submissions.

13. Learned Senior Counsel for the appellant-plaintiffs, to substantiate his contention referred the provisions of Section 122 and Section 123 of the Transfer of property Act and Section 3, 8 of the Transfer of Property Act and Section 68 and 90 of the Evidence Act and also relied

upon Order VI and Rule 4 of C.P.C and further referred Para No.21 of the written statement filed by the respondent-defendant and submitted that Learned Trial Court at the time of deciding issue No.3, after considering everything, rightly came to the conclusion that the Gift Deed was valid one and accordingly, decreed the suit.

14. To the contrary, Learned Senior Counsel for the respondent-defendant submitted that the respondent-defendant denied the execution of Gift Deed by Sikha Rani Saha in favour of appellant-plaintiff No.1 and also before the Revenue Officer, in course of mutation proceeding, she denied that she executed any Gift Deed in favour of appellant-plaintiff No.1 and during her evidence before the Court also, she specifically denied the said fact that she executed any Gift Deed. So, according to Learned Senior Counsel, Learned Appellate Court rightly reversed the judgment of the Learned Trial Court and furthermore, that the respondent-defendant was not a licensee as alleged by the appellant-plaintiffs, because the Easement Act is not applicable in our State and the said Easement Act has not been adopted in our State. So, the stand of the appellant-plaintiffs that the respondent-defendant was a licensee was nothing but a concocted story. Because the respondent-defendant all along possessed the suit land with the permission of said Sikha Rani Saha and constructed his permanent structure therein and further submitted that there is no evidence on record that possession of the suit property

at any point of time was handed over to the appellant-plaintiff No.1 by said Sikha Rani Saha and prayed for dismissal of this appeal. Now, I would like to refer herein below the relevant provisions of Section 122 and 123 of the Transfer of Property Act:

Section 122:

"122."Gift" defined.- "Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made.—Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void."

Section 123:

"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.

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."

From the aforesaid provisions, it appears that 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.

15. Here in the given case, through Exhibit-1 the suit property was transferred to the appellant-plaintiff No.1,

according to the appellant-plaintiffs. But Sikha Rani Saha, the mother of the parties denied the execution of any such Gift Deed in favour of appellant-plaintiff No.1 through Exhibit-1. Said Sikha Rani Saha, although during her evidence, denied the execution of any Gift Deed by her in favour of appellant-plaintiff No.1. But the respondent-defendant in the pleading took a different stand in para No.21 of the written statement, wherein it was mentioned that *"the alleged Deed was caused to be executed by her son, Nitailal Saha, Plaintiff no-1 without informing her in details about the transfer of the property and that she was unable to read the contents of the deed as it was written in English and she intends to distribute this property amongst her all sons and daughters."*

16. On bare perusal of the pleading, as aforesaid, it appears that the respondent took the plea of misrepresentation, but it was not mentioned that Sikha Rani Saha did not execute any Exhibit-1 in favour of plaintiff-appellant-plaintiff No.1. Now, the question comes since said Sikha Rani Saha stood as witness on behalf of the contesting respondent denying the execution of Deed, so, whether the appellant-plaintiffs have been able to prove the Exhibit-1, as per law or not. In this regard, I would like to refer herein below the relevant provisions of Section 67 and 68 of the Evidence Act which provides as under:

Section 67:-

"67. Proof of signature and handwriting of person alleged to have

signed or written document produced.- If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."

Section 68:-

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

17. In course of hearing, further Learned Senior Counsel for the appellant-plaintiffs has drawn the attention of the Court referring the definition of 'attested' as prescribed in Section 3 of Transfer of Property Act and submitted that the present appellant-plaintiffs had complied with the requirements of law in proving the Deed of Gift. He also in support of his contention referred the provision of Section 91 of the Evidence Act, regarding this matter and further submitted that since the appellant-plaintiffs have/had got valid title over the suit property, so, in view of Section 8 of the Transfer of Property Act, no further relief regarding title was required to be sought for at the time of filing of this suit before the Learned Trial Court. Now, for the sake of convenience, I would like to mention herein below, the

relevant provisions of Section 3 and Section 8 of Transfer of Property Act and Section 91 of Evidence Act:

Section 3 of Transfer of Property Act:

"3. Interpretation clause.—

In this Act, unless there is something repugnant in the subject or context,—

"attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the 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;"

Section 8 of Transfer of Property Act:

"8. Operation of transfer.- Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof."

Section 91 of Evidence Act:

"91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document. -- When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

18. The appellant-plaintiff No.1, in course of his examination relied upon Gift Deed No.1-676 dated

17.04.2009, executed by Sikha Rani Saha in favour of him, which was marked as Exhibit-1 and he identified the signature on said Exhibit-1 as a Donee which was marked as Exhibit-1(i). PW3, in course of his examination-in-chief, before the Court below stated that Sikha Rani Saha signed in the Exhibit-1 in his presence in the house of Sikha Rani Saha and this witness identified her signature on the Gift Deed marked as Exhibit 1(ii) series and his signature on Exhibit-1 marked Exhibit-1(iii). Further deposed that by the said Gift Deed, Sikha Rani Saha gifted the household land to Nitai Lal Saha and one Siraj Ahamed Khadim read over the Gift Deed to Sikha Rani Saha and thereafter, said Sikha Rani Saha has signed the Gift Deed. Further deposed that at the time of execution of Exhibit-1, Nitai Lal Saha was present and at first Sikha Rani Saha signed on Exhibit-1, therefore, the witness himself and other witnesses including Nitai Lal Saha signed. The contesting respondent by the trend of cross-examination could not raise any doubt to discard the evidence on record of the appellant-plaintiffs.

19. In **Renikuntla Rajamma(D) by LR.s. v. K. Sarwanamma** dated 17.07.2014 reported in **AIR (2014) SC 2906** wherein in para no.15, Hon'ble the Supreme Court observed as under:

"15. The matter can be viewed from yet another angle. Section 123 of the T.P. Act is in two parts. The first part deals with gifts of immovable property while the second part deals with gifts of movable property. Insofar as the gifts of immovable property are concerned, Section 123 makes transfer by a registered instrument

mandatory. This is evident from the use of word "transfer must be effected" used by Parliament in so far as immovable property is concerned. In contradiction to that requirement the second part of Section 123 dealing with gifts of movable property, simply requires that gift of movable property may be effected either by a registered instrument signed as aforesaid or "by delivery". The difference in the two provisions lies in the fact that in so far as the transfer of movable property by way of gift is concerned the same can be effected by a registered instrument or by delivery. Such transfer in the case of immovable property no doubt requires a registered instrument but the provision does not make delivery of possession of the immovable property gifted as an additional requirement for the gift to be valid and effective. If the intention of the legislature was to make delivery of possession of the property gifted also as a condition precedent for a valid gift, the provision could and indeed would have specifically said so. Absence of any such requirement can only lead us to the conclusion that delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property."

Referring the same, Learned Senior Counsel for the appellant-plaintiffs submitted that as alleged by the respondent-defendant, delivery of possession is not an essential prerequisite for making of a Deed of Gift valid in case of immovable property.

Learned Senior Counsel further submitted that since the plaintiffs have been to prove Exhibit-1 as per law, so, there is/was no scope to disbelieve Exhibit-1.

20. In **Surendra Kumar v. Nathulal** dated 02.05.2001 reported in **AIR (2001) SC 2040** wherein in para no.12, Hon'ble Supreme of India further observed as under:

"12. 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.”

21. In **V. Prabhakara v. Basavaraj K.(Dead) by Legal Representatives and another** dated 07.10.2021 reported in **(2022) 1 SCC 115**, Hon’ble the Supreme Court of India in para No.16 observed as under:

“16. Section 68 of the Evidence Act, 1872 speaks of a requirement of proving the execution of a document required by law to be attested. This provision being mandatory as the word employed is “shall”, meaning thereby it shall not be used as evidence unless one attesting witness at least has been called for to prove its execution. When it comes to proving a Will, Section 68 of the Act is mandatorily to be followed. This provision has to be seen and read along with Section 63 of the Succession Act which not only mandates a compulsory attestation but reiterates compliance of section 68 of the Evidence Act.”

Referring the same, Learned Senior Counsel for the appellant-plaintiffs submitted that to prove the Deed of Gift (Exhibit-1) Section 67 of evidence Act would not be applied in this case rather Section 68 of the Evidence Act would be applied and the present appellant-plaintiffs have been able to prove the Gift Deed in accordance with the provision of Section 68 of the Evidence Act.

22. Further, Learned Senior Counsel for the appellant-plaintiffs relied upon another judgment of the Hon’ble Supreme Court in **Brij Raj Singh (dead) by L.Rs. and others v. Sewak Ram and another** dated 22.04.1999, reported in **AIR (1999) SC 2203** wherein Learned Apex Court in para No. 17, 18, 25, 26 observed as under:

"17. The High Court, however, has rightly noticed that the gift deed was executed by Kanwar Chander Raj Saran Singh. However, the High Court held that the gift deed has not been duly attested as required under section 123 of the Transfer of Property Act. The High Court in the course of judgment observed as follows:-

"From the perusal of the gift deed, it is quite evident that this was executed by Kanwar Chander Raj Saran Singh on 18.1.1961. No one has signed as a witness to the document. The scribe Ram Saran Dass has written "dated 18th January, 1961 Bakalam Ram Saran Dass". Later on, on 9th of February, 1961, the said document was presented for registration by one Janardhan Sharma who claimed himself to be the Mokhtiar-a-Aam of donor Kanwar Chander Raj Saran Singh. The necessary power of attorney in his favour dated 18th of February, 1953 was also produced before the Sub-Registrar as is evident from his endorsement made on 9th of February, 1961. He was identified before the Sub-Registrar by Ram Saran Dass the scribe and one Shabha Ram. According to the learned Counsel for the appellant, since Janardhan Sharma, the Mukhtiar-a-Aam of the donor Kanwar Chander Raj Saran Singh admitted the execution of the document before the Sub-Registrar and Ram Saran Dass, the scribe and Shabha Ram attested the same before Sub-Registrar it will amount to attestation as required under section 123 of the Transfer of Property Act. In support of this contention, he relied upon *Girja Datt Singh v. Gangotri Datt Singh*, AIR 1955 SC 346 and *Narain Singh v. Parsa Singh alias Parsu*, 1971 Cur LJ 195.

After the hearing the learned Counsel for the parties at a great length, as observed earlier, it appears that before the trial Court no such objection was taken specifically either at the time of admission of the document Exhibit P.W.5/1 or at the time of the arguments. It was only at the appellate stage that this objection was taken on behalf of the defendant that the gift deed on the basis of which the plaintiff claimed himself to be owner of the site in dispute, is not a valid document as it was never attested by any of the witnesses as required under the Transfer of Property Act. This objection prevailed with the lower appellate Court. The argument of the learned Counsel for the appellant that the admission made by Janardhan Sharma, Mukhtiar-a-Aam of the donor and signed by the scribe Ram Saran Dass and Shabha

Ram before the Sub-Registrar, will amount to attestation, has no merit. The document was required to be attested at the time when it was actually executed on 18.1.1961 by Kanwar Chander Raj Saran Singh. Since no one attested the document at that time, the subsequent signatures of the scribe and Shabha Ram who identified the Mukhtiar-a-Aam Janardhan Sharma before the Sub-Registrar, could not fill up the lacuna. Under sub-section (2) of Section 35 of the Registration Act, the registering officer may, in order to satisfy himself that the persons appearing before him are the persons they represent themselves to be or for any other purpose contemplated by this Act, examine any one present in his office. Thus Ram Saran Dass and Shabha Ram only identified the Mukhtiar-a-Aam Janardhan Sharma in order to satisfy the registering officer. In *Timavva Dundappa Budihal v. Channava Appaya Kanasgeri*, AIR 1948 Bom 322, it has been held that signatures made by the Sub-Registrar while he made endorsement on the document admitting it to registration and the signatures of the identifying witnesses made by them when they identified the executant before the Sub-Registrar cannot be regarded as the signatures of attesting witnesses. Moreover, at the time of registration, the donor himself did not appear. It was only his Mukhtiar-a-Aam Janardhan Sharma who presented the same for registration on his behalf. The authorities relied upon by the learned Counsel for the appellant, are not at all applicable to the facts of the present case and are clearly distinguishable. Since, there was no attestation witness at the time of the execution of the document on 18th of January, 1961, the lower appellate Court rightly came to the conclusion that the gift deed, if is taken away as not duly executed, the plaintiff cannot be held to be the owner of the suit land because he claimed his title on the basis of the gift deed alone."

"18. At this stage, let us extract the relevant section in Transfer of Property Act and Evidence Act.

Transfer of Property Act:-

S. 3. In this Act, unless there is something repugnant in the subject or context, -

"Attested" in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has been the executant sign or affix his mark to the

instrument, or has seen some other person sign the instrument in the 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. [only relevant portion is set out]

"S.123. For the purpose of making a gift of immoveable 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 moveable 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."

The Indian Evidence Act

"S. 68. Proof of executing 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 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

"25. We do not want to add the citation except to refer a judgment of the Guwahati High Court in Dhiren Bailung v. Bhutuki, AIR 1972 Gauhati 44, wherein the Court held as follows:-

"All that Section 68 demands before a document requiring attestation can be used as evidence is that one attesting witness at least should be called "for the purpose of proving its execution". It has been stated above that one attesting witness was called in the present case and he testified that Sashi and Paniram had executed the

mortgage deed Ex. 1 in his presence by placing their signatures on it and that he had attested the document. Therefore, the requirements of Section 68 were evidently satisfied. However, the two courts below were of the opinion that it was incumbent upon the plaintiff to establish before he could succeed in that suit, the attestation of the deed by two witnesses, as enjoined by section 59 of Transfer of Property Act, in the manner required by section 3 thereof where the expression "attested" is defined. I find it difficult to endorse that opinion. AIR 1932 All 527 (FB) Lachman Singh v. Surendra Bahadur, is an authority for the propositions that Sections 68 and 69 of the Evidence Act" make a document which is attested admissible in evidence if the requirements of those sections are complied with" and that "if the documents become admissible in evidence they become admissible to prove what they contain. That is to say, they would become admissible to prove whether a mortgage had been executed or a gift had been made". There seems to be no warrant for an argument the Full Bench observed that a deed may be merely admissible and yet may be incapable of being read as a document of the kind which it professes to be. The Full Bench clinched the issue by stating further that to make a mortgage deed or a gift deed admissible in evidence as a deed of mortgage or gift, as the case may be, it is enough to comply with the provisions of section 68 or S. 69 of the Evidence Act. However, it was added that if the question raised is whether the document did create a mortgage or gift or not, it must be proved that the requirements of law as contained in Sections 59 and 123, Transfer of Property Act, have been complied with. I respectfully agree with these observations of the Full Bench. Therefore, the precise question that falls for determination in the present appeal is whether, on the pleadings of the parties, there arises a question whether the deed Ext. 1 does or does not create a mortgage."

.....

..... "To sum up, I hold that the defendants had denied only the execution of the mortgage deed, that they had not challenged its due attestation, that the legality of the mortgage deed was assailed on the specific ground that Sashi and Paniram had no exclusive right to mortgage the land in dispute, and that the parties went to trial only on the specific allegations adopted by them in their written pleadings. I hold

further that in the context of the parties' pleadings the plaintiff was called upon to prove only the execution of the mortgage deed, that the execution is proved by the testimony of Harakanta Duara, an attesting witness, and plaintiff's father Tularam, and that the testimony of the Harakanta Duara constitutes enough of compliance with the statutory requirements set out in the body of Section 68. Hence the mortgage pleaded by the plaintiff is proved beyond doubt."

"26. We are of the view that the above extracts from the judgments of the various High Courts do reflect the correct position in law. In the case on hand PW 6 has categorically stated that he has signed as scribe, signed as witness and signed as identifying witness. We also find his signatures at three places. Nothing was elicited from this witness to disbelieve his statement in Chief Examination. It is not denied that the deed was registered as per the Indian Registration Act. Therefore even on merits the appellant has established the due execution and attestation of the gift deed according to law. We find from the original gift deed at the first page by the side of signatures of the donor, two witnesses have subscribed their signatures. We, therefore, hold that the lower appellate Court and the High Court went wrong in allowing the defendants to raise the plea of non-compliance of Section 123 of the Transfer of Property Act and in holding that the gift deed was not proved."

Referring the above, Learned Senior Counsel for the appellant-plaintiffs submitted that in view of the principles of aforesaid citation, the appellant-plaintiffs have been able to prove Exhibit-1 as per law. But the Learned First Appellate Court failed to appreciate the legal provisions and came to an erroneous observation that Exhibit-1 was not valid in the eye of law and it was suspicious.

23. On the other hand, Learned Senior Counsel, for the respondents as already stated, in support of his contention drawn the attention of the Court that the

appellant-plaintiffs have failed to comply with the provision of Section 67 of the Evidence Act. He further submitted that there was no acceptance of the Gift Deed, as required by law and further submitted that no possession was handed over to the appellant-plaintiffs by said Sikha Rani Saha and since said Sikha Rani Saha denied the execution of Deed. So, Learned First Appellate Court rightly delivered the judgment in favour of the respondent-defendant. Furthermore, Learned Senior Counsel also submitted that the appellant-plaintiffs did not approach to the Court with clean hands, because he did not seek any specific relief for title, only sought relief for khas possession and more so, Exhibit-1 was also not proved in accordance with law. He further submitted that as alleged by the appellant-plaintiffs the respondent-defendant was not a licensee as per Easement Act, because the Easement Act has not been adopted in the State of Tripura.

24. In **Panchugopal Barua and others v. Umesh Chandra Goswami and others** dated 12.02.1997, reported in **AIR (1997) SC 1041**, Hon'ble the Supreme Court in para no. 13 observed as under:

"13. The approach of the learned Single Judge in our opinion was erroneous. Once it was found that the Easements Act had no application to the State of Assam, the question of "clearing the way for Section 60(b) of the Act to operate" cannot at all arise. Of course, the principles of "justice, equity and good conscience" on which Section 60(b) of the Easements Act rests may apply in the facts and circumstances of a given case but that is not to say that though the Easements Act does not apply, provisions of Section 60(b) of the Easements Act still "operate". Since, the legislature did not intend the Act

to apply to Assam, the learned Single Judge could not have defeated that intendment by holding that "the defendant of the present case was protected by Section 60(b) of the Act." It is not permissible to extend the provisions of an Act, made not applicable by the legislature to a State, by a judicial order as it amounts to enacting legislation by the High Court, a power not vested in the judiciary."

Referring the same, Learned Senior Counsel submitted that the plea of the appellant-plaintiffs cannot be accepted.

25. In **Prem Singh and Others v. Birbal and Others** dated 02.05.2006, reported in **(2006) 5 SCC 353**, Hon'ble the Supreme Court in para no. 16 observed as under:

"16. When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non est in the eye of the law, as it would be a nullity."

Referring the same, Learned Senior Counsel further submitted that since Exhibit-1 has been failed to be proved as per law by the appellant-plaintiffs, so, as alleged by Learned Counsel for the appellant-plaintiffs no separate suit was required on behalf of said Sikha Rani Saha to cancel the Deed (Exhibit-1) in view of the principles of the aforesaid citations as it was non est.

26. He also relied upon another citation of the Hon'ble Supreme Court in **Subhra Mukherjee and Another v. Bharat Coking Coal LTD.** and Others dated 08.03.2000,

reported in **(2000) 3 SCC 312** in para no. 12, observed as under:

"12. There can be no dispute that a person who attacks a transaction as sham, bogus and fictitious must prove the same. But a plain reading of Question 1 discloses that it is in two parts; the first part says, "whether the transaction in question is a bona fide and genuine one" which has to be proved by the appellants. It is only when this has been done that the respondent has to dislodge it by proving that it is a sham and fictitious transaction. When the circumstances of the case and the intrinsic evidence on record clearly point out that the transaction is not bona fide and genuine, it is unnecessary for the court to find out whether the respondent has led any evidence to show that the transaction is sham, bogus or fictitious."

Referring the same, he submitted that it was the responsibility of the appellant-plaintiffs to prove the case. More so, said Sikha Rani Saha was not made party in the suit by the appellant-plaintiffs and finally, submitted that since, DW-6 denied execution of Exhibit-1, so, it was the duty of the Learned Trial Court to take steps for examining the signatures through Scientific Expert. But the Learned Trial Court ignoring the legal position by order dated 21.07.2017, came to an wrong observation that it was not necessary to take expert opinion and gave a perverse finding but the Learned Appellate Court, after hearing both the sides, rightly and reasonably reversed the judgment of the Learned Trial Court and urged for dismissal of the appeal.

27. I have heard submission of the Learned Counsels at length, perused the principles of the aforesaid citations relied upon by the parties and also gone through the records

of the Learned Court below including the evidence on record both oral and documentary. After hearing both the sides, it appears to me that to prove a Deed of Gift valid, and also for effecting a Gift of Deed, registration is required as per law and that Deed should be proved as per Section 68 of the Evidence Act and furthermore, to prove a Gift Deed it is not required that possession should be given to the Donee by the donor at the time of execution of Deed of Gift. Here in the case at hand, it is proved that the appellant-plaintiffs have been able to prove Exhibit-1 as per law. Although, DW-6, being the executant of the Deed denied her signature on the same but on perusal of Exhibit-1 and Exhibit-A series and also of Exhibit-E, it appears that in those documents she had given her signatures. But at the time of recording her evidence by Commission, she gave her thumb impression and in course of her cross-examination, she specifically stated that she could not recollect as to whether she put her signatures or not and although she denied her signatures, thereafter an application was submitted by the appellant-plaintiffs for taking expert opinion in respect of her signatures, but the Learned Trial Court below, after detailed hearing, by order dated 21.07.2017 came to an observation that there was no necessity to take any expert opinion and furthermore, the respondent-defendant, in their pleading did not deny that said Sikha Rani Saha did not execute the Gift Deed rather took a different plea that she could not understand the contents of the Deed as Nitai Lal Saha

without informing her in details took her signatures and furthermore, challenging the Gift Deed, neither said Sikha Rani Saha nor the respondent-defendant filed any suit for cancellation of Exhibit-1.

28. It is to be noted here that said Sikha Rani Saha is staying with the contesting respondent in the same residence. So, it is quite natural that she would support the case of the respondent-defendant. Furthermore, the Exhibit-1 was executed in the year 2009 but as already stated, challenging Exhibit-1, said Sikha Rani Saha did not file any suit in any forum. More so, the contesting respondent as DW-1, during his cross-examination by the appellant-plaintiffs stated that in year 2011/2012, for the first time he had seen the Gift Deed executed in favour of plaintiff No.1 by his mother. Even after knowing the same, no step was taken on his behalf to challenge the Gift Deed.

28. It also appears that the plea of Sikha Rani Saha was not mentioned in the written statement filed by the contesting respondent as required under Order VI, Rule 4 of C.P.C, which provides as under:

Order VI, Rule 4 of C.P.C:-

4. Particulars to be given where necessary.- In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

There was no explanation in this regard from the side of the respondent-defendant.

30. So, after analyzing the evidence on record, it appears that the Learned First Appellate Court, without proper appreciation of the legal provisions of law came to an observation that Exhibit-1 was made under suspicious circumstances and the appellant-plaintiffs did not comply with Section 67 of the Evidence Act and thus, came to an erroneous finding reversing the judgment of the Learned Trial Court, which in my considered view, Learned First Appellate Court wrongly passed/delivered. So, after hearing both the sides, it appears that the substantial questions of law as formulated leans in favour of the present appellant-plaintiffs of this case and Exhibit-1 was executed by Sikha Rani Saha in favour of appellant-plaintiff No.1.

31. In the result, the appeal filed by the present appellant-plaintiffs is hereby allowed on contest with costs. The judgment and decree dated 23.02.2022 and 02.03.2022 respectively passed by Learned Additional District Judge, Gomati District, in connection with T.A. No.26 of 2017 reversing the judgment and decree dated 28.08.2017 passed by the Learned Civil Judge, Senior Division in Title Suit No. 18 of 2016 is hereby set aside. The appellant-plaintiffs are entitled to get the decree of recovery of khas possession of the suit property against the respondent-defendant. The respondent-defendant be asked to handover the possession of this suit property to the appellant-plaintiffs within a period

of 60(sixty) days failing which the appellant-plaintiffs shall recover the same by due process of law.

Pending application(s), if any, also stands disposed of.

Prepare decree accordingly and send down the LCRs.

JUDGE



**MOUMITA
DATTA**
Purnita

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MOUMITA DATTA
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