

Court No. - 36

Case :- SECOND APPEAL No. - 954 of 2024

Appellant :- Ballia (Deceased) And 4 Others

Respondent :- Om Prakash And Another

Counsel for Appellant :- Ashutosh Ganguli,Pranab Kumar Ganguli

Counsel for Respondent :- Ashish Agrawal

And

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Appellant :- Ballia Deceased And 4 Others

Respondent :- Om Prakash And Another

Counsel for Appellant :- Ashutosh Ganguli,Pranab Kumar Ganguli

Counsel for Respondent :- Ajay Kumar Singh,Ashish Kumar Singh,Tejas Singh

Hon'ble Kshitij Shailendra,J.

1. Heard Sri Atul Dayal, learned Senior Counsel assisted by Sri P.K. Ganguly, learned counsel for the appellants and Sri Ajay Kumar Singh and Sri Ashish Agrawal, learned counsel for contesting respondents in both the appeals.

2. Since common questions of fact and law are involved for consideration in these appeals, a common judgment is being passed.

3. These two appeals arise out of two civil appeals but a single civil suit. The civil appeals were filed by two different defendants. The trial court decreed the suit for cancellation of gift deed dated 11.01.1973 (registered on 15.01.1973) and injunction. However, the decree has been reversed by the first appellate court by a consolidated judgment and, consequently, the suit has been dismissed.

4. Brief facts giving rise to the appeal are that the aforesaid gift deed was executed by Smt. Ballia (appellant no. 1) in favour of Jawahir, i.e. father of defendant no. 1, and Bhrigunath, i.e. defendant no. 2. The suit was instituted after three years on the ground that execution of the gift deed was a result of impersonation. There is no dispute about the fact that for a period of about 20 years, the proceedings of the suit remained held up on account of an issue of effect of consolidation operations on the proceedings of the civil suit and after the matter stood revived pursuant to determination made by this Court to the effect that suit would proceed, evidence began in the suit and lis was decided.

5. Learned Senior Counsel appearing for the appellants submits that Ravi Saran and Soti were two attesting witnesses to the aforesaid gift deed and, in view of the provisions of Section 123 of the Transfer of Property Act, attestation of gift deed by two witnesses being requirement of law, the same having not been satisfied, the trial court was justified in treating the gift deed as "not proved" in view of Section 68 of the Evidence Act. Further submission is that there was a dispute regarding thumb impression on the gift deed and, admittedly, original gift deed having not been produced by the defendants, its certified copy was admitted in evidence and, later on, two experts were called for conducting examination of the document. Both the parties obtained opinion from experts and two reports were brought on record, however, later on, both the reports were misplaced. The trial court, after conducting thorough analysis of the expert report again brought on record through reconstruction thereof, held that the disputed gift deed did not contain thumb impression of the appellant no. 1 and, consequently, decreed the suit. The first appellate court has reversed the decision by observing that both the attesting witnesses

had died and only witness being D.W.-2 Ram Nayak, who was, in fact, not witness to the gift deed, his testimony has been believed by the first appellate court and the decision has been reversed.

6. As regards expert opinion, the submission is that his evidence has been discarded by placing reliance upon some judgment dated 30.01.2001 passed by Sixth Additional District & Sessions Judge, Varanasi in Sessions Trial No. 856 of 1997, wherein certain observations regarding genuineness of the reports submitted by the same expert were made but the appellate court has not reversed the findings of the trial court based upon the expert report. It is also argued that cross-examination of the D.W.-2 reveals that he remembered the exact dates of 1973 though the statement was recorded in 2014, i.e. after a period of 41 years and, therefore, the testimony of the said witness was unbelievable but the appellate court has not properly appreciated this aspect of the matter and has accepted the same.

7. Per contra, both learned counsel for the respondents submit that, admittedly, two attesting witnesses having expired during the course of trial, the first appellate court has taken aid of Section 69 of the Evidence Act and, then, discussed the testimony of D.W.-2 Ram Nayak. As regards his credit worthiness, it is urged that the said witness was not attesting witness to the registered gift deed, rather he was Clerk in the chamber of the Advocate, who had drafted the gift deed and the witness had stated in clear terms that the attesting witnesses as well as the executant of the gift deed had, in his presence, put their thumb impressions on the gift deed in the presence of the Sub Registrar concerned. It is, therefore, urged that the first appellate court has not erred in accepting the oral testimony of D.W.-2 particularly when even the name of Ram Nayak is mentioned in the registered gift deed, certified copy

whereof was admitted in evidence.

8. As regards expert report, it is contended that after the expert reports were misplaced for one reason or the other, record was reconstructed and though it is true that reconstruction was made on the steps taken by the plaintiffs-appellants, merely on account of this fact it cannot be said that the expert evidence produced by an expert, whose conduct was recorded in a judgment of the Court, and then discussed in the impugned judgment was acceptable. It is also urged that P.W.-1 stated that the document was got executed under pressure and once the execution of the document is admitted to the executant herself, plea of impersonation does not stand established. As regards the fact that there was some discrepancy in the suggestion recorded by the Reader of the Court, it is submitted that an application seeking recall of witness for re-examination was filed by the plaintiffs-appellants but the same was rejected and the revision against the rejection order was also dismissed and, hence, the oral testimony of the said witness would be read as it is without any improvement.

9. Having heard learned counsel for the parties, I find that the fate of the appeals is dependent upon the solitary question as to whether due execution of the disputed gift deed was proved in accordance with law.

10. The Court has gone through the entire material placed before it and though non-concurrent judgments have been passed in this case, the point for determination stated by the first appellate court at the bottom of internal page no. 7 of its judgment is as regards due execution of the registered gift deed. Therefore, the Court proceeds to examine the correctness of the findings recorded by the first appellate court.

11. From the record, it is apparent that Ravi Saran and Soti were two attesting witnesses to the gift deed. They died pending suit proceedings and even before the evidence began in the suit. Therefore, though as per Section 123 of the Transfer of Property Act, attestation of a gift deed by two attesting witnesses is the mandatory requirement of law, question of its proof has to be seen in the light of Sections 68 and 69 of the Evidence Act. Section 68 would have no application in the present case as the attesting witnesses were not alive on the date of recording of evidence. Section 69, as relied upon by the first appellate court, reads as under:-

"69. **Proof where no attesting witness found.**-If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the documents is in the handwriting of that person."

12. A perusal of Section 69 shows that if no attesting witness can be found (which includes death of such witness), the document can be proved by leading evidence establishing that attestation made by at least one attesting witness by his handwriting or signature was proved. Therefore, the Court has to see as to whether there was any evidence on record to show that attestation made by one or the other attesting witnesses was proved in terms of Section 69.

13. The D.W.-2 Ram Nayak, being Clerk, stated in his examination-in-chief that the document was written and executed on 10.01.1973 in District Court, Varanasi and its draft was finalized by Babu Ram Adhar Singh, Advocate in whose chamber he was working as a Clerk. The said witness purchased the stamp paper from Brij Mohan Gupta vendor, the document was typed in Varanasi, all the persons reached Varanasi on 11.01.1973 at 2.00

p.m. where attesting witnesses were present, attesting witness Ravi Sharan put his thumb impression on the deed, thereafter Soti put his thumb impression and Smt. Ballia, executant of the gift deed, also put her thumb impression and none of these persons signed the document. Presentation of the gift deed before the Sub Registrar by Advocate Ram Adhar Singh was also stated in clear terms. Other statements were also made in relation to execution of the gift deed.

14. The Court is confining its examination as to whether in terms of Section 69 of the Evidence Act, the oral testimony of D.W.-2 was trustworthy and the Court is satisfied that since putting of thumb impression by both attesting witnesses in his presence was proved by D.W.-2, the said requirement stood fulfilled. Merely because the statement was recorded after 41 years and the said witness in clear terms mentioned the exact dates as to when the stamp was purchased and document was executed, the same cannot raise doubt on the creditworthiness of the said witness inasmuch as it is a known procedure of trial proceedings that when a witness comes in the witness-box and based upon the execution of a document he is cross-examined, the document is placed before him and he can read down the dates and other contents of the document and make statements accordingly. The time gap between execution of document and the date of cross-examination cannot be fatal to the facts stated based upon the contents of the document witness is confronted with. The same thing has happened in the present case and the specific version of D.W.-2 cannot be read against him.

15. As regards the expert evidence, this Court finds that first appellate court has recorded finding that both the reports were confirmed subject to evidence by an order dated 02.03.1979.

Thereafter the expert reports were misplaced. As regards report 72-C and the enclosures thereto, finding is that photographs as well as negatives were not clear and were blurred. Even the thumb impressions obtained from register no.8 were also blurred. It is significant to note that an attempt was made to re-summon the register no.8 from the office of the Sub-Registrar, however, a report was sent by the Sub-Registrar to the effect that the said register stood weeded out.

16. The first appellate court also placed reliance upon judgment dated 30.01.2001 passed by VI Additional District and Session Judge, Varanasi in S.T. No. 856 of 1997. The said judgment discarded the expert evidence submitted by Syed Irteza Hussain expert with a finding that the said expert was habitual of submitting false reports. Though, it is true that mere such observation cannot lead to a circumstance that every report submitted by the said expert will be disbelieved in all proceedings as the concept "ONCE A LIER ALWAYS A LIER" does not apply in India, there is another aspect of this matter i.e. that the original document was not on record and it is a case where Section 73 of the Evidence Act could not come in picture as the dispute was not regarding handwriting or signatures but about only thumb impressions and none of the courts below could exercise the power under Section 73 nor have the said powers been exercised in its true sense. What remains then is the satisfaction recorded by the first appellate court as regards the contents of the expert evidence.

17. As noted above, the documents attached to the expert report having been found to be blurred by the first appellate court, this Court is convinced that contrary finding recorded by the trial court reproducing the contents of the expert report without carefully perusing the enclosures thereto and forming an opinion that the

gift deed did not contain the thumb impression of the plaintiff no.1, does not appear to be correct, particularly when a strong presumption exists as regards a registered document.

18. It is not a case where the judgment of the first appellate court is silent on any aspect involved in the matter, rather each and everything has been examined and the finding have been recorded setting aside the judgment of the trial court.

19. It is well settled that if two views are possible in a particular case, the view taken by the first appellate court, being last court of fact, its judgment cannot be set aside merely on the ground that a different view was possible.

20. An appeal may raise various grounds of challenge to the impugned decree, however, every ground raised cannot be treated as a substantial question of law.

21. In **Kamti Devi (Smt.) and Anr. v. Poshi Ram (2001) 5 SCC 311**, the Supreme Court came to the conclusion that the finding reached by the first appellate court cannot be interfered with in a second appeal as no substantial question of law would have flowed out of such a finding. In **Thiagarajan v. Sri Venugopalaswamy B. Koil, (2004) 5 SCC 762**, the Supreme Court has held that the High Court in its jurisdiction under Section 100 C.P.C. is not justified in interfering with the findings of fact and that it is the obligation of the courts of law to further clear intendment of the legislature and not frustrate it by excluding the same and where findings of fact by the lower appellate Court are based on evidence, the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

22. Similar view has been taken in **Kondiba Dagadu Kadam vs**

Savitribai Sopan Gujar and others, (1999) 3 SCC 722 by observing that disturbance in findings of fact would be contrary to limitations imposed by section 100 C.P.C. The Supreme Court again reminded in **Commissioner, Hindu Religious & Charitable Endowments vs. P. Shanmugama (2005) 9 SCC 232** that the High Court has no jurisdiction in second appeal to interfere with the findings of fact. The Apex Court, in **State of Kerala v. Mohd. Kunhi (2005) 10 SCC 139** reiterated the same principle by observing that by such interference, the High Court would go beyond the scope of Section 100 of the Code of Civil Procedure.

23. In **Madhavan Nair v. Bhaskar Pillai (2005) 10 SCC 553**, the Supreme Court observed that even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same.

24. The view taken in the aforesaid decisions has been reiterated by the Apex Court in **Gurdev Kaur and others vs. Kaki and others, 2007 (1) SCC 546**.

25. Recently, the Supreme Court has seriously condemned the approach of the High Courts to entertain a challenge even when no substantial question of law is involved and appeals are admitted on inappropriate questions which cannot be said to be substantial questions. The proposition has been laid down in **Civil Appeal Nos.14138- 14139 of 2024, Jaichand (dead) through LRs and others Vs. Sahnulal and another, decided on 10.12.2024**.

26. This Court is satisfied that, in the instant case, the first appellate court has analyzed the pleadings of the parties and entire oral and documentary evidence, including the re-constructed report of the Expert, and has recorded findings after making critical analysis thereof. This Court is not inclined to take a different view

of the matter.

27. No substantial question of law arises for consideration.

28. The appeal is **dismissed** under Order 41 Rule 11 C.P.C.

Order Date :- 21.1.2025

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