

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.95 of 2015

=====

1. Durgesh Nandan Verma @ D. Rajan
2. Mritunjay Kumar Verma @ Mritunjay Verma, Both Sons of Late Bipin Bihari Verma, Resident of Mohalla - Pachhim Tola, Police Station - Ara Town, District - Bhojpur.

.... Appellants

Versus

1. Sumeshwar Prasad Son of Late Bhuneshwar Ram, Resident of Village - Hematpur, Sohara, Police Station - Barahara, District - Bhojpur. Presently residing at Mohalla - Pachhim Tola, Ward No. 5, P.S. Ara Town, District - Bhojpur.
2. Vijay Shankar Verma,
3. Sanjay Verma, both sons of Late Bipin Bihari Verma,
4. Poonam Devi, Wife of Girish Chandra Srivastava, Resident of Village - Gangauli, Police Station - Kasibabad, District - Gajipur, U.P. Presently residing at Pachhim Tola, P.S. Ara Town, District - Bhojpur at Ara.
5. Kumud Devi, Wife of Binay Kumar Sinha, Resident of Village - Ekwana, Police Station - Barahara, District - Bhojpur. Respondets NO. 4 and 5 are the daughter of Late Bipin Bihari Verma
6. Kalawati Devi, Wife of Late Sheonath Prasad,
7. Parmeshwar Kumar,
8. Rameshwar Kumar @ Kallu
9. Binod Kumar @ Lallu,
10. Ashok Kumar @ Bhaiya, All Sons of Late Sheonath Prasad, All resident of Mohalla - Pachhim Tola, Ward No. 5, Police Station - Ara Town, District - Bhojpur.

.... Respondents

with

=====

Second Appeal No. 144 of 2015

=====

1. Durgesh Nandan Verma @ D. Rajan
2. Mritunjay Verma @ Mritunjay Kumar Verma Both S/o Late Bipin Bihari Verma Resident of Mohalla Pachhim Tola, Police Station Ara Town, District Bhojpur.

.... Appellants

Versus

1. Sumeshwar Prasad S/o Late Bhuneshwar Ram Resident of Village Hematpur, Sohara, Police Station Barahara, District Bhojpur. Presently residing at Mohalla Pachhim Tola, Ward No. 5, P.S. Ara Town, District Bhojpur.
2. Vijay Shankar Verma
3. Sanjay Verma Both S/o Late Bipin Bihari Verma Resident of Mohalla Pachhim Tola, Ward No. 5, P.S. Ara Town, District Bhojpur.
4. Kumud Devi W/o Vinay Kumar Sinha, D/o Late Bipin Bihari Verma Resident of Village Ekauna, Police Station Barahara, District Bhojpur.
5. Poonam Devi W/o Girish Chandra Shrivastava, D/o Bipin Bihari Verma Resident of Village Gangauli, Police Station Kasibabad, District Gazipur (U.P.) both are at



present resident of Mohalla pachhim Tola, Ward No. 5, P.S. Ara Town, District Bhojpur.

6. Kalawati Devi W/o Late Sheonath Prasad

7. Parmeshwar Kumar

8. Rameshwar Kumar @ Kallu

9. Binod Kumar @ Lallu

10. Ashok Kumar @ Bhaiya All S/o Late Sheo Nath Prasad All Resident of Village Pachhim Tola, Ward No. 5, P.S. Ara Town, District Bhojpur.

.... Respondents

=====

Appearance :

(In SA No. 95 of 2015)

For the Appellant/s : Mr. Bakshi S.R.P., Sinha, Sr. Adv, Mr. Rahul Nath, Adv

For the Respondent/s : None.

(In SA No. 144 of 2015)

For the Appellant/s : Mr. Bakshi S.R.P., Sinha, Sr. Adv, Mr. Rahul Nath, Adv

For the Respondent/s : None.

=====

CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 15-12-2016

Heard Mr. Bakshi S.R.P. Sinha, learned senior counsel appearing for the appellants in both the appeals.

Learned senior counsel for the appellants has submitted that the identical issues of law and facts are arising in both the appeals and therefore the prayer has been made to hear both the appeals under Order 41 Rule 11 C.P.C together. Accordingly, the prayer has been allowed and both the appeals i.e. S.A.No.95/2015 and S.A.No. 144/2015 have been heard together at the stage of Order 41 Rule 11 C.P.C.

The matrix of facts discloses that the suit property, which is a house, originally belonged to one Girija Kuer. This fact is admitted by both the appellants and the respondents. The



T.S.No.95/1990 was filed by the plaintiff Bhuneshwar Ram (since deceased through L.R.) claiming his title and possession over the suit property on the basis of the sale deed dated 07.01.1983 executed in his favour by his vendor who got the suit house through the registered gift deed dated 28.06.1956 executed by Girija Kuer in his favour. The another T.S.No.278/1992 was filed by the defendants of T.S.No. 95/1990 as plaintiffs for declaration of their own title over the same suit property on the basis of the assertion that the original owner Girija Kuer had executed a will on 12.03.1960 in their favour and after grant of its probate in 1986, they had acquired valid right, title and interest over the suit property.

The trial court returned the findings on the issues in favour of the plaintiffs of T.S.No.278/1992, and accordingly T.S.No.95/1990 was dismissed and T.S.No. 278/1992 was decreed. The plaintiffs of T.S.No. 95/1990 filed two appeals i.e. T.A.No. 38/2006 and T.A.No. 39/2006 against the judgment and decree passed in T.S.No. 95/1990 and T.S.No. 278/1992. It would be pertinent to mention here that the abovementioned two suits were heard analogously and had been disposed of by a common judgment and similarly the two title appeals as abovementioned have also been analogously heard and disposed of by a common judgment whereby the two title appeals have been allowed reversing judgment and decree



passed in T.S. No. 95/1990 and T.S. 278/1992 and granting the decree to the plaintiffs of T.S. No. 95/1990 as prayed. The judgments and decrees passed in T.A. No. 38/2006 and T.A. No. 39/2006 have been impugned in the present two second appeals i.e. S.A. No. 144/2015 and S.A. No. 95/2015 respectively.

Mr. Sinha, learned senior counsel appearing for the appellants, has firstly emphasized the irregularity in the preparation of the decree by the trial court as well as the appellate court below and has submitted that it is difficult to decipher the matter in which the decree has been passed. It has been further contended by learned senior counsel that the suit property was in possession of one Shivnath Ram as tenant and he was impleaded as one of the defendants in T.S.No. 278/1972(filed by the present appellants) but he had not been made party in the T.A. No. 39/2006 filed by the respondents. It has, however, been accepted during course of submission that the tenant Shivnath Ram is no other person than the son of the plaintiff Bhuneshwar Ram (of T.S. No. 95/1990) who had purchased the property by the sale deed dated 07.01.1983 from the donee of the gift deed dated 28.06.1956. It has been next argued that the judgment of the appellate court below is vulnerable inasmuch as the learned court has not specifically set aside the findings of the trial court which it was required to do while passing a judgment of reversal. The learned



senior counsel has propounded that the appellate court below has wrongly proceeded to decide the appeal only on the basis of admission of the execution of the gift deed dated 28.06.1956 by Girija Kuer in favour of the vendor of the plaintiff Bhuneshwar Ram which appeared in the recitals made in the deed of will in favour of the present appellants. Developing the submission, learned senior counsel has placed reliance upon Section 21 of the Evidence Act in order to persuade this Court to hold that the said averments/recitals in the deed of will cannot be used as admission against the present appellants. Learned senior counsel has further canvassed that the appellate court below has not considered the material evidence which have been considered by the trial court below on the issue as to whether the gift in question was acted upon or not and therefore the substantial question of law arises relating to the legal acceptability of the findings by the appellate court below. The learned senior counsel has also put emphasis that the prayer for mutation over the suit property was made by the donee belatedly and much after the death of the donor Girija Kuer in the year 1960 which shows that the gift was not acted upon. No other submission has been made on behalf of the appellants.

After considering the submissions and perusal of the judgments of both the courts below, it is manifest that the suit property admittedly belonged to Girija Kuer. Plaintiff Bhuneshwar



Ram (since deceased through L.R.) of T.S.No. 95/1990 claimed his title over the suit property on the basis of purchase by sale deed dated 07.01.1983 from the vendor who had obtained the title over the said property through gift deed dated 28.06.1956 by the admitted owner Girija Kuer. In the T.S. No. 95/1990, the relief was claimed for declaration of title and confirmation of possession over the suit property. It would be seemly to mention here that in the T.S. No. 278 of 1992 (filed by the appellants of this appeal), the relief was claimed for declaration of title over the suit property and for declaration that the defendant No. 1 Bhuneshwar Ram was the tenant of the plaintiffs and also for recovery of possession after dispossessing the defendant No. 1 Bhuneshwar Ram and defendant No. 2 Shivnath Prasad from the suit property. It is however not disputed that Shivnath Prasad was the son of Bhuneshwar Ram and Bhuneshwar Ram after his death had been substituted in the suit by his another son Sumeshwar Prasad (Respondent No. 1 in the present two appeals). Manifestly therefore the spinal issue between the parties to both the suits, which have been heard analogously, pertained to the rival claim of title over the suit property. In this backdrop the possession of the defendants over the suit property as tenant, which fact has been asserted by the present appellants in their suit would not be very material in view of the nature of the claim of the parties over the suit property. Learned



senior counsel on behalf of the appellants who has ardently raised the issue of non-joinder of Shivnath Prasad as party in the appeal by the respondent No. 1 before the appellate court below has failed to convince this Court as to how Shivnath Prasad who had been alleged to be in occupation of the suit property as tenant would be a necessary party in the suit or appeal filed by the Respondent No. 1 in the facts and circumstances where no relief had been sought against him by Respondent No. 1; and further as to how his non-impleadment as party in the appeal (filed by the Respondent No. 1) had affected the merits of the case and the jurisdiction of the court. Section 99 C.P.C. clearly precludes the prayer on behalf of the appellants for reversal of the decree in these facts.

It is admitted fact that in the deed of will which is the pivot of the claim of title of the appellants over the suit property, the testator Girija Kuer had made statements which demonstrate that she was aware of the registered gift deed executed by her in favour of the vendor of the plaintiff Bhuneshwar Ram (of T.S. No. 95/1990), though she had also alleged the same to be vitiated by fraud. Undisputedly therefore the donor Girija Devi had the knowledge of the gift deed before the execution of the deed of will in favour of the appellants and sequentially therefore the appellants had also the knowledge of gift deed in the year 1960 itself when the deed of will



by Girija Kuer was executed in their favour. However, the specific plea on behalf of the appellants, in this regard, is that the gift deed was not legally valid as it was vitiated by fraud. The law is well settled that the allegation of fraud will make a transaction only voidable and the same will remain valid till it is cancelled by a competent court. In the facts of the present case, no ‘presumptive invalidity’ can be attached to the gift deed in question. The donor Girija Kuer or for that matter the appellants were required to bring a suit for cancellation of the gift deed within three years from the date of the execution of the gift deed or from the date when the facts entitling them to obtain the requisite relief against the gift deed first became known to them. Noteceably, however, even in the T.S. No. 278/1992 filed by the appellants, no relief has been claimed against the gift deed in question before claiming the relief for declaration of their title over the suit property. It would be fruitful here to notice the dictum, in this regard, as laid down by the Apex Court in ***Md. Nurul Hodda vs Bibi Raifunnisa & Anr 1996(7) S.C.C 767*** as follows:-

“...When the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled, or set aside



or rescinded. Section 31 of the Specific Relief Act, 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or avoidable and the court may in its discretion so adjudge it and order it to be delivered or cancelled...”

Further, it is also transparent from the facts that the execution of the gift deed for the suit property by the original owner Girija Kuer in favour of the plaintiff of T.S.No. 95/1990 is an admitted fact and in that view of the matter, this Court does not find any substance in the submission on behalf of the appellants that the plaintiff was still required to prove the fact of the said gift. There is also nothing in Section 21 of the Evidence Act which would enable the appellants to wriggle out of the affect of the statement regarding the gift deed in the subsequent deed of will which is the base of the claim of title by the appellants over the suit property.

Learned senior counsel for the appellants has been emphatic in his submission that the gift deed in favour of Narbadeshwar Prasad (vendor of the plaintiff Bhuneshwar Ram) was not acted upon. However from the perusal of the judgments of both the courts below, it is transparent that the material evidence on record as discussed by the courts below do not support this contention. It is



evident from the certified copy of the plaint of T.S. No. 48/1967 (Exhibit-4) that the donee Narbadeshwar Prasad filed suit for eviction of the tenant Shivnath Prasad from the suit property as far back as in 1967. The advocate notice dated 27.01.1967 (Exhibit-5) had also preceded the filing of the suit. The compromise petition in T.A. No. 170/1971 (Exhibit-6) discloses that there was compromise between the parties of the said suit at the stage of appeal and the sale deed was executed by the donee Narbadeshwar Prasad in favour of Bhuneshwar Ram who was the father of the tenant Shivnath Prasad. The rent receipts (Exhibit-1/E and 1/G) and other documentary evidence pertaining to the mutation proceedings between the parties also indicate that the donee Narbadeshwar Prasad and after purchase, the plaintiff Bhuneshwar Ram had been asserting their right, title and interest over the suit property on the basis of the gift deed from 1983 onwards to the knowledge of the present appellants. The inference flowing from the documentary evidence adduced by both sides is definitely not in consonance with the submission that the gift deed was not acted upon. The appellants also have not adduced evidence to establish that the admitted owner Girija Kuer was aggrieved from the act of her brother in getting the gift deed in question executed by her nor there is any explanation as to why Girija Kuer did not take any step against the gift deed which according to her (as stated in the deed



of will) was fraudulently obtained. This Court, therefore, is not persuaded to interdict the findings of the appellate court below that the gift deed is a legally valid and effective document and the plaintiff Bhuneshwar Ram (of T.S. No. 95/1990) acquired valid right, title and interest over the suit property after purchase from the donee of the said gift deed. The further submission that the appellate court has acted illegally in not specifically reversing the findings of the trial court is also devoid of merit in view of the well settled dictum in this regard that the appellate court should not interfere when the judgment is not right but only when it is wrong. Demonstrably the findings of facts have been recorded by the appellate court below on the basis of evidence which were acceptable and could have been relied upon and this Court does not find perversity or unreasonableness in the same in any manner. The possibility of another view on the same set of evidence cannot raise a substantial question of law.

Ex consequenti, this Court does not find any substantial question of law arising for consideration in both the appeals, which are accordingly, dismissed.

(V. Nath, J)

Nitesh/-

U			
---	--	--	--

