

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.95 of 2010

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Mahendra Pandey & Ors.

.... Appellant/s

Versus

Shanti Devi & Ors.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ajit Kumar Singh

For the respondent no.2 : Mr. Jay Shankar Pathak

For respondent nos. 1 & 3 : Mr. Gopal Govind Mishra

CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

ORAL JUDGMENT

Date: 14-12-2017

1. This appeal has been preferred by the defendants-appellants (hereinafter referred to as the defendants) against the judgment and decree dated 28.4.2010 and 11.5.2010 respectively passed by the Sub Judge I, Bhojpur at Ara in Title suit no. 641/2007 by which and whereunder he decreed the suit filed on behalf of the plaintiffs-respondents (hereinafter referred to as the plaintiffs) and accordingly, declared registered gift deed dated 4.8.2001 as forged and fabricated and not binding upon the plaintiffs.

2. Plaintiffs brought Title suit no. 641/2007 against the defendants and sought reliefs for declaration of gift deed dated 4.8.2001 as forged and fabricated and not binding upon them and also for grant of interim



injunction restraining the defendants not to interfere into their peaceful possession.

3. The case of the plaintiffs is that one Hanuman Pandey had four sons, namely, Bajrangi Pandey, Ramlal Pandey, Rajendra Pandey and Vikrama Pandey. Bajrangi Pandey had two sons, namely, Mahendra Pandey and Viswanath Pandey who are defendant nos.1 and 2 of the suit. Ramlal Pandey had two wives. Plaintiff no.2, namely, Janki Devi was born from first wife of Ramlal Pandey whereas plaintiff no.3, namely, Urmila Devi and one Laxmania Devi were born from second wife of Ramlal Pandey. Plaintiff no.1 is second wife of Ramlal Pandey. The aforesaid Ramlal Pandey died leaving behind his widow plaintiff no.1 and two daughters, plaintiff nos. 2 and 3 as well as two sons of pre-deceased daughter, namely, Laxamina Devi. Rajendra Pandey had one son, namely, Satyadev Pandey who is defendant no.3 of the suit and Vikrama Pandey had two sons, namely, Ramjanam Pandey and Arun Pandey but they have not been made party to the suit as they are not necessary party to the suit. Ramlal Pandey died on 13.6.2001 and his last ritual was performed at his village. Plaintiff no.3,



namely, Urmila Devi used to reside at her parental village along with her mother. Further case of the plaintiffs is that defendants took plaintiff nos. 1 and 3 to Ara on 4.8.2001 on the pretext to get prepared paper of family pension of plaintiff no. 1 and in that course, they took thumb impressions of plaintiff nos. 1 and 3 on several papers and by playing fraud on plaintiff nos. 1 and 3 got executed a gift deed. Further case of plaintiffs is that Ramlal Pandey was separate from his brothers and he had acquired disputed land as his self-acquired property. Brothers of Ramlal Pandey wanted to grab his property and that is the reason, they having entered into connivance with each others fraudulently got executed gift deed. Further case of plaintiffs is that husband of plaintiff no.3 was in job at Bombay and in the month of May, 2007, when he came to village Lohar, he learnt about the above stated forged gift deed and thereafter, he enquired from villagers and witnesses of the aforesaid gift deed but villagers and witnesses of the gift deed did not disclose the exact date and year of the aforesaid gift deed. However, after hectic search, he got certified copy of the gift deed in the month of June, 2007 and thereafter, the



aforesaid certified copy of the gift deed was shown to defendants. The defendants accepted their fault and agreed to execute relinquishment deed. Husband of plaintiff no.3 went to Bombay but defendants did not execute any relinquishment deed and again, husband of plaintiff no.3 came to village and asked defendants to execute relinquishment deed but defendants refused to execute any relinquishment deed and thereafter, plaintiffs brought the above stated suit.

4. The defendants appeared in the aforesaid suit and contested the suit by filing written statement in which they denied the pleadings of the plaintiffs and specifically, stated that Ramlal Pandey had only one wife, namely, Shanti Devi who is the plaintiff no.1 and only one daughter, namely, Urmila Devi, plaintiff no.3 and two sons namely, Munna Pandey and Tunna Pandey but unfortunately, both sons of Ramlal Pandey died in their early age. Marriage of plaintiff no. 3 was solemnized with Gopal Mishra and at the time of her marriage, sufficient gifts were given and that was the reason plaintiff no.3 had relinquished her right in favour of her mother. It has been admitted in the written statement that plaintiff no.1 was in



possession of land of Ramlal Pandey. The defendants flatly denied that Ramlal Pandey had two more daughters, namely, Janki Devi and Laxamina Devi. It has also been admitted in the written statement that Ramlal Pandey died in the year 2001 leaving behind his widow Shanti Devi and daughter Urmila Devi. The defendants further pleaded in their written statement that they used to look after Ramlal Pandey and Shanti Devi and after death of Ramlal Pandey, plaintiff no. 1 after taking advice of plaintiff no.3 and other members of her natal village expressed her desire to execute gift deed in favour of defendants and having understood all pros and cons and by her own free will, she executed gift deed dated 4.8.2001 in favour of defendants and the aforesaid gift deed was got registered at registry office and after execution of the gift deed, defendants came in possession of disputed land. The aforesaid gift deed dated 4.8.2001 was executed in presence of plaintiff no.3 and she, having understood the contents of the gift deed, put her thumb impression on the gift deed in presence of the witnesses and she was identified by Jagnarain Singh of village Lohar. Further case of defendants is that after execution



of gift deed, they got mutated their names in circle office and started paying rent and accordingly, they prayed for dismissal of the suit of the plaintiffs.

5. On the basis of pleadings of the parties, learned court below framed following issues:-

- i) Is the suit, as framed, maintainable?
- ii) Have the plaintiffs got valid cause of action?
- iii) Is the suit bad due to non-joinder and mis-joinder of the parties?
- iv) Is the suit hit by section 34 of the Specific Relief Act?
- v) Is the deed of gift with respect of schedule Ka property of the plaint alleged to have been executed by the plaintiffs in favour of defendants, forged, fabricated and not binding on the plaintiffs?
- vi) Have the plaintiffs entitled to get the relief, as sought for?

6. The plaintiffs got examined six witnesses and also got exhibited certified copy of gift deed dated 4.8.2001 as exhibit 1. Similarly, defendants got examined seven witnesses and also got exhibited original gift deed dated 4.8.2001 as exhibit A, rent receipts as exhibits B to B/7, Original paper of family pension of plaintiff no.1 as



exhibit C and order dated 10.12.2002 passed in Mutation case no. 1553/02-03 as exhibit D.

7. Learned court below, having analyzed the evidences and pleadings of the parties, came to the conclusion that defendants got executed gift deed dated 4.8.2001 by playing fraud upon plaintiff nos. 1 and 3 and accordingly, learned court below decreed the suit passing the impugned judgment and decree which is under challenge before this court.

8. Learned counsel appearing for the appellants assailed the impugned judgment and decree arguing that learned court below failed to appreciate evidences available on record in its right perspective. He, further, submitted that plaintiff no. 1 was examined before the court below as PW 2 and in her cross-examination, she accepted this fact that her examination-in-chief filed on affidavit was prepared by her learned counsel and she was not aware what has been stated in the aforesaid affidavit. She also stated that she does not know as to why the suit was filed. Similarly, PW 2 failed to disclose about pre-deceased daughter of Ramlal Pandey. She also expressed her inability to say about nature of the present



suit. He, further, submitted that plaintiff no.3, namely, Urmila Devi could not dare to come before the court in support of her case and due to her non-examination, defendants could not get an opportunity to cross-examine her. He, further, submitted that husband of Urmila Devi has been examined in this case as PW 4 but he, too, failed to prove the case of the plaintiffs and several contradictions have occurred in his deposition but even then learned court below decreed the suit.

9. Learned counsel appearing for the appellants further submitted that execution of gift deed dated 4.8.2001 is an admitted fact and witnesses examined on behalf of the defendants, specifically, stated that defendants came in possession of the suit property after execution of gift deed but the plaintiffs had not sought any relief for recovery of possession and, therefore, suit of the plaintiffs was hit by section 34 of the Specific Relief Act. He, further, submitted that learned court below failed to take note of the aforesaid fact and came to wrong conclusion. He, further, submitted that it was incumbent duty of the plaintiffs to prove their case but learned court below wrongly shifted the burden of proof



upon the defendants. He, further, submitted that after execution of gift in question, the defendants got mutated their name and they are paying rent which is proved by exhibit B series.

In support of his contentions, he referred decision rendered by Hon'ble Supreme Court in the case of **Mehar Chand Ds vs. Lal Babu Siddique & ors reported in AIR 2007 SC 1499** wherein at para 12 it has been held by the Apex Court that a suit for mere declaration is not maintainable, if the plaintiff of that suit is not in possession of the suit property. He also relied upon the judgment rendered by Hon'ble Supreme Court of this country in the case of **T.K. Mohammed Abubucker (D) L.Rs. & ors vs. P.S.M. Ahamed Abdul Khader & ors reported in AIR 2009 SC 2966** wherein at para 14, it has been held by the Apex Court that the plaintiff in a suit for declaration of title and possession can succeed only by making out his title and entitlement to possession and not on any alleged weakness in the title or possession of the defendants. He also relied upon judgment of **Bachchan Singh vs. Sub-divisional officer & others reported in 1978 BLT 57** wherein it has been



held by Division bench of this court that mutation proves possession of the concerned party.

10. On the basis of the aforesaid submissions, learned counsel for appellants prayed for setting aside the impugned judgment and decree.

11. On contrary, learned counsel for respondents refuted the above stated submissions arguing that learned court below rightly put burden of proof upon the defendants and the defendants failed to prove this fact that no fraud was played upon plaintiff nos. 1 and 3 at the time of execution of gift deed dated 4.8.2001 and they also failed to prove that plaintiff no. 1 executed gift deed in question by her own free will having understood the contents of gift deed. He, further, submitted that defendants also failed to prove this fact that contents of gift deed in question were read over to plaintiff nos. 1 and 3 and having understood the contents of gift deed, plaintiff nos. 1 and 3 put their thumb impressions on the gift deed. He, further, submitted that admittedly, plaintiff nos. 1 is an old lady and at the time of execution of gift deed, she was more than 70 years old. He, further, submitted that it is admitted position that both plaintiff



nos. 1 and 3 are illiterate ladies and the defendants being their agnates were in dominate possession. He, further, submitted that after death of husband of plaintiff no.1, plaintiff no.1 as well as plaintiff no.3 were being looked after by the defendants and having taken advantage of the aforesaid situation, they fraudulently got executed gift deed in question. He, further, submitted that learned court below relied upon several circumstances to base his findings and the aforesaid circumstances clearly go to show that fraud was played upon plaintiff nos. 1 and 3.

12. Learned counsel for the defendants cited judgment of **Krishna Mohan Kul @ Nani Charan Kul and another vs. Pratima Maity and others reported in AIR 2003 SC 4351** wherein it has been held by Apex Court of this country that when fraud, misrepresentation or undue influence is alleged by a party in a suit normally, the burden is on him to prove such fraud, undue influence or misrepresentation but when a person is in a fiduciary relationship with another and the latter is in a position of active confidence, the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position and he has to



prove that there was fair play in the transaction and that the apparent is the real in other words, that the transaction is genuine and bona fide. He, further, submitted that the Hon'ble Supreme Court as well as High Court have evolved guidelines for pardanashin ladies because in India, pardanashin ladies are given a special protection in view of the social conditions of the times. He, further, submitted that similar is the case of illiterate ladies because there is no much difference between illiterate ladies and pardanashin ladies. He, further, submitted that admittedly, both plaintiff nos. 1 and 3 are illiterate ladies and, therefore, they were entitled to get similar protection as pardanashin ladies. In support of his contention, he referred decision of **Mst. Kharbuja Kuer vs. Jangbahadur Rai and others reported in AIR 1963 SC 1203.**

13. Having heard contentions of both parties, I have gone through the record along with lower court record.

14. In the present case, actual dispute between the parties is as to whether gift deed dated 4.8.2001 is a genuine document or not and as to whether the aforesaid



document was got executed by playing fraud upon plaintiff nos. 1 and 3 or not? Furthermore, it is also an important question for decision of the case as to whether plaintiff no. 2 is daughter of Ramlal Pandey or not?

15. Certain facts are admitted in the present case. It is admitted position that Hanuman Pandey had four sons and defendant nos. 1 and 2 are sons of Bajrangi Pandey who happens to be son of Hanuman Pandey. Similarly, defendant no.3 is son of Rajendra Pandey who happens to be another son of Hanuman Pandey. It is also admitted position that Ramlal Pandey is son of Hanuman Pandey whereas plaintiff no.3 is daughter of Ramlal Pandey. Status of plaintiff no. 2 as daughter of Ramlal Pandey has been denied by defendants as they have claimed that deceased Ramlal Pandey had only one wife, namely, Shanti Devi, plaintiff no. 1. Plaintiff no. 2 has been examined in this case as PW 2 and she has claimed that she is daughter from the first wife of Ramlal Pandey. Although she has been cross-examined by the defendants but they could not dare to put a direct question to her denying her relation with Ramlal Pandey rather they have only stated to her that Shanti Devi had only one daughter



namely, Urmila Devi. Therefore, it appears that her statement in respect of her relation with deceased Ramlal Pandey remains uncontroverted.

16. Defendant no.2, namely, Vishwanath Pandey was examined before the court below as DW1 and at para 45 of his deposition, he admitted that Ramlal Pandey died on 13.6.2001 and admittedly, gift deed in question was executed on 4.8.2001 i.e. within less than two months of death of deceased Ramlal Pandey. It is admitted position that plaintiff no.1 had no male issue and at the time of death of her husband, she was aged about more than 70 years because in her deposition, plaintiff no. 1 disclosed her age as 80 years and the court below, too, assessed her age as 80 years. Therefore, it is obvious that she was an old lady at the time of execution of alleged gift deed dated 4.8.2001. The alleged gift contains thumb impression of plaintiff no.1 and it is also admitted by witnesses of the defendants that she is an illiterate lady and, therefore, it is obvious from the aforesaid fact that plaintiff no.1 is an old illiterate lady. Similarly, it is also admitted position that plaintiff no.3 is illiterate lady as she has also put her thumb impression on the alleged deed



of gift. Therefore, it is obvious from the aforesaid discussions that the aforesaid ladies are illiterate ladies.

17. It is also admitted position that the defendants are agnates of plaintiff nos. 1 and 3 and after death of husband of plaintiff no.1, plaintiff nos. 1 and 3 were in protection of defendant no.2 as admitted by the defendants' witnesses. Defendant witness no.2 at para 21 of his cross-examination admitted that whenever plaintiff no.1 asked to withdraw her pension, he used to withdraw her pension on her behalf. Therefore, the aforesaid fact also goes to show that plaintiff no.1 was not even able to withdraw pension by her own.

18. Section 111 of the Evidence Act says that where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith on the transaction is on the party who is in a position of active confidence.

19. In the present case, it is obvious from the materials available on record that defendants were in dominant position and plaintiff nos. 1 and 3 had faith upon them. Therefore, in view of section 111 of the



Evidence Act, it was burden of the defendants to prove that transaction of gift deed dated 4.8.2001 was genuine.

20. It is also an admitted position that Ramlal Pandey died on 13.6.2001. Family pension paper of appellant no.1 has been brought on record as exhibit C which goes to show that pension paper of appellant no.1 was prepared on 10.8.2001 i.e. after execution of the gift deed dated 4.8.2001 and it is specific case of the plaintiffs that defendants took plaintiff nos. 1 and 3 to Ara on pretext to get paper of family pension prepared. Apart from this defendant no.2 stated in his deposition that defendant no.3 had relinquished her share by executing deed but the aforesaid deed has not been brought on record. The above stated facts clearly go to prove that till the execution of the gift deed dated 4.8.2001, appellant no.1 was not getting family pension. Therefore, this possibility can not be ruled out that plaintiff nos. 1 and 3 were taken to Ara and their thumb impressions were taken on the deed in question on pretext to get the papers of family pension prepared. Moreover, the original gift deed goes to show that the stamp paper was purchased on 28.7.2001 in the name of Mahendra Pandey, but no



explanation as to why the stamp paper was purchased one week before the actual date of execution of the deed.

21. Recently, in the case of **Pratima Choudhury vs Kalpana Mukerjee and another reported in(2014) SCC 196**, the Hon'ble Supreme Court has held that when parties are in fiduciary relationship, burden of proving, genuiness of transaction is on party who held the dominating position. In the present case the plaintiffs have proved that they are illiterate ladies and the defendants being their agnates were in dominating position, particularly, after the death of husband of plaintiff no.1. Therefore, in my view, the learned court below rightly shifted the burden of proving the genuiness of the gift deed upon the defendants.

22. No doubt, defendants tried to prove execution of gift deed dated 4.8.2001 by examining witnesses of the aforesaid gift deed but mere proving execution of gift deed is not sufficient because execution of gift deed dated 4.8.2001 is not in dispute rather it was burden of the defendants to prove that the aforesaid gift deed had been executed by plaintiff no.1 by her own sweet will having understood the contents of gift deed



dated 4.8.2001. Here, I would like to mention that according to defendants' case scribe of the aforesaid gift deed was one Jagnarain Singh. The defendants' witnesses have, specifically, stated that the contents of gift deed in question was read over to plaintiff nos. 1 and 3 by the aforesaid scribe Jagnarain Singh but the aforesaid Jagnarain Singh has not been examined in this case. The aforesaid Jagnarain Singh was a competent witness to say as to whether contents of gift deed had been read over to plaintiff nos. 1 and 3 or not and, therefore, non-examination of scribe Jagnarain Singh will go against the case of the defendants.

23. No doubt, it is well settled principle of law that if in a suit, plaintiff is not in possession, then, in that circumstance, mere declatory relief is not sufficient. However, in the present case, fact is quite different because in the present case, admittedly, defendants were cultivating lands covered by gift deed in question on behalf of the plaintiffs after death of Ramlal Pandey and it is specific case of plaintiffs that no gift deed had been executed and possession of the disputed lands had never been given to defendants. Therefore, in my view, the suit



of the plaintiffs is not hit by section 34 of the Specific Relief Act. It is settled principle of law that mutation does not confer any right and title. Therefore, even the order of mutation has been passed in favour of defendants, then also, it does not make any difference.

24. Therefore, on the basis of the aforesaid discussions, I do not find any ground to interfere into the impugned judgment and decree and accordingly, this appeal stands dismissed and the impugned judgment and decree is, hereby, confirmed.

Shahid

(Hemant Kumar Srivastava, J)

AFR	
CAV DATE	NA
Uploading Date	23.12.2017
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