IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.233 of 2015

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1. Bibi Nasima Khatoon @ Nasima Khatoon wife of Raish Mian, resident of Mohalla Dargah, Post office Police Station Bettiah town, District- West Champaran the address given by the plaintiff Mohalla Noniar, Ward No.4 Post Office/Police Station Bettiah Town, District West Champaran.
2. Bibi Hasina Khatoon @ Hasina Khatoon wife of Md. Tahir resident of Mohalla Dargah, Post Office, Police Station Bettiah Town District West Champaran the address given by plaintiff Mohalla Baswaria Dhunia Patti, Post Office/Police Station Bettiah Town District West Champaran.

.... Appellants

Versus

Md. Rasid, son of Late Md. Basir @ Nathu Mian, Resident of Mohalla Dargah, Post/Police Station Bettiah Town, District- West Champaran.

.... Respondent

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Appearance :

For the Appellant/s : Mr. Shiv Kumar Dwivedy

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 01-03-2017

Heard Mr. Shiv Kr. Dwivedy, learned counsel appearing on behalf of the appellants.

The defendants are the appellants in this appeal filed against the judgment and decree of affirmance granting the decree in favour of the plaintiff for declaration of title over the schedule-I property and recovery of possession over the Schedule-II property described in the plaint.

The plaintiff filed the suit for declaration of title and recovery of possession over the suit property described in schedule- I and II of the plaint respectively.

From the matrix of facts as appearing in the judgments of both the Courts below as well as the submissions put forth on behalf of the appellants, it is admitted fact that the suit property originally belonged to one Md. Basir who was the father of the plaintiff as well as defendants. It is also admitted position that a deed of gift has been executed by Md. Basir in favour of the plaintiff on 12.02.1986 with regard to the suit property in question. The plaintiff has based his claim of title and possession on the basis of that gift deed. However, there is another deed which is said to be a registered deed of rectification dated 18.07.1986 executed by Md. Basir in favour of his wife, daughters and the son for the suit property. In this rectification deed, Md. Basir had averred that the previous deed of gift dated 12.02.1986 had been obtained by the plaintiff Md. Rasid for the suit premises in his favour by playing fraud upon Md. Basir. The defendants denied the assertions of the plaintiff and resisted the relief as prayed for in the suit. It was the case of the defendants that a fraud was played by the plaintiff Md. Rasid upon his father Md. Basir in getting the aforesaid gift deed and in fact after the execution of the rectification deed, the parties were in possession over the suit premises according to their shares.

Both the Courts below have concurrently decided the issues in favour of the plaintiff and against the defendants.

Mr. Dwivedi, learned counsel for the appellant has emphatically submitted by referring to *Section 150 of Mulla's Principles of Mahomedan Law* that the delivery of possession is an essential ingredient for completion of title on the basis of gift among Mahomedans. Elaborating the submissions, it has been contended that the plaintiff has not been in exclusive possession over the suit property, subject matter of the gift deed dated 12.02.1986 (Ext.2) and therefore, the relief as sought for by the plaintiff on the basis of the said gift deed cannot be legally granted. It has been convassed that the intention of Md. Basir is also clear from the subsequent deed of rectification dated 18.07.1986 executed by him in this regard on the basis of which the persons named in said deed are in respective possession over the suit property. It has however been not denied by learned counsel for appellants that the donor Md. Basir had not filed any suit for cancellation of the gift deed dated 12.02.1986 and the defendant-appellants had also not filed a suit seeking appropriate relief against the said gift deed. The main thrust of the submission on behalf of appellants is on the basis that the delivery of possession on the basis of gift as envisaged in *Mulla's Principles of Mahomedan Law* has not taken place over the suit property.

After considering the submissions and the findings of both the Courts below, it is manifest that the execution of the gift deed on 12.02.1986 and the rectification deed on 18.07.1986 by the donor Md. Basir is an admitted fact. The further crucial fact that the said gift deed was obtained by playing fraud has also been incorporated in the subsequent rectification deed by Md. Basir. However, in view of the provisions as envisaged under *Section 26 of the Specific Relief Act*, such rectification deed has no legal relevance in absence of a suit by Md. Basir in view of the allegation of fraud against the donee. The defendants who are claiming exclusive title over their respective shares in the suit property and resisting recovery of possession as made by the plaintiff were also required to assail the said gift deed in view of the provisions of Section 31 of the Specific Relief Act. So far as possession part is concerned, the case of the defendants is that the plaintiff has been in possession over the suit property but only with regard to part of the same but it is well settled by now that in such a case, the possession of a donee over the gifted property must not be actual and may be constructive. The Courts below have considered the oral and documentary evidence in this regard as well the contentions put forth by the defendants- appellants and thereafter, have come to the conclusion that the claim of the plaintiff on the basis of the gift deed which is still subsisting cannot be denied only on the basis of the fact that the plaintiff is in possession of only the part of the suit premises. The findings have been recorded by both the Courts on the basis of evidence which were acceptable and could have been relied upon. This court has not been persuaded to find any perversity or unreasonableness in the conclusions of both the Courts below.

In the ultimate eventuate, this Court does not find any susbstantial question of law arising in this appeal for consideration.

Accordingly, this Second Appeal stands dismissed.

(V. Nath, J.)

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