

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:
NAGPUR BENCH : NAGPUR
Second Appeal No.231 of 2017
[Panchsheel Shikshan Prasaran Mandal, Amravati & others Vs.
Vishwanath Narayan Panchwate]

Office Notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's orders

Mr. R. N. Ghuge, Adv., for the appellants.

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CORAM : A. S. CHANDURKAR, J.

DATE : 15th September, 2017

This appeal has been filed by the original defendants who are aggrieved by the judgment of the first appellate Court by which the decree passed by the trial Court declaring the Gift-Deed dated 13th March 2007 to be void ab initio has been passed.

It is the case of the respondent-original plaintiff that he is the owner of land admeasuring 0.98 Are situated at Amravati. The defendant no.2 by posing himself as Secretary of the defendant no.1-Society got executed a document purporting to be the Gift-Deed of the aforesaid suit property in favour of the Society. Hence, a suit was filed seeking a declaration that this Gift-Deed dated 13th March, 2007 was void ab initio. According to the defendants, said Gift-Deed was validly executed and possession was also handed over to the Society. It was denied that the Gift-Deed was executed

through undue influence and coercion.

The trial Court held that the Gift-Deed had been got executed under coercion and undue influence. On that basis, the suit came to be decreed. The appellate Court after considering the evidence of the attesting witness confirmed said decree.

Shri R. N. Ghuge, learned counsel for the appellants, submitted that the trial Court committed an error while framing the issues and while considering the question as to whether the Will was executed by exercising undue influence and coercion. Relying upon the judgment of the Honourable Supreme Court in **Subhas Chandra Das Mushib Vs. Ganga Prosad Das Mushib & others** [AIR 1967 SC 878], it was submitted that there was no evidence on record to indicate that the defendant no.2 was in a dominating position so as to influence the plaintiff in executing the Gift-Deed. It was then submitted that possession of the suit property even if was retained by the plaintiff, that would not militate against the case of the defendants. It was not necessary that possession had to be delivered along with execution of the Gift-Deed. For said purpose, he placed reliance on the judgment of Honourable Supreme Court in **Renikuntla Rajamma (D) by LRs. Vs. K. Sarwanamma** [AIR 2014 SC 2906].

I have perused the impugned judgments.

As per the provisions of Section 123 of the Transfer of Property Act 1882, the transfer by way of gift has to be effected by a registered document and must be attested by at least two witnesses. The manner in which attestation has to be done is stated in Section 63 (c) of the Indian Succession Act. If the evidence of DW 2 – Suresh Khatri at Exh.77 is perused, the same indicates that he has merely stated that the plaintiff executed a Gift-Deed on 13th March, 2007 and handed over possession of the suit property. In his cross-examination, he stated that he was not aware whether the plaintiff could not read and write.

From the aforesaid deposition, it is clear that this witness has not deposed about attestation of the said Will when it was executed by the plaintiff. He could, therefore, not be said to be a witness to attestation. The requirements of Section 123 of the Transfer of Property Act are, therefore, not complied with. The appellate Court in para 13 of its judgment has rightly observed that said witness did not depose that the plaintiff had put his thumb impression on the Gift-Deed in his presence.

Considering this evidence, it is clear that execution of the Gift-Deed has not been duly proved.

There can be no dispute with the law laid down

by the Honourable Supreme Court in *Subhas Chandra Das Munshib* [supra]. However, on the basis of the evidence in the case in hand, the execution of the Gift-Deed itself has not been proved. Hence, it is not necessary to go into the further question as to whether it was got executed by exercising undue influence. Similarly, in view of the admission of the defendants' witnesses that the plaintiff was in possession, the decision in *Renikuntla Rajamma (D) by LRs* [supra] cannot apply to the facts of the present case.

I, therefore, find that both the Courts rightly held in favour of the plaintiff when it was held that the Gift-Deed was not duly proved. Hence, no substantial question of law arises. Second Appeal is dismissed. No costs.

Pending applications are also dismissed.

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Judge