

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

1. RSA No.4188 of 2008 (O&M)
Date of decision : 18.09.2018

Ajay Kumar ...Appellant

Versus

Rishalo Devi and others ...Respondents

2. RSA No.11 of 2010 (O&M)
Date of decision : 18.09.2018

Ajay Kumar ...Appellant

Versus

Hawa Singh and others ...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Shailendra Jain, Sr. Advocate with
Mr. Vikrant Rana, Advocate for the appellant.

Mr. Akshay Kumar Goel, Advocate for the respondents.

ANIL KSHETARPAL, J. (ORAL)

This judgment shall dispose of two appeals bearing RSA No.11 of 2010 and RSA No.4188 of 2008. In fact, RSA No.11 of 2010 has been listed for hearing after Hon'ble the Supreme Court remanded the case vide order dated 01.08.2014. The operative part of the order reads as under:-

“In our considered opinion, the findings of the trial Court, which we have noted above disclose that issue no.3 was held in favour of the appellant and in the said circumstances, there was a substantial question of law required to be examined by the High Court in the second appeal as raised before it at the instance of the appellant.

Therefore, while setting aside the judgment impugned in this appeal, we remit the matter back to the High Court for framing appropriate substantial questions of law and decide the second appeal on merits. We hasten to add that we have not stated anything on merits of the issues raised in the Second Appeal and the High Court may decide the Second Appeal on its own.

In view of the above, the appeal stands allowed.”

Although, as per the Hon'ble subsequent Constitution Bench of the Supreme Court in the case of *Pankajakshi (Dead) through LRs. Vs. Chandrika and others, 2016(6) SCC 157*, framing of the question of law is not necessary for disposal of the second appeal as in this High Court, second appeals are governed by Section 41 of the Punjab Courts Act, however, this Court would attempt to answer question No.(iv) on which the Hon'ble Supreme Court has remanded the matter back.

First of all, some facts would be required to be noticed.

Jeewan was common ancestor of all the parties to this litigation. He had two sons namely Cheta and Mamraj. Smt. Mankauri (plaintiff in Civil Suit No.442 of 1992) is widow of grandson of Mamraj whereas defendants are great grandsons of Cheta. Smt. Mankauri, the plaintiff executed three registered gift deeds on 23.01.1980 vide gift deeds Nos.1836, 1837 and 1838 donating/gifting her entire property in favour of the defendants who are great grandsons of Cheta. The entry of the gift deeds was made in the revenue record by entering and sanctioning the mutation Nos.583, 584 and 585.

The plaintiff-Smt. Mankauri filed a suit for declaration on

20.07.1992 challenging the gift deeds on the ground that such gift deeds got executed by fraud.

On the other hand, defendants contested the suit. It may be significant to note at this stage that Smt. Mankauri is alleged to have adopted the son of Kuldeep Singh who was great-grandson of Mamraj in the year 1992. A registered Adoption Deed was executed by her on 26.05.1992. The suit was filed by Smt. Mankauri through Sh. Kuldeep, whose son Ajay was adopted by her.

Learned trial Court after appreciating the evidence held that the execution of the gift deeds is proved and the plaintiff-Smt. Mankauri has miserably failed to lead any evidence to prove that the gift deeds were result of fraud. The relevant findings of the trial Court in this regard, are as under:-

“11. The onus to prove issues No.2 and 3 was on the defendants. Defendants while examining scribe DW1 Karam Chand have got proved gift deeds Ex.D1 to Ex.D3 and Will Ex.D4. They have also examined Mula Ram DW3 one of the attesting witness to these documents. It has been pleaded that Will No.114 dated 23.1.1980 has been cancelled by Mankauri, through registered documents of 15.6.1992 but no positive evidence by producing and proving documents in this regard has been adduced by the plaintiff. The execution of impugned gift deeds No.1836 to 1838 dated 23.1.1980 has been duly proved by the defendants. The main grounds to challenge these was fraud and misrepresentation but plaintiff has miserably failed to show that any fraud and misrepresentation was practised while executing these documents because admittedly when these documents were executed then she was accompanied by her brother Dhanna Ram. Moreover in the plaint it has been stated that she

remained in Dadri for three days for execution of these documents, however, DW1 Karam Chand has stated that in this regard Mankauri and others visited him only once and this falsifies the version of the plaintiff.”

However, learned trial Court held that since the value of the property has been mentioned, therefore, such gift deeds were sale transactions and hence, cannot be sustained.

However, the suit filed by Smt. Mankauri was dismissed. It may be noticed that Smt. Mankauri had died during pendency of the suit and Ajay Kumar adopted son was impleaded as legal heir.

Learned trial Court however, while dismissing the suit held that since on the day, the gift deeds were executed, a registered Will was also executed by Smt. Mankauri in favour of the defendants, therefore, the defendants became owner on the date of execution of the Will and on the basis of the Will.

It may be noted that the defendants in the first suit also filed a separate suit for declaration challenging the Adoption Deed dated 26.05.1992 and registered Will executed by Smt. Mankauri in favour of Ajay Kumar, her adopted son on 22.06.1992. In the first suit filed by the defendants (the plaintiffs in Civil Suit No.200 of 1995) succeeded and the learned Court in separate suit held that the registered Adoption Deed dated 26.05.1992 and registered Will dated 22.06.1992 are not valid documents and, therefore, not binding on the plaintiffs (defendants in the previous suit).

By that time, the appeal in the first suit came up for hearing. Even the appeal filed in the second suit had been decided on 12.08.2008.

In the first suit, the First Appellate Court reversed the finding of the learned trial Court while upholding that no fraud in execution and registration of the gift deeds have been proved, but reversed the finding of the trial Court that gift is invalid on account of the fact that there was a sale consideration mentioned. Thus, the suit filed by Smt. Mankauri stood dismissed. That is how these two appeals were preferred. As noticed, one of the appeal i.e. RSA No.11 of 2010 came up for final hearing and this Court dismissed the appeal. However, Hon'ble the Supreme Court vide order dated 01.08.2014 remanded the case back to this Court.

Learned counsel for the appellant has proposed the following substantial questions of law:-

- “(i) *Whether a person is divested of her/his ownership rights in the property, the moment a Will is executed by her/him or the Will takes the effect only after the death of the testator?*
- (ii) *Whether a person, who claims himself to be an owner on the basis of gift deeds/Will, can claim to have become owner of the suit property by way of adverse possession and/or the said plea is destructive to each other?*
- (iii) *Once the defendants have claimed their ownership by way of adverse possession, whether by necessary implication, it is an admission of the ownership of the plaintiff and whether the finding, as recorded by the learned trial Court, which has been affirmed by the lower appellate court, can legally be sustained when neither there is any plea nor any proof regarding the ingredients of plea of adverse possession?*
- (iv) *Once the gift deeds have not been proved to have been validly executed and mutations sanctioned on that basis*

have been set aside, whether the appellant, who is the owners of the suit property, is entitled to a decree for possession?

- (v) *Whether the judgment of the lower appellate court is perverse and under the facts and circumstances of the present case, is not legally sustainable?"*

This Court has heard the learned counsel for the parties at length and with their able assistance gone through the judgments passed by both the Courts below and the record.

The gift is defined in Section 122 of the Transfer of Property Act, 1882 (hereinafter to be referred as "the Act of 1882") whereas manner in which the gift is to be effected has been provided in Section 123 of the Act of 1882. Both provisions of the Act of 1882 are extracted as under:-

"122. "Gift" defined- *"Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.*

Acceptance when to be made-*Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.*

If the donee dies before acceptance, the gift is void.

123. Transfer how effected- *For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.*

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold

may be delivered.”

Learned Senior Counsel appearing for the appellant in both the appeals has submitted that the execution of the gift deeds and registered Will on the same day i.e. on 23.01.1980 in favour of defendants in the first suit is contradictory and, therefore, liable to be set aside. He further submitted that the gift deeds were result of fraud. He further submitted that the gift is not complete as there is no evidence that it has been accepted by or on behalf of donee. He further submitted that natural heir, even in absence of adoption, has been ignored as Kuldeep Singh or Ajay were comparatively closely related than the defendants. He further submitted that Smt. Mankauri was a poor and gullible widow and, therefore, the defendants exercised their undue influence and converted the blank thumb mark papers into registered gift deeds and registered Will. While arguing RSA No.4188 of 2008, he has submitted that a registered Adoption Deed could not be set aside and the appeal i.e. RSA No.4188 of 2008 involves following substantial question of law:-

“(ii) Admittedly, the Adoption Deed which is on record as Ex.P11 is a registered Adoption Deed in view of Section 16 of the Hindu Adoption and Maintenance Act, whether there is a presumption that adoption has been made in compliance with the provisions of the Act”

On the other hand, learned counsel for the respondents has submitted that once there is a concurrent findings to the effect that plaintiff-Smt. Mankauri failed to prove that gift deeds dated 23.01.1980 were result of fraud, she did not remain owner and, therefore, she could not pass on the property in favour of her alleged adopted son Ajay. He further submitted

that ceremonies of adoption has not been proved and the adoption was only with a view to grab the property of Smt. Mankauri.

This Court has gone through the registered gift deeds from the record with the help of the learned counsel for the parties. It is apparent that only for the purpose of determining the stamp duty payable, value of the property has been mentioned otherwise it is a gift deeds executed by Smt. Mankauri in favour of defendants in the first suit. Hence, the only ground on which the trial Court had set aside the gift deeds is against the record.

First contention of the learned counsel that the execution of the gift deeds and registered Will on the same date amounts to contradiction is just to be noticed and rejected. Through the gift deeds, the property was immediately transferred, however, for backup, the Will was also executed and registered, that itself shows that Smt. Mankauri wanted to give the property in favour of the defendants. Hence, there is no contradiction.

As regards the arguments that the gift being based on fraud, both the Courts have found that the plaintiff has failed to lead any evidence. Fraud is to be proved beyond reasonable doubt. In the present case, the evidence led by the plaintiff does not prove any fraud.

As regards the gift being incomplete, it may be noticed that no particular form of acceptance of the gift has been prescribed. The gift is through three registered documents in the present case. On the basis of the aforesaid gift, property has been mutated in favour of the defendants. The defendants have never taken a stand that the gift is not acceptable. In these circumstances, the acceptance of the gift can be inferred from all these facts.

The gift was executed in the year 1980 and immediately on the execution of

the gift deeds, the property was transferred in the revenue record in favour of the defendants and till date, the defendants have never impliedly or expressly stated that they do not accept the gift.

Next argument of the learned Senior Counsel that Smt. Mankauri gifted the property to distant relatives rather than to the close relative, is also without any substance. The gift is an instrument through which donor transfers the property in favour of donee. It is not necessary that donor and donee must be closely related. It depends upon the wish of the donor.

Next argument of the learned counsel that Smt. Mankauri was poor and gullibly widow and, therefore, the defendants exercised their undue influence, also does not have any substance because no evidence to that effect has been led. Late Sh. Ramji Lal, her husband died in the year 1972. She survived in the world all alone for 8 years. It has further come in evidence that when the gift deeds were executed, her brother was accompanying him.

Now let us answer the questions of law proposed by the learned counsel for the appellant.

In response to the first question, it is well settled that the Testament/Will only operates after the death of the Testator or Executant. There cannot be any doubt about the same.

With regard to question Nos.2 and 3, it may be noted that the defendants are entitled to take alternative plea in the written statement, however, such plea cannot be treated as destructive to each other. In the present case, the defendants defended the suit by taking a plea that the gift

deeds have been executed. However, in the alternative, they further took a plea of having perfected title by way of adverse possession. Hence, on account of their plea of having become owner by way of adverse possession, first defence taken on the basis of gift deeds does not get adversely affected.

As regards question No.4, it may be noted that both the Courts have held that the gift deeds have been validly executed and proved before the Court. Learned trial Court as well as First Appellate Court have noticed that the Scribe as well as the attesting witness of the gift deeds, has been examined to prove the due execution of the gift deeds. The mutations neither confer any title nor give rise to any cause of action. The mutations are sanctioned only for fiscal purposes and for updating the record. The document of title is a deed of gift which has been proved on file.

Question No.5 is a question of fact and the learned counsel for the appellant could not establish or point out any perversity in the judgments passed by both the Courts below.

In the second appeal, the questions of law which was framed while admitting the appeal, have been extracted above. It is apparent from the reading of Section 16 of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter to be referred as “the Act of 1956”) that the registered Adoption Deed has a presumption that the adoption has been made in accordance with the provisions of the Act. Smt. Mankauri when filed the first suit, challenged the gift deeds, admitted the execution of the adoption deed and as also adoption of Ajay. Still further, natural mother and father of Ajay have appeared in evidence and they deposed about the valid adoption. DW2 Daya Nand, Deed Writer has also been examined who has deposed

that the Adoption Deed was written by him on the instructions given by Late Smt. Mankauri. Other two witnesses have been examined who have also stated that the adoption had taken place. Hence, the reasons given by the learned Courts below discarding the valid adoption on the ground that the condition of Section 11 of the Act of 1956, have not been complied with or the ceremony of adoption has not been proved, are not valid. The First Appellate Court has wrongly held that since it is not proved that on the death of Smt. Mankauri, Ajay had performed her last rites, therefore, adoption is not proved, is also erroneous.

As per the Act of 1956, no particular form of adoption has been prescribed. The adoption can be done simply by putting a child in the lap of adopting parents by the natural parents. Learned First Appellate Court has not pointed out that which condition of Section 11 of the Act of 1956, is not fulfilled in the present case. Section 11 of the Act of 1956 reads as under:-

“11. Other conditions for a valid adoption- In every adoption, the following conditions must be complied with:-

(i) if any adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(iii) if the adoption is by a male and the person to be

adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;

(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

(v) the same child may not be adopted simultaneously by two or more persons;

(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption.

Provided that the performance of datta homan, shall not be essential to the validity of an adoption.”

In view of the aforesaid discussions, the questions of law framed in RSA No.4188 of 2008, are answered in favour of the appellant.

Hence, RSA No.11 of 2010, is dismissed whereas RSA No.4188 of 2008 is allowed.

All the miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

18.09.2018

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No