

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.218 of 2006

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Ramawati Devi, W/o Shiv Narayan Singh, resident of village-Samahuta, P.S.-
Mohania, at present resident of village-Gori, P.S.-Kargahar, Distt.-Rohtas.

... .. Plaintiff-Respondent-Appellant

Versus

1. Sant Prasad, son of late Sudama Rai, resident of village-Gori, P.S.
Kargahar, Distt.-Rohtas.

... .. Defendant-Appellant-Respondent

2. Ramesh Kumar Singh, S/o Jani Rai

3. Smt. Pramila Devi

4. Munna Singh

5. Pratap Bahadur Singh

6. Indu Devi

7. Rakesh Kumar Singh

All resident of village-Gori, P.S. Kargahar, Distt.-Rohtas.

..... Intervener-Respondents

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Appearance :

For the Appellant : Mr. S.S. Dwivedi, Senior Advocate

Mr. Rewti Kant Raman, Advocate

For the Respondent No.1: Mr. Bindhyachal Singh, Advocate

Mr. Parijat Saurav, Advocate

Mr. Vipin Kumar Singh, Advocate

Mr. Prashant Sinha, Advocate

For the Intervenors : Mr. Mahesh Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

C.A.V. JUDGMENT

Date : 01-08-2019

The plaintiff has put to challenge judgment and decree dated 25.09.2006 passed by the learned Presiding Officer, Additional Court (Fast Track Court) No. 1, Rohtas at Sasaram, in Title Appeal No. 54/14 of 1991/04, whereby he has reversed the judgment and decree dated 24.04.1992 passed by the learned 2nd Munsif, Sasaram, in Title Suit No. 82 of 1987. A declaration that a deed of gift executed by one Apnano Kuer in favour of the defendant-respondent in respect of Schedule 'A' property,



mentioned in the plaint was illegal, fraudulent and that the defendant did not acquire any title or possession over the disputed land on the said basis, which was not binding on the plaintiff, was sought in the plaint. The plaintiff accordingly sought for setting aside the deed of gift.

2. It was the plaintiffs' case that one Sitaram (since deceased) had two wives, namely, late Apnana Kuer and Most Tapesara Kuer. Sitaram died sometimes in December, 1984, leaving behind two widows and his daughter Ramawati (the appellant, born to Apnana Kuer). Apnana Kuer died of her natural death on 22.07.1987, whereafter the entire property of Late Sitaram was inherited by Tapesara Kuer, his second widow and his daughter Ramawati Devi. When the defendant was trying to put obstruction and attempting to cultivate the disputed land, upon enquiry, they learnt that the defendant had got executed a deed of gift in his favour by Apnana Kuer on 24.02.1987, whereafter the plaintiffs obtained a certified copy of the deed of gift on 28.07.1987. It was their further case that before execution of the deed of gift, a permission was obtained from the Consolidation Officer by practicing fraud and that the deed of gift was brought into existence by setting up another lady in place of Apnana Kuer. The plaintiff claimed that as a matter of fact, Apnana Kuer was completely paralyzed and not in a position to move and, therefore,

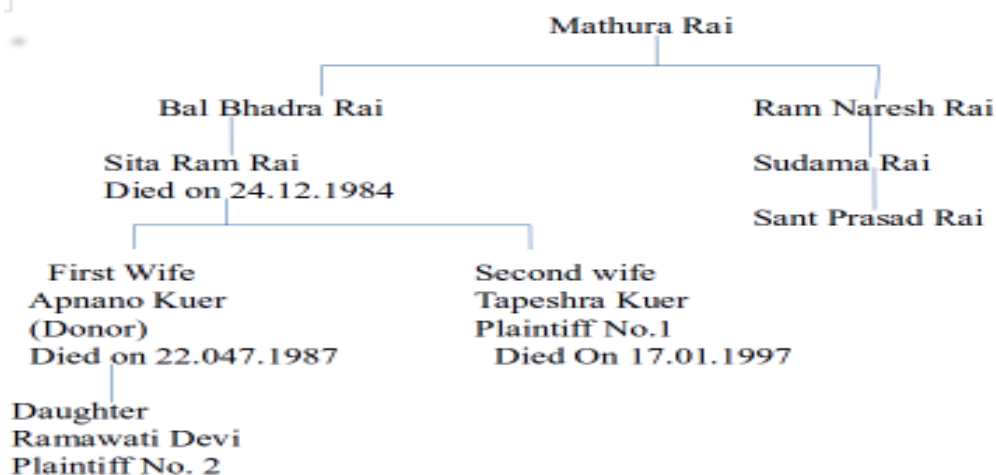


there was no possibility of her going to the registry office for registration of the deed in question.

3. It is to be noted that the suit was filed by Tapeshwara Kuer (Plaintiff No.1) and Ramawati Devi (Plaintiff No.2, the appellant herein).

4. The plaintiffs claimed that it was wrongly mentioned in the gift deed that the husband of the plaintiff No.1 and father of plaintiff No.2 had been living jointly with the defendant. Contents of the deed of gift regarding tendering of certificate to Apnana Kuer by the defendant was also denied. Further, the content in the deed of gift regarding execution of will by the husband of plaintiff No.1, too was denied.

5. The defendant appeared in the case and filed his written statement and denied the assertions in the plaint that Apnana Kuer was paralyzed. He asserted that the gift deed was duly executed in the presence of witnesses and was duly identified by them. The defendant furnished a genealogical table to establish his relationship with the donor as under : -



6. Based on rival pleadings, the trial Court framed following issues on 0.06.1989, as is evident from the lower Court record : -

“1. Is the suit as framed maintainable?

2. Have the plaintiffs got any valid cause of action for the suit?

3. Is the suit barred by principles of estoppel, waiver and acquiescence?

4. Is the suit barred by provisions of Section 34 of the Specific Relief Act?

5. Is the Court fee paid is sufficient?

6. Whether the deed of gift executed by Most. Apnana Kuer in favour of the defendants is illegal, void and fraudulent?

6. Whether the plaintiffs are entitled for the relief prayed for?

7. What other relief or reliefs are the plaintiffs entitled to?”

(Note : Two issues have been numbered as 6. There were, thus, eight issues framed).

7. The parties adduced their evidence in the light of their respective pleadings and with reference to the issues framed.

8. The trial Court decreed the suit in favour of the plaintiffs-appellant by the judgment and decree dated 24.04.1992 recording, his finding that the gift deed dated 24.02.1987 was fraudulently prepared and, therefore, an illegal document, based on which the defendant did not acquire any title or possession over the suit land. As has been noted hereinbelow, there were altogether eight issues framed by the trial Court on 08.06.1989, the trial Court, in his judgment referred to only four issues, i.e., Issue No. 1, 2, 6 and 7.



9. It is manifest from the judgment of the trial Court that it did not refer to one of the main issues, which was framed as issue No. 4, which read, “Is the suit barred by provisions of Section 34 of the Specific Relief Act?”. The defendant preferred appeal, giving rise to Title Appeal No.54/15 of 1992/2004. The appellate Court, by the impugned judgment and decree has reversed the findings of the trial Court and has held that the plaintiffs failed to prove the deed of gift as illegal and not executed by Apnano Kuer. The appellate Court further held that the defendant proved due execution of the registered deed of gift in his favour by Apnano Kuer and his possession over the disputed land. The appellate Court also examined the point whether without any relief for seeking possession over the dispute land, suit, as framed, was barred by Section 34 of the Specific Relief Act, 1963.

10. Aggrieved by the said judgment and decree of the First Appellate Court, dated 25.09.2006, this second appeal under Section 100 of the Code of Civil Procedure has been preferred. The case was admitted by an order dated 07.01.2009 after framing following three substantial questions of law :

“(i)Whether the learned court of appeal below while reversing the judgment and decree of the learned trial court, was justified in framing issues regarding possession and section 34 of the Specific Relief Act by itself, without giving any chance to the plaintiff to lead evidence on those issues and without even allowing the interlocutory application filed under Order XLI Rule 27 of the Code of Civil Procedure and without



even following the procedure of Order XLI Rule 25 of the Code of Civil Procedure?

(ii)Whether the judgment and decree of the learned court below is vitiated as it was based on documents not on record and even alien to the pleadings of the parties?

(iii)Whether the learned court of appeal below was justified in relying upon the deed of gift although two attesting witnesses did not support and the other side failed to prove it by any proper and legal evidence as the onus squarely upon them because the deed is said to have been executed by an old and illiterate lady?”

11. The questions of law were apparently framed before the records were called for, and on the basis of the submissions made on behalf of the appellant on perusal of the judgment of the trial Court and appellate Court. As has already been noticed above, the fact that there was an issue framed on the point of maintainability of the suit in the absence of any relief seeking possession and, therefore, the suit itself being barred by Section 34 of the Specific Relief Act, the same was not taken note of in the judgment of the trial Court and possibly this was the reason why this Court framed first substantial question of law as noted above. Since the said issue was already framed, first substantial question of law stands answered accordingly.

12. It is, therefore, incorrect to say that the plaintiffs did not have any chance to lead evidence on the said issue and there was any requirement of invoking the provisions under Rule 25 or Rule 27 of the Order 41 of the Code of Civil Procedure. The



judgment of the first appellate Court cannot be faulted with on the said ground.

13. It is to be noted that during the pendency of this appeal an interlocutory application, being I.A. No. 4950 of 2015 was filed seeking intervention by the purchasers from the plaintiff-appellant. The said application was allowed by an order dated 06.08.2015 and accordingly the purchasers have been impleaded as respondents No. 2 to 7.

14. I have heard Mr. Shashi Shekhar Dwivedi, learned Senior Counsel appearing on behalf of the appellant and Mr. Bindhyachal Singh, learned counsel appearing on behalf of the respondent No.1-defendant at length. Written notes of arguments have also been filed on their behalf, which also I have considered.

15. Mr. S. S Dwivedi, learned Senior Counsel has argued that while setting aside the decree of the trial Court, the appellate Court has committed a grave error of law in framing a new issue regarding the possession and Section 34 of the Specific Relief Act by himself without giving any chance to the plaintiffs to lead evidence on such issue or following Order 41 Rule 25 of the Code of Civil Procedure. He has submitted that the appellate Court, before recording his finding on application of Section 34 of the Specific Relief Act ought to have directed the trial Court to decide the issue on the point of possession, as contemplated under order 41 Rule 25 of the Code of Civil Procedure and ought to have



called for a finding on the point of possession by the trial Court. He has argued that the petition under order 41 Rule 27 of the Code of Civil Procedure filed by the defendant having never been allowed by the First Appellate Court and no chance of rebuttal having been given to the plaintiffs, the findings based on such documents, i.e., a deed of sale dated 14.06.1991 executed in favour of the witnesses Ashok Kumar Singh and the order dated 04.06.1992, by which permission filed by the plaintiffs has been rejected are illegal and unsustainable in view of law laid down by the Supreme Court in case of *Vijay Kumar Talwar vs. Commissioner of Income Tax, Delhi*, reported in (2011) 1 SCC 673. He has argued that there was no occasion for the plaintiffs to seek relief for possession since they were already in possession of the suit property and for that reason, the suit could not be said to be hit by Section 34 of the Specific Relief Act. He has argued that the findings recorded by the First Appellate Court, holding the gift deed to be valid is based on such document, which was not there on record. He has also argued that the defendant failed to prove due execution of the deed of gift as the two contesting witnesses did not support the same.

16. Mr. Dwivedi, learned Senior Counsel, has further contended that finding, in paragraph 22 of the judgment under appeal to the effect that the plaintiffs had knowledge about execution of the gift deed (Exhibit-F) when Apnano Kuer was



alive, is perverse and based on conjectures. It is his submission that the abrupt conclusion of the First Appellate Court to this effect was unwarranted in view of the Supreme Court's decision in case of *Brihanmumbai Mahanagar Palika v. Akruiti Nirman (P) Ltd.*, reported in (2008) 3 SCC 78. He has further argued that though the trial Court had given several reasons before he came to the finding that LTI of Apnana Kuer on the disputed gift deed was not clear, the First Appellate Court has just brushed aside the said reason without assigning stronger reasons to take a different view than what was taken by the trial Court.

17. Mr. Bindhyachal Singh, learned counsel appearing on behalf of the contesting respondent, on the other hand, has argued that the appellate Court below has rightly recorded his finding that the defendant was in possession of the suit land on the basis of uncontroverted evidence. According to him, since the trial Court had failed to record any finding on issue No. 4 regarding possession over the suit land and application of Section 34 of the Specific Relief Act, the appellate Court rightly, on appreciating the evidence, which was adduced at the trial, has recorded his independent finding on the point of respondent's possession over the suit land. He has relied on Section 123 of the Transfer of Property Act to submit that delivery of gifted immovable property to the donee is effected upon registration of the gift deed and thus as soon as the gift deed in question was registered on 24.02.1987,



transfer of ownership and possession over the suit land to the donee-defendant became complete. He has submitted that the defendant had specifically pleaded in his written statement that the suit land was in his possession ever since the execution of the impugned gift deed and, therefore, the suit was barred by Section 34 of the Specific Relief Act. He has referred to the evidence of the several witnesses particularly, PW 14, PW 4, DW 9, DW 11, DW 13, DW 15 and DW 19, to submit that evidence was led on the point of possession and, therefore, in the absence of any prayer for possession in the plaint, the suit has been rightly held to be barred by Section 34 of the Specific Relief Act, by the First Appellate Court. He has relied on following judgments of Supreme Court in support of his contention :-

1. *Ram Sharan and Another v. Smt. Ganga Devi*, reported in (1973) 2 SCC 60;

2. *Vinay Krishna v. Keshav Chandra and Another* reported in 1993 Supp (3) SCC 129; and

3. *Venkataraja and Others v. Vidyane Doureradjaperumal (Dead) through L.R. and Ors.*, reported in (2014) 14 SCC 502.

18. He has reiterated that it was a serious error on the part of the trial Court not to have decided Issue No. 4, which has been rightly corrected by the First Appellate Court.



19. Mr. Bindhyachal Singh has contended that the parties including the plaintiffs had adduced evidence before the trial Court on the point of their respective possession. Pleadings were already there on record stating their respective possession, which is why an issue in respect of non-maintainability of suit being hit by Section 34 of the Specific Relief Act was framed. It is to be noted that an argument was advanced on behalf of the appellant that the act of trial Court omitting to decide the issue No.4 regarding possession and Section 34 of the Specific Relief Act amounts to automatic striking off/deleting the said issue under Order 41 Rule 5 of the Code of Civil Procedure. In response to the said submission Mr. Singh has argued that such presumptive argument cannot be accepted in the absence of any specific order having been passed by the trial Court, striking off the said issue No.4 in exercise of power under Order 14 Rule 5 of the Code of Civil Procedure. He has argued that once the trial Court had framed the issues, the Court had a bounden duty to pronounce judgment on all such issues. Relying on decisions of this Court reported in the case of *Ram Vinod Roy v. Mostt. Ram Sumari Devi*, reported in 2004(2) PLJR 755 and in the case of *Md. Moid @ Abdul Moid and Ors. v. Maha Sundari Devi & Ors.*, reported in 2011(3) PLJR 221, Mr. Singh has contended that since parties had led evidence regarding possession over the suit land, the First



Appellate Court had rightly decided the issue under Order 41 Rule 24 of the Code of Civil Procedure.

20. Replying to the second substantial question of law framed by this Court, it has been argued that the same does not speak as to which specific document was not there on record, which has been considered by the First Appellate Court. This is to be noted that in course of submission, learned Senior Counsel, Mr. Dwivedi, appearing on behalf of the appellant, had referred to sale deed dated 14.06.1991, which has been taken note of in paragraph 14 and 22 of judgment of the First Appellate Court in respect of transfer of 17 decimals of land to PW 1, Ashok Kumar Singh, by the appellant so as to reach the conclusion that evidence of PW 1 was collusive. According to Mr. Dwivedi, the appellant did not have any chance of rebuttal against the sale deed dated 14.06.1991. It has been argued by Mr. Singh, however, that certified copy of the sale deed dated 14.06.1991 was brought on record by the defendant by way of an application under Order 41 Rule 27 of the Code of Civil Procedure dated 27.08.1994 and 11.07.2006. It has further been argued that the First Appellate Court vide order 11.08.2006 and 21.08.2006, after having recorded that the plaintiffs and respondent did not have any objection to taking the document by the First Appellate Court, had allowed the said application under Order 41 Rule 27 of the Code of Civil Procedure under sub-Rule (1)(b). It has been argued that the said



additional evidence has been taken on record with the assent of both the sides vide order dated 11.08.2006 and 21.08.2006 in the title appeal. He has relied on a Supreme Court's decision in case of **K. Venkataramiah v. A. Seetharama Reddy (AIR 1963 SC 1526)**, to contend that once additional evidence has been taken with assent of both the sides without any objection at the time when it was taken, it would not be open to a party to complain of it later.

21. Responding to the third substantial question of law, Mr. Singh has submitted that it is incorrect on the part of the appellant to contend that two attesting witnesses did not support the execution of the gift deed. He submits that only one attesting witness, PW 1, Ashok Kumar Singh, denied the execution of the gift deed for the apparent reason that he got transferred in his favour a piece of land through a sale deed executed by the plaintiff during the pendency of the suit. He has submitted that other attesting witnesses, DW 15, and the scribe, DW 18, have fully supported the execution and registration of the gift deed. Reliance has been placed on a Division Bench decision of this Court in case of **Mt. Manki Kaur v. Hansraj Singh, (AIR 1938 Pat 301)**, to submit that the defendant had succeeded in proving execution of gift deed by examining attesting witness DW 15. He has also submitted, referring to a decision of this Court in case of **Suresh Prasad Singh v. Nathuni Ansari**, reported in **2013(3) PLJR 341**,



that there is presumption of validity of registration of a document. He has also argued that a completely false case was developed by the plaintiffs about the ailment of the donor, Apnano Kuer, without any evidence produced at the trial at all. He has also argued that the plaintiff/appellant, Ramawati Devi, being the daughter of Apnano Kuer, would have been the best person to say about incapacity or otherwise of Apnano Kuer to execute the gift deed because of her ailment, who was not examined as witness and the appellate Court has, in such circumstance, rightly drawn an adverse inference.

22. On the evidence of PW 1, the handwriting expert of the plaintiff, he has contended that he was supplied a wrong thumb impression by the plaintiffs and in his cross-examination, he could not stand the test of cross-examination as he failed to prove that the photograph of thumb impression, which was provided to him, was of Apnano Kuer. It has also been argued that the said PW 11 had apparently not examined thumb impression/L.T.I. of Apnano Kuer, on the date of gift dated 20.01.1987.

23. I have perused the pleadings on record. I have also gone through the oral evidence of witnesses and other documentary evidence, which are there on record. Before I answer the substantial question of law framed by this Court in the background of the submission advanced on behalf of the parties certain basic facts, over which there cannot be any dispute need to



be taken note of, at this stage. The dispute between the parties revolves around execution of registered deed of gift by Apnano Kuer on 24.02.1987. Apnano Kuer was, admittedly, the aunt of defendant-respondent No.1. Plaintiff No.2/the appellant is daughter of Apnano Kuer, in respect of which also, there is no dispute. Appellant's father, Sitaram Rai, had died on 24.12.1984, leaving behind two widows, namely Apnano Kuer and Tapesara Kuer (plaintiff No.1) and his daughter Ramawati Devi, plaintiff No.2/ the appellant. Tapesara Kuer was, admittedly, thus, step mother of Ramawati Devi. The family belonged to village-Gori under Kargahar Police Station of Rohtas district. The appellant got married to Shiv Narayan Singh (PW 4) of village-Samahuta, under Mohania Police Station of Kaimur district. It has been the consistent case of the plaintiffs that Apnano Kuer, because she was suffering from paralysis, was unable to move for more than six months from before the date of her death, i.e. on 22.07.1987. With this consistent plea, it has been the stand of the plaintiffs that Apnano Kuer was physically incapacitated from moving to the Registry Office for registration of the gift deed. It has accordingly been the case of the plaintiffs that the gift deed was got registered by the defendant by producing another lady in the Registry Office, which is accordingly fraudulent, fabricated, illegal, ineffective and not binding of the plaintiffs.



24. According to the defendant, on the other had, the gift deed was duly executed in the presence of attesting witnesses, namely, Ashok Kumar Singh (PW 1) and Sureshan Rai (DW 15). DW 16 had identified the parties to the gift deed, which was supported by *Katib*, Kaneshwar Prasad Singh (DW 18). Except PW 1, Ashok Kumar Singh, the attesting witness, other witnesses have supported execution of gift deed. Ashok Kumar Singh (PW 1) has denied of having witnessed the execution of the gift deed. The First Appellate Court has not accepted the evidence of PW 1 and has termed his evidence as collusive. Upon appreciating the evidence of other witnesses to the execution of gift deed and the fact that PW 1 had, during the pendency of the trial, got a sale deed executed by the plaintiff in his favour, has refused to accept his evidence. On perusal of the evidence of PW 1, Ashok Kumar Singh, it can be easily seen that he admitted to have put his signature on a blank stamp paper. Witness, PW 3, is resident of the same village and PW 4 is the son-in-law of Apnano Kuer and husband of the plaintiff No.2/the appellant. PW 7, PW 8, PW 13 and PW 14 have deposed in their evidence that Apnano Kuer was suffering from paralysis. Apnano Kuer died in Varanasi, where she was taken for treatment, according to the deposition of plaintiff No.1 (PW 14), four days before her death. It is, however, to be noted that none of the witnesses disclosed in their evidence, date, month or year since when Apnano Kuer was suffering from



paralysis. None of the witnesses have deposed that Apnano Kuer was treated for paralyses ever. The plaintiffs, thus, apparently, failed to establish their case that Apnano Kuer was so physically incapable as to move to the Registry Office for execution of the gift deed.

25. I also notice from the lower Court records that evidence was led on the point of possession over the disputed land. This is easily noticeable from the evidence of PW 4, who has denied possession of the defendant. PW 7, 8 and 14 and even other plaintiff witnesses had deposed on the point of possession. Situated thus, the plea on behalf of the appellant that the parties did not lead evidence on the point of possession, in the absence of specific issues framed by the trial Court, is not acceptable to me.

26. As I have already noticed, despite there being specific issue framed on the question as to whether the suit was barred by Section 34 of the Specific Relief Act, the trial Court had not pronounced his judgment on the said issued. In my opinion, Mr. Bindhyachal Singh, is correct in his submission that failure on the part of the trial Court to have pronounced the judgment on the said issue cannot amount to striking off the issue itself under Order 14 Rule 5 of the Code of Civil Procedure. It is true that order 14 Rule 5(2) confers upon the Court to strike out any issue that appear to be wrongly framed or introduced at any time, before passing a decree. It does not appear, however, that there has been any



conscious exercise of the said power by the trial Court in the present case. There is no discussion in the judgment and decree of the trial Court in this regard.

27. It is the mandate of the Code of Civil Procedure for the Courts to render decision with reasons on all the issues so framed and if for any reason, an issue needs to be struck off by applying Rule 5(2) of Order 14, there must be an order to this effect. I am in agreement with the view of the Delhi High Court in case of *DDA v. Rama Associates Pvt. Ltd.*, reported in **(2013) 136 DRJ 342 : 2013 SCC OnLine Del 6445**, which has been relied on by learned counsel appearing on behalf of the respondent. The trial Court had, thus, apparently committed an error in not even referring to issue No.4 in his judgment and decree.

28. A question arises, as to whether in such circumstance, the appellate Court ought to have remanded the matter back to the trial Court for its judgment on issue No.4, as has been argued by Mr. Dwivedi, learned Senior Counsel appearing on behalf of the appellant, or the appellate Court, as he has done, proceeded to deliver his judgment, if, according to him, the evidence on record were sufficient for determination of the controversy. Answer to this question lies directly in Rule 24 of Order 41 of the Code of Civil Procedure, which reads thus :-

“24. Where evidence on record sufficient, Appellate Court may determine case finally.—Where the evidence upon the record is sufficient to enable the Appellate Court to



pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.”

29. Clear language of Rule 24 confers upon the appellate Court the jurisdiction to finally determine the suit where the evidence on record is sufficient to pronounce judgment, notwithstanding that the judgment of the trial Court has proceeded wholly upon some ground other than on which the appellate Court proceeds. It can be easily discerned, from the evidence adduced at the trial on behalf of the contesting parties, that the parties were aware of the disputes between them in the background of the framing of the issues. Evidences were led on the point of their respective possession over the suit land. It cannot be said that the evidence were insufficient for the appellate Court to pronounce judgment after appreciation of the materials available on record. The Supreme Court, in case of *Ashwinkumar K. Patel v. Upendra J. Patel*, (AIR 1999 SC 1125), has discouraged the practice of the appellate Courts remanding the matter back to the lower Court on the ground that the reasoning of the lower Court in some respect was wrong. Following observations made by the Supreme Court in paragraph 7 is being reproduced in this regard for the benefit of quick reference :-



“7. In our view, the High Court should not ordinarily remand a case under Order 41, Rule 23, C.P.C. to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima-facie case on the material available. In matters Involving agreements of 1980(and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary.”

30. Similar view has been taken by this Court in case of *Ram Vinod Roy v. Mostt. Ram Sumari Devi* (supra) and *Md. Moid @ Abdul Moid and Ors. v. Maha Sundari Devi & Ors.* (supra).

31. Coming to the judgment of the First Appellate Court, I find that the Court below has taken note of several materials on record, including handing over of original gift deed dated 26.04.1937 executed in favour of Apnano Kuer by her father-in-law in respect of the disputed land in respect of which the said deed of gift in question dated 24.02.1987 was executed, for reaching a conclusion that possession was handed over to the defendant after execution of the gift deed. There does not appear to be much controversy over this aspect that the dispute land was



self-acquired land of Apnano Kuer. Plaintiff No.2, the widow of the deceased husband of Apnano Kuer, could not have inherited the property left behind by Apnano Kuer, after her death. Her daughter, Ramawati Devi, plaintiff No.2, was not even examined and in the absence of any explanation for her non-examination, she being the only interested person in the suit, the appellate Court rightly drew adverse inference, under Section 114 of the Evidence Act.

32. Coming back to the substantial questions of law, in my view, as has already been noted at the very outset, issue of maintainability of the suit, being hit by Section 34 of the Specific Relief Act, was already framed, which was not dealt with by the trial Court in his judgment. The plea that chance should have been given to plaintiff to lead evidence on those issues after allowing the interlocutory application filed under Order 41 Rule 27 of the Code of Civil Procedure and the plea of non-compliance of Order 41 Rule 25 of the Code of Civil Procedure has been answered already by referring to the Supreme Court decision in case of *Ashwinkumar K. Patel v. Upendra J. Patel* (supra) and of this Court in case of *Ram Vinod Roy v. Mostt. Ram Sumari Devi* (supra) and *Md. Moid @ Abdul Moid and Ors. v. Maha Sundari Devi & Ors.* (supra).

33. In respect of substantial question No.2, learned counsel appearing on behalf of the respondent has rightly



contended that the said question does not refer to the document, which was, though not there on record and even alien to the pleadings of the parties, has been taken into considered by the appellate Court. The plea that a sale deed, dated 14.06.1991, was brought on record by the defendant, which was executed by the appellant in favour of PW 1, has not been resisted. The said question is answered accordingly.

34. So far as substantial question No. 3 is concerned, it is incorrect to say that the two attesting witnesses did not support the deed of gift. One of the two attesting witnesses, namely, Ashok Kumar Singh (PW 1), refused to support the gift deed. Upon perusal of the judgment of the First Appellate Court, I find that he has reappreciated the evidence on record and upon considering the entire conspectus of the material available before him in the form of pleadings and evidence, both oral and documentary, has recorded his finding about genesis of the execution of the registered deed of gift. I have already noticed in my present judgment that though the plaintiff claimed that Apnano Kuer was an infirm lady suffering from paralyses when the said deed of gift was said to have been executed, but they miserably failed to establish their case of Apnano Kuer suffering from paralyses. All submissions, advanced on behalf of the appellant with reference to none framing of issue in respect of suit being barred by provisions of Section 34 of the Specific Relief Act, are hereby rejected after



having noticed that the issue was as a matter of fact framed and the parties had adduced evidence in support of their respective claim of possession over the suit land. The finding recorded by the appellate Court below cannot be said to be perverse. The judgment of Supreme Court in case of ***Municipal Committee, Hoshiarpur v. Punjab State Electricity Board***, reported in (2010) 13 SCC 216, has no application in the facts and circumstances of the case. Application of Order 41 Rule 27 of the Code of Civil Procedure does not arise in the present facts and circumstances of the case. An additional evidence can be adduced before the appellate Court under Order 41 Rule 27 of the Code of Civil Procedure in three circumstances, namely, (I) where the trial Court has illegally refused the evidence although it ought to have been permitted; (ii) where the evidence sought to be adduced by the parties was not available to it despite exercise of due diligence; and (iii) where the additional evidence was necessary in order to enable the appellate Court to pronounce the judgment or any other substantial cause of similar nature. The decision in case of ***Vijay Kumar Talwar v. CIT***, reported in (2011) 1 SCC 673, as relied on behalf of the appellant, does not, in any manner, support the appellant's case. On the question of contradictory reports and evidences of the handwriting experts appointed by the respective parties, it has been argued that the appellate Court has not duly dealt with the reasons assigned by the trial Court. Reliance in this regard has been placed



on the Supreme Court decision in case of *Chinthamani Ammal v. Nandagopal Gounder*, reported in (2007) 4 SCC 163.

35. There cannot be any quarrel over the legal proposition that the appellate Court has a duty to assign sufficient and cogent reasons while reversing the findings of the trial Court. In the present case, the First Appellate Court has dealt in detail with the evidence of the witnesses including the handwriting experts. The appellate Court has dealt with this aspect of the matter in detail and has assigned reasons for accepting the opinion of the defendant’s expert. The said conclusion cannot be said to be completely erroneous requiring this Court’s interference exercising power under Section 100 of the Code of Civil Procedure.

36. In my opinion, the First Appellate Court found legal evidence adduced at the trial to support execution of gift deed by Apnano Kuer. In the above background, substantial question No. 3 stands answered accordingly.

37. This appeal is dismissed.

38. However, there shall be no order as to costs.

(Chakradhari Sharan Singh, J)

Pawan/-

AFR/NAFR	N.A.F.R.
CAV DATE	10.05.2019
Uploading Date	21.08.2019
Transmission Date	N/A

