

04.02.2021.
Item No. 11

S.A.T. 294 of 2019
with
C.A.N. 1 of 2019 (Old No. C.A.N. 10366 of 2019)

Sri Santosh Kar
Vs.
Mahima Ranjan Kar.

Mr. Partha Pratim Roy,
Mr. Dyutiman Banerjee.

... for the appellant.

The instant appeal arises from the judgment and decree dated 6th February 2019 passed by the learned Civil Judge (Senior Division), Kandi, Murshidabad, in Title Appeal No. 51 of 2012 affirming the judgment and decree dated 2nd May 2012 passed by the learned Civil Judge (Junior Division), Kandi, Murshidabad, in Title Suit No. 96 of 2010, whereby and whereunder the suit for declaration that the deed is void as the executant never executed the same was decreed.

Admittedly, the plaintiff/respondent is the owner of the property and alleged that he never divested his right, title and interest in respect of the suit property in favour of the defendant/appellant by executing purported deed of gift. The specific case made out in the plaint is that though the name of the plaintiff/respondent is shown in the purported deed but somebody impersonating the plaintiff/respondent executed the same and, therefore, a declaration is required that the said deed is void.

The defendant/appellant appeared and contested the suit denying all the averments made in the plaint. It is a specific case of the defendant/appellant that the plaintiff/respondent

executed a deed of gift vide no. 5322 in the year 1975 in favour of the defendant/appellant by giving the property described in schedule 'ka' to the plaintiff. Pursuant to the said deed of gift, the LR Record of Right is corrected and the entry recorded therein would evince that the defendant/appellant is the owner of the disputed property.

Several issues were framed including the issue relating to the maintainability of the suit because of the embargo created under Section 34 of the Specific Relief Act, 1963 (herein after referred to as 'said Act'). It was contended by the defendant/appellant that the suit seeking declaration that the purported deed is void on the ground of impersonification without any further relief for cancellation thereto is hit by the proviso appended to Section 34 of the said Act.

Both the courts below find that there is no impediment on the part of the plaintiff/respondent to seek mere declaration that the deed is void without further relief of cancellation and the suit would not be hit by Section 34 of the said Act. Both the courts below held that the original purported deed of gift was not produced by the defendant/appellant, however, the certified copy of the deed was produced by both the sides, which would be evident from the fact that the certified copy of the purported deed was marked as Exhibit-1 and Exhibit-A respectively and an adverse inference was drawn against the defendant/appellant under Section 114(g) of the Evidence Act in not producing the original.

Mr. Partha Pratim Roy, learned Advocate appearing on behalf of the appellant, submits that the suit is hit by Section 34 of the said Act inasmuch as the plaintiff/respondent failed to seek a relief for cancellation of the deed and, therefore, both the courts have proceeded in wrong premise of law. In

support of the same, he relies upon the judgments rendered in case of **Suhrid Singh vs. Randhir Singh and Ors.**, reported in **(2010) 12 Supreme Court Cases 112** and **Deccan Paper Mills Co. Ltd. vs. Regency Mahavir Properties and Ors.**, reported in **AIR 2020 Supreme Court 4047**. He contended that the suit under Section 31 of the said Act seeking cancellation of deed is, in fact, inviting the court to pass a judgment in personem, whereas the suit under Section 34 of the said Act invites the court to pass the judgment in rem. He further submits that in case of a suit under Section 34 of the said Act, it imposes more onerous duty on the part of the plaintiff/respondent to seek further relief than the mere relief of declaration and if he omits to do so, the suit would be hit under the proviso appended thereto and, therefore, both the courts have wrongly proceeded to decree the suit negating the point urged before the court. He arduously submits that the registration of a document carries the presumption of its due execution and, therefore, the onus lies on the plaintiff/respondent to rebut the said presumption and having failed to do so, the court should not have decreed the suit declaring the deed to be void.

At the first blush, we thought that the point urged by Mr. Roy assumes significance and importance in relation to the respective stands of the parties but after going through the materials and findings recorded by both the courts below, we do not think it involves substantial question of law.

The donor has come before the court by filing a suit seeking declaration that the deed is void, as he never executed the same and somebody impersonifying him executed the said document conferring the right on the defendant/appellant in respect of the property described in schedule 'ka' to

the plaint. Section 122 of the Transfer of Property Act defines the 'gift', as the mode of transfer of an existing moveable and immovable property without consideration and voluntarily and accepted by or on behalf of the donee, the acceptance may be made during lifetime of the donor when he is still capable of giving but before the acceptance if the donee dies, the gift would be rendered void. Section 123 encompasses the procedure for effecting the transfer by way of gift of the immovable property by a registered instrument duly signed by the donor and attested by two witnesses.

What can be gathered from the composite effect of the aforesaid two provisions is that the deed of gift being a transfer, if of the immovable property, must be made by a registered document/instrument signed by the donor and attested by at least two witnesses and such gift must be accepted by the donee during the lifetime of the donor. The aforesaid provisions are taken into consideration for the simple reason that the courts below have taken a plea that the deed of gift has not been proved by producing the attesting witness and presumption of its due execution cannot be raised in favour of the defendant/appellant.

The mode of proving of a document other than the Will requiring an attestation is provided in Section 68 of the Evidence Act and the manner in which it should be proved. A plea was taken that the donee was the minor at the time of purported execution and registration of the deed of gift and in absence of any acceptance such deed of gift is void, but we do not think that such point may act as an obstacle in deciding the other points, which, in our opinion, clinches the issue. Even then, the combined reading of Section 122 and Section 123 of the Transfer of Property Act clarifies the situation where

the donee at any point of time during the lifetime of the donor may accept the gift and the gift would not be rendered void, as it was not accepted at the time of execution and registration thereof. The only condition enshrined therein that such acceptance must be during the lifetime of the donor and not thereafter.

The donor himself has filed a suit seeking declaration that the purported deed of gift is void and the defendant/appellant is resisting the claim of title having conferred upon him by virtue of the said purported deed of gift, which implies the due acceptance and, therefore, such finding, in our opinion, does not run in consonance with the law applicable thereto.

Reverting the core issues, admittedly, the original deed of gift was never produced by the defendant/appellant and the certified copy of the deed was produced by both the parties and the challenge is thrown by the plaintiff/appellant, as indicated above, on the ground of impersonification.

The Apex Court in case of **Suhrid Singh (supra)** expounded the law applicable in this regard and held that if the executant of the deed wanted to get away therefrom, he has to seek for cancellation and non-executant of the deed may not be required to seek cancellation, if he seeks for declaration that the deed is void on the well recognized parameters of law. It would be profitable to quote paragraph 6 and 7 of the said judgment, which runs thus:

“6. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to ‘A’

and 'B' – two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non-est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if 'B', a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7(iv)(c) of the Act. Section 7(iv)(c) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by Clause (v) of Section 7.

7. In this case, there is no prayer for cancellation of the sale deeds. The prayer is for a declaration that the deeds do not bind the "co-parcenary" and for joint possession. The plaintiff in the suit was not the executant of the sale deeds. Therefore, the court fee was computable under Section 7(iv)(c) of the Act. The trial court and the High Court were therefore not justified in holding that the effect of the prayer was to seek cancellation of the sale deeds or that therefore court fee had to be paid on the sale consideration mentioned in the sale deeds."

Though the plaintiff/respondent *ex facie* shown as executant of the deed but the aforesaid principle is required to be considered in the light of the case

made out in the plaint touching upon the execution thereof. It is the specific case of the plaintiff/respondent that he never executed the purported deed of gift and somebody poses him executed the same. If such stand has been taken, it put the plaintiff/respondent to the category of non-executant and the onus lies on a person who asserts such execution and defending his right over the property on the basis thereof. It was the ardent duty of the defendant/appellant to prove the due execution of the deed of gift, as he asserts legality, genuinity and validity thereof, by producing at least one attesting witness required under Section 68 of the Evidence Act provided all attesting witnesses are alive. Nowhere in the record we could find that the aforesaid attesting witnesses are not alive or unavailable, so one can safely proceed that the attesting witnesses are alive and available to depose in such capacity to prove the due execution of the said document.

Both the courts have found that the defendant/appellant did not bring the attesting witness to prove the due execution and once the initial onus is discharged by the plaintiff/respondent, it shifts upon him to dispel the same and having not done so, the plaintiff/respondent is entitled to decree, as prayed for.

Solely on the ground that the defendant/appellant has not been able to prove the due execution of the purported deed of gift, though the onus heavily lies on him, we do not see any infirmity in the judgment and decree of both the courts below.

For further academic purpose, we feel certain observations are required, as both the courts have relied upon the provision relating to adverse inference

under Section 114(g) of the Evidence Act. The said provision is quoted as under:

“114. Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks like to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

The Court may presume-

(a)

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.”

From the meaningful reading of the provision, as indicated above, the presumption would be raised to the existence of fact, which likely to have happened or happened in common course of the natural events, human conduct and private and public business. Such presumption can be raised and the onus shift on the adversary to rebut the same as such presumption is not static. However, the illustration appended to the said Section, more particularly, clause (g) thereof, contains the eventuality relating to drawing of adverse inference or reverse presumption against a person who is the holder of the vital evidence but did not produce it for the reason that if it is produced it would be unfavourable to him. In other words, withholding of the material piece of evidence by a person who with all probability possessed the same if omits to produce the said document on the premise that it would be unfavourable to him, the court may draw an adverse inference.

Both the courts have proceeded to draw such adverse inference as the original purported deed of

gift supposed to be in the custody of the defendant/appellant was not produced by him in course of hearing and certified copy thereof was produced.

Since it was a case of impersonification, the signature appended on the original document may have been a relevant factor but not the sole factor. The certified copy of the purported deed of gift was filed by both the parties and, therefore, we do not think that it was such a case where a strong adverse inference should be drawn under Section 114(g) of the Evidence Act.

In view of the discussions made herein above, we do not think that the instant appeal involves any substantial question of law and the same is hereby dismissed.

In view of the dismissal of the appeal itself, the connected application being C.A.N. 1 of 2019 (Old No. C.A.N. 10366 of 2019) has become infructuous and the same is also dismissed.

There shall, however, be no order as to costs.

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(Harish Tandon, J.)

(Kausik Chanda, J.)