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C.O. 1714 of 2022

**Abha Bagrodia
Vs
Pushpa Bagrodia & Ors**

Mr. Probal Mukherjee, Sr. Adv
Mr. Siddhartha Lahiri,
Mr. Debraj Dutta, ... For the petitioner.

Mr. Aniruddha Chatterjee,
Mr. Tanmoy Mukherjee,
Mr. Neelesh Chowdhury,
Ms. Anuradha Poddar, ... For the opposite parties.

The impugned order dated 11th May, 2022 passed by the learned Civil Judge (Senior Division), 2nd Court, Alipore in Title Suit No. 83 of 2015 allowing application filed by the plaintiffs upon admitting a certified copy of deed of gift dated 23rd August, 2004 in evidence, marked as exhibit is under challenge in this revisional application.

Mr. Probal Mukherjee, learned senior advocate appearing for the petitioner advertent to Section 68 of Evidence Act, submits that the court below has not strictly considered the provisions mentioned in Section 68 of Evidence Act, in spite of availability of attesting witnesses to the said deed of gift, who are very much alive at the moment.

It is contended by Mr. Mukherjee that making certified copy of deed of gift, as exhibit so as to accept the same in evidence, without examination of one of

the attesting witnesses to the deed of gift is contrary to the law.

Thus it is submitted by Mr. Mukherjee that the deed of gift dated 23.08.2004 being challenged by the petitioner/defendant, as disclosed in written statement, the same should have been proved in evidence in accordance with law, taking resort to the provisions mentioned in Section 68 of the Evidence Act.

The marking of exhibit on certified copy of deed of gift is thus grossly illegal, Mr. Mukherjee argues.

Per contra Mr. Aniruddha Chatterjee, learned advocate appearing for the plaintiffs/opposite parties disputes with the submission of Mr. Mukherjee submitting that examination of attesting witness is not compulsory one, in a case where the execution of deed of gift is not challenged.

Making reference to the proviso appended to Section 68 of the Evidence Act together with para 26 of the written statement, Mr. Chatterjee submits that petitioner was well aware of the execution of the deed of gift, though it was stated therein that it was so done behind the back of the petitioner/defendant.

Mr. Mukherjee thus submits that when it was disclosed in the written statement that there has been execution of a deed of gift, that too behind the back of the petitioner, the petitioner may be taken

with the knowledge of execution of the deed of gift.

It is thus execution of the deed of gift is not at all denied by the petitioner, though the probative value of such document may be under challenge as per defence set up in the written statement.

There has been a previous round of litigation between the parties and in connection with C.O. 69 of 2022, this Court directed that the certified copy of the purported deed of gift be presented before the Court below, for proving the same in accordance with law. It is in exercise of such direction of this Court, the certified copy of the deed of gift was produced and sought to be proved in evidence doing adherence to the provisions mentioned in Section 68 of the Evidence Act.

This is a case wherein the signature of donor and donee of deed of gift has already been proved in evidence by PW1.

The signature of attesting witness was also marked as exhibit at the time, when PW1 was examined without any objection on the part of the petitioner/defendant.

It would be profitable here to refer the provisions mentioned in Section 68 of the Evidence Act, which may be produced herein below:

“68. Proof of execution of document required by law to be attested.

If a document is required by law to be attested, it shall not be used as evidence

until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence; (PROVIDED that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance the provisions of the Indian Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.)

The proviso appended to such section speaks that requirement for examination of an attesting witness is not must in this case, under reference, wherein deed of gift is fundamentally challenged by the defendants as per their written statement, which has been registered in accordance with law, and where the execution is not denied by the person, by whom it purports to have been executed.

Paragraph 26 of the written statement leaves materials to show that the execution of the deed was not denied by the person, by whom it purports to have been executed, though it was disclosed that deed of gift was made behind the back of the defendant thereby disputing with the probative value of such document.

That being the position, the execution of the deed of gift can not be taken to be under challenge in the present circumstances of this case, as set up by the parties to this case, wherein examination of

attesting witness is not at all necessary in view of proviso appended to Section 68 of the Evidence Act.

Since this is a pure question of law, as already answered by this Court, in the foregoing paragraphs, no further elaboration is necessary.

The probative value of deed of gift may be decided by the Court below in accordance with law at the time of final hearing of the suit, when the petitioner may challenge such document in terms of the evidence already adduced in the case record in accordance with law.

With this observation and direction, the revisional application stands disposed of.

Urgent photostat certified copy of the order, if applied for, be given to the parties on usual undertakings.

(Subhasis Dasgupta, J)