

DL. January
17. 31, 2022

Through Video Conference

F.M.A.T. 574 of 2021

Sri Badal Pradhan & ors.
Vs.
Sri Shyamal Pradhan & anr

Mr. Amit Baran Dash,
...for the appellants.

Mr. Swarnendu Ghosh,
Mr. Surya Maity,
Ms. Amrita Maji,
...for the respondents.

The appellants have come up before this court against an appellate order directing open remand.

The suit relates to declaration of title and cancellation of a deed of gift alleged to have been executed on January 19, 2009. The plaintiffs/appellants and the defendants/respondents are the uterine brothers. The appellants alleged that on June 12, 2011, the defendant no. 1 threatened to dispossess the plaintiffs/appellants from the suit property claiming that the 'ka' scheduled property has been gifted to him by their father vide a gift deed being No. 348 dated January 19, 2009. The defendants/respondents contested the suit and supported execution of the said deed of gift in favour of the defendant no. 1 alleged to have been done by their father putting his left thumb impression over the said document. Before the trial court, the certified copy of the said deed of gift was exhibited without any objection. The defendants also claimed to have produced the original deed of gift and the signature of Sri Rabindra

Nath Pradhan, one of the attesting witnesses in the said deed of gift was marked as exhibit 'C'. However, the defendants curiously did not invite the court to mark the original deed of gift as exhibit, the reason presumably being that the certified copy of the deed of gift has already been marked as exhibit.

The parties have adduced evidence on all the issues including the genuineness of the said deed of gift. The trial court decreed the suit in favour of the plaintiffs.

In the appeal before the first appellate court, the defendants/respondents filed an application under Order XLI Rule 27 of the Code of Civil Procedure inviting the appellate court to take into consideration the original deed of gift and for a direction upon the trial court to take fresh evidence in respect of the said deed of gift being no. 348 of 2009 and also to give opportunities to the parties to cross examine the witness.

The first appellate court although had noticed that the certified copy of the deed of gift has been marked as exhibit-1, but remanded the suit for fresh consideration on the ground that the said document was marked as an exhibit without following proper procedure according to the provisions of Indian Evidence Act. The first appellate court did not specify which procedure was not followed. The said document was marked as exhibit-1 without any objection. The first appellate court, taking into consideration the fact that the defendant no. 1 during the course of his examination in chief filed the original deed of gift and that one of the attesting witnesses, namely, Rabindra Nath Pradhan, has been examined as plaintiffs' witness no. 2 and that the signature of the said witness

has been marked as exhibit-‘C’, arrived at a finding that since the original deed of gift produced by the defendants has not been marked as an exhibited document, the judgment of the trial court suffers from a material irregularity for which open remand is required.

We find that the first appellate court has completely misled its mind in directing the fresh trial. It is always open to the appellate court to take the said document on record by following the procedure Order XLI Rule 27(1)(b) of the Code of Civil Procedure instead of remanding the matter to the trial court. The first appellate court could have marked the said document as an exhibit and disposed of the appeal on merits. In absence of any challenge being thrown to the certified copy of the deed of gift and also in absence of any discrepancy being noticed between the original deed of gift and the certified copy of the same, being exhibit-1, there was no necessity of fresh evidence to be taken on remand.

Accordingly, the order of remand passed by the first appellate court is set aside. The first appellate court is directed to hear the appeal on merits after taking the original deed of gift on record without any further evidence.

We make it clear that we proceeded on the basis that there is no discrepancy between the original deed of gift and the certified copy of the same as the learned advocates for the parties are unable to point out any such discrepancy at this stage.

However, if there is a material discrepancy between the certified copy of the deed of gift and the original deed of gift, for which the parties may adduce evidence before the first appellate

court only with regard to such material discrepancy.

With the aforesaid observations, the appeal is disposed of even at the admission stage.

In view of disposal of the appeal, nothing remains in the application for stay filed under CAN 1 of 2021 and the same is also disposed of.

There will be no order as to costs.

Photostat certified copy of this order, if appalled for, will be made available to the applicant within a week from the date of putting in the requisites.

(Soumen Sen, J.)

(Ajoy Kumar Mukherjee, J.)

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