

DL. November
54. 14, 2022

S.A. 28 of 2022

Mst. Meherjan Bibi

Vs.

Sk. Jahur Ali & ors.

In spite of service of administrative notice upon the appellant, the appellant is not represented, nor any accommodation is prayed for. On the earlier occasion, on the prayer of the learned advocate for the appellant, we permitted him to retire from the matter. However, we propose to consider the question of admission of the present second appeal on the basis of the materials available on record.

The judgment and decree of affirmance dated April 5, 2006 passed by the learned Additional District Judge at Arambagh, Hooghly, in Title Appeal No. 34 of 2004 arising out of judgment and decree dated August 18, 2004 passed by the learned Civil Judge (Senior Division) at Arambagh, Hooghly, in Title Suit No. 79 of 1999, in a suit for declaration of right, title and interest, confirmation of possession, recovery of khas possession and alternatively for partition and permanent injunction, is the subject matter of challenge in this appeal.

The claim of the plaintiff/appellant is based on a deed of gift alleged to have been executed by one Gulzar Ali. The plaintiff/appellant is the daughter of Gulzar whereas the defendants/respondents no. 1 and 2 are the son and daughter of

Gulzar and the defendant no. 3 is the widow of Gulzar. The name of Gulzar was recorded in the revisional settlement records of right and the land revenue records of right as would appear from exhibits 1 and 2 respectively. At the time of filing of the suit, Gulzar was not alive.

The defendant no. 1 alleged that the said deed was obtained by fraud, undue influence and misrepresentation. Various suspicious circumstances were raised surrounding the execution of the deed.

It was an admitted position that Gulzar was an illiterate person. He was the owner of about 11 decimals of land. The plaintiff/appellant used to reside at the family of her father along with her husband. At the fag end of his life, Gulzar was suffering from various illness. At the time of execution of the deed the son and other daughter of Gulzar were minor.

The plaintiff's witness no. 1, in her examination in chief, has stated that her father put his left thumb impression on the said deed. The plaintiff/appellant was residing with her father after her marriage along with her husband. At the time of alleged execution of the deed she was 18/19 years old. The defendant no. 1/respondent no. 1 used to earn money by plying rickshaw. Considering the fact that the defendants no. 1 and 2 were minor at the relevant point of time, it is quite unbelievable that Gulzar would deprive the other legal heirs since all the children of Gulzar were in need of money and the respondent no.2 and 3 were minors.

In order to prove the deed of gift one Gobinda Chandra Pal and Bhadreswar Roy were produced by the plaintiff/appellant. From their evidence, it would appear that the plaintiff/appellant was present at the time of execution of the deed of gift. It has been stated that deed of gift was read over and explained to the father by Gobinda prior to its execution.

The defendants have all throughout contended that Gulzar was illiterate – he did not know how to read and write. It was alleged that a false case has been made out by the appellant regarding execution of the said deed, in fact, there is no evidence to show that Gobindo, in fact, had read over and explained the deed to Gulzar before execution of the said deed.

The evidence on record would show that Bhadeshwar could not satisfactorily explain due execution of the said deed. Bhadeshwar has stated in his examination in chief that Gulzar put his LTI with an intention to execute the said deed. In fact, Bhadeshwar did not have actually seen Gulzar to put his LTI in his presence. There is insertion of some statement in the deed in different ink at different places. The evidence in chief of Bhadeshwar regarding putting the signature of Gulzar prior to signature of the attesting witness Bhadeshwar was not believable as during his cross examination he has admitted that he has not seen the deed and it was only after alleged execution of Gulzar by putting his LTI the said deed was brought by Gulzar to him. Gobindo did not depose.

Under such facts and circumstances it is not possible for Bhadeshwar to show that the deed was executed by Gulzar after it was read over and explained to him by Gobindo. There are other suspicious circumstances regarding the execution of the said deed.

In the schedule of the deed there is no mention regarding of existence of four room, residential house on 'Ka-1' schedule property while the plaintiff claimed that on the strength of the said deed his father gifted that house to her. The said schedule was inserted in a different ink and the plaintiff could not explain whose pen was used by Ganesh to put his signature as an attesting witness. It would appear from a scrutiny of Exbt.3 that some statements were inserted in the said deed in a different ink and the witnesses on behalf of the plaintiff/appellant were unable to clarify such insertion by different inks and at whose instance.

PW2 could not say when Gobinda had prepared and drafted the deed. The scribe was not examined. The deed was not acted upon as no possession was delivered. There are also other discrepancies namely that the oral evidence of PW1 does not corroborate with the reasons for which the alleged deed was executed in favour of her daughter-plaintiff. The recitals are of variance with the oral testimony.

Both the courts have arrived at a conclusion on the basis of the evidence that the way in which the deed came into existence, description of the properties in the schedule of properties and different ink used without any explanation for insertion of statements and the LTI of the executant appearing on the deed in blue colour are some of the suspicion circumstances surrounding the execution of the deed. The scribe was never examined and by

the time the appeal was taken up for consideration he was dead. From the evidence it is also clear that the appellant was in a position to dominate the will of the father taking advantage of the age of the respondent nos. 2 and 3, moreover, the circumstances surrounding the execution of the said deed would show that the said LTI is invalid on the ground that the mind of the executor did not accompany the signature, in other words Gulzar never intended to sign and therefore in contemplation of law never did sign the deed to which his name was appended. It is trite that when it is established that a document is executed by an illiterate person the burden of proof in respect of such document should rest upon the person who seeks to sustain such transaction. At the trial the person benefitted by the said deed is required to establish that the said document was executed by the executant clearly understanding the nature of the transaction and that the donor or the executants of the document was prepared to act both physical and mental in executing such document. It has to be established that the executant had full knowledge and understanding of the nature of the document the executant is about to execute. The understanding of the whole document accompanied by his independent mind are to be established at the trial. These tests when applied at the instant case would clearly establish failure to satisfy the said conditions by the plaintiff.

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The learned trial court as well as the first appellate court has rightly disbelieved the execution of the said document and has correctly observed that the plaintiff has failed to discharge her burden and onus to prove the execution of the said document.

In view of concurrent findings of fact arrived at by both the courts below, we do not find any reason to interfere with such concurrent findings of fact. As such, we do not find any substantial question of law involved in this appeal for which the same is required to be admitted.

The second appeal is, therefore, summarily dismissed under Order XLI Rule 11 of the Code of Civil Procedure.

There will be no order as to costs.

(Soumen Sen, J.)

(Uday Kumar, J.)