11 **19.06.2023**

Ct. No. 04

Ab

SAT 73 of 2022

Sri Sricharan Mandal
Vs.
Shyamapada Mandal.

Mr. D. N. Chatterjee,
Mr. R. K. Biswas,
Mr. P. C. Poddar,
Mr. Subhas Chandra Saha.
... for the appellant.

Both the courts below have concurrently held that the deed of gift dated 23rd June 2003 executed by the father of the parties in favour of the defendant/appellant is void and, therefore, no right, title and interest can be created on the defendant/appellant.

Admittedly, the dispute relates to the right, title and interest in respect of the property described in Schedule – 'ka' to the plaint, which comprises of three decimals of land. According to the plaintiff/respondent, the father during his lifetime executed the deed of gift and got the same registered on 11th July 2003 giving 'ka' schedule property to the plaintiff/respondent. After acceptance of the deed of gift dated 11th July 2003, the plaintiff/respondent approached the concerned authority for mutation of his name and, in fact, paid the rent in respect thereof.

Six rent receipts were filed by the plaintiff/respondent, which has not been disputed by either of the parties. The defendant/appellant alleged that after being aware of the fact that the father has gifted the 'ka' schedule property to the plaintiff/respondent on 11th July 2003, the defendant/appellant got a predated stamp paper and allegedly shown the execution thereof on 23rd June 2003 when the said document revealed that it was presented for registration on 16th September 2003 i.e. practically three months after the alleged execution thereof.

The plaintiff/respondent, therefore, asserts that there was no due execution as on 23rd June 2003 and even if it is construed that the execution has been done by the father and the document relating to gift was presented before the registering authority, it would be deemed to have been done on 16th September 2003, much after the deed of gift executed and registered by the said father on 11th July 2003.

The defendant/appellant contested the said proceeding solely on the ground that the father executed the deed of gift on 23rd June 2003 and subsequently got it registered on 16th September 2003 and, therefore, the defendant/appellant is a prior title holder and subsequent deed of gift executed in favour of the plaintiff/respondent shall not create any right, title and interest in their father.

Both the courts below disbelieved the story of the defendant/appellant and found that the evidence so adduced runs counter to the pleadings made in the written statement. Both the courts below concurrently held that there was no due execution of purported deed of gift on 23rd June 2003 and, in fact, the execution was made on 16th September 2003 when the said document was presented for registration before the registering authority and, therefore, such deed being a later deed is void vis-à-vis the plaintiff/respondent.

There is no ambiguity in our mind to the proposition of law that the moment the deed of gift is executed by the donor and accepted by the donee, it passes all right, title and interest possessed by the donor to the donee and thereafter the donor cannot usurp any such right, title and interest in respect of the immovable property.

The legal maxim '*nemo dat quod non habet*' has its applicability in the instant case, meaning thereby, a person cannot give what he does not possess. A person has divested his right, title and interest in respect of the immovable property by executing and registering the deed recognized in law, it is inconceivable and improbable as well as impermissible in law that the said person would again divest the interest in the land, which he does not possess.

So far as the deed of gift is concerned, which is defined in Section 122 of the Transfer of Property Act, 1882 to be incident of transfer of certain existing movable or immovable property made voluntarily and without consideration by one person known as donor to another known as donee and acceptance by and on behalf of the donee is also one of the paramount duty. The said Section further indicates that such acceptance must be made during lifetime of the donor and in the event the donor dies before the acceptance, the said deed would be regarded as void.

The deed of gift is distinct from the other mode of transfer. The mode of execution of gift deed is provided under Section 123 of the said Act. The said Section postulates that for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by the donor himself or on his behalf and attested by two attesting witnesses. Admittedly, the impugned deed contained the name of two witnesses and one of such attesting witness was called to depose in the court for and on behalf of the defendant/appellant.

Section 68 of the Evidence Act requires that the document where the attestation is compulsory shall not be used as evidence unless one of the attesting witnesses is called for the purpose of proving the due execution of the said deed. However, the proviso carves out an exception to it that in the event the execution is not denied, there is no necessity of calling such attesting witness.

As indicated above, the execution on a day when the said purported deed of gift has been shown to have been executed was under challenge as it was a specific case of the plaintiff/respondent that the said deed was never executed on the said date and, in fact, it has been shown to have been executed on a back dated stamp paper. The logical inference, which can be drawn from the stand of the plaintiff/respondent, that the execution on the date, which has been shown in the purported deed of gift was a centre of debate and has been denied by the plaintiff/respondent and, therefore, it is a solemn duty of the defendant/appellant to prove the due execution thereof by calling one of the attesting witnesses before the court.

Both the courts have relied upon the deposition of the defendant/appellant as well as the attesting witness, who stood as second witness for the defendant/appellant, wherein he has said that on the day when the said purported deed of gift was presented for registration, the same was prepared in the Registration Office and the execution thereof was made on the said date. Both the courts found that the execution was predated and, in fact, it was executed on 16th September 2003 and not on 23rd June 2003 as shown therein.

The obvious reason of predating the date of execution is that the moment the document is registered, it would take effect from the date of its execution and not from the date when the deed was presented for registration or was registered under the Indian Registration Act. The obvious reason one can see from the conduct of the defendant/appellant that such predating would frustrate the validity and the legal efficacy of the deed of gift executed in favour of the plaintiff/respondent on 11th July 2003.

We had an occasion to peruse the deposition of both the witnesses of the defendant/appellant and we further noticed that the defendant/appellant himself deposed that the execution of the said deed of gift was, in fact, done on the date when the said deed of gift was presented for registration.

On the basis of such categorical stand, there is no hesitation in our mind as well that the purported deed of gift ('kha' schedule) was never executed on 23rd June 2003 and, therefore, there is no infirmity and/or illegality in the findings returned by both the courts below that the said deed is void.

We, thus, do not find any substantial question of law involved in the instant appeal and same is hereby dismissed under Order XLI Rule 11 of the Code of Civil Procedure.

Urgent photostat certified copy of this order, if applied for, be given to the parties within three days from the date of the application.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)