

**14.09.
2023**

Ct. No. 04

Ab

**FAT 316 of 2018
IA No. CAN 1 of 2019 (Old No. CAN 9789 of 2019)**

**Asha Sharma and another
Vs.
Nakul Sharma.**

**Mr. Subrata Ghosh,
... for the appellants.**

**Mr. Sounak Mukhopadhyay,
Ms. Dipanwita Das,
Mr. Debarshee Bhattacharya,
Mr. Arka Mukherjee.
... for the respondent.**

Re: CAN 1 of 2019 (Old No. CAN 9789 of 2019)

This is an application for condonation of delay in preferring the instant appeal.

It is averred in the instant application that the appellant no. 1 could not contact the learned Advocate because of her old age and suffering from several illnesses and was not aware of the fact that the suit has been dismissed ex parte on 24th March 2017. After hearing that the suit has been dismissed, a contact was made to the learned Advocate, who confirm the said fact and then an application for certified copy was made and after getting the certified copy and engaging the learned Advocate to file the application, there is a considerable delay.

Considering the aforesaid fact and upon perusal of the impugned judgment, we find that the meritorious matter should not be defeated on the anvil of limitation. If the cause shown in the said application is somewhat constitute the sufficiency of the cause, the minor lapses cannot be projected affront to defeat the meritorious proceeding.

Accordingly, the application for condonation of delay is hereby allowed. The delay in preferring the instant appeal is hereby condoned. The appeal shall be formally registered in the docket of the Court.

Since the respondent has also appeared, we invited the Counsels appearing for the respective parties to address us on the merit of the instant appeal.

The plaintiff/appellant no. 1 filed a suit for declaration that the purported deed no. 1537 dated 26th March 2010 is void being obtained by practicing fraud upon the plaintiff/appellant no. 1 by taking an advantage of her poor eye side and lack of understanding. It is further averred in the plaint that there was a cordial relation of the appellants with the defendant/respondent and, in fact, she intended to execute a Power of Attorney so that his right in the property was protected and taken care of, but taking advantage of the same, the defendant/respondent got the deed of gift executed in his favour.

Admittedly, after service of the summons, the defendant/respondent did not appear and contest the said suit, as a consequence whereof the suit was posted for ex parte hearing. The trial Court dismissed the said suit on two grounds; firstly, the plaintiffs/appellants failed to prove the allegation of fraud in preparing the purported deed of gift and secondly, the appellants failed to prove the purported deed of gift by bringing the attesting witness.

It is no doubt true that it is imperative on the part of the plaintiffs/appellants to prove the case made out in the plaint even the suit has reached the stage of ex parte. In normal circumstances, the deed of gift, which requires an attestation, is to be proved by calling an attesting witness under Section 68 of the Evidence Act. The aforesaid provision postulates that a document, which requires an attestation, shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution.

What is mandated under the aforesaid provision is that an attesting witness is required for the purpose of proving the execution of the document, which is required

to be attested under the law. However, the aforesaid provision cannot be pressed in service where the execution of the said document is not denied.

In the instant case, the plaintiffs/appellants have categorically averred in the plaint that they intended to execute the document by giving a Power of Attorney to the defendant/respondent, but the said defendant/respondent taking advantage of the medical condition of the plaintiff/appellant no. 1 got the purported deed of gift executed in his favour. There is no denial of an execution and, therefore, Section 68 of the Evidence Act cannot be pressed in service as it is restricted to a case where the execution is required to be proved of a document duly attested by the attesting witnesses.

The case is founded upon an allegation that the defendant /respondent has committed fraud upon the plaintiffs/appellants in converting the Power of Attorney into a purported deed of gift and, therefore, the suit was filed for declaration of such deed to be declared as void. For such reason, we do not find that the finding of the trial Court that the purported deed of gift has not been proved is tenable and sustainable in law, more particularly, the execution thereof has not been denied by the plaintiffs/appellants.

The core issue involved in the said suit is whether the purported deed of gift was obtained by practicing fraud or making misrepresentation to him. In the affidavit as to examination in-chief, the first witness of the plaintiffs/appellants categorically averred that the said executant had a poor eye side and was not capable to read and write, though she can sign only. The said witness further depose that the said executant repose trust upon the defendant/respondent and, in fact, intended to execute a Power of Attorney, but taking advantage of the aforesaid confidence reposed upon the defendant/respondent, the plaintiff/appellant no. 1 was

taken to a registry office and surreptitiously got the purported deed of gift executed in his favour. The evidence would further reveal that the said executant all along cultivated the suit plot and never parted with possession thereof to the defendant/respondent.

As indicated above, the suit was tried at the ex parte stage and, therefore, the pleading as well as the evidence adduced by the plaintiffs/appellants remain uncontroverted. The Court did not consider the other aspects that in order to complete the gift, the transfer must be made voluntarily and without consideration in favour of another and the same is accepted by the other or anybody on his/her behalf.

Section 122 of the Transfer of Property Act further indicates that such acceptance may be made either during the lifetime of the donor or even thereafter while she is still capable of giving. What is *sine qua non* to complete the transfer by way of gift is the acceptance by the donee and in a case of this nature, such acceptance can be presumed in the event the possession of the property involved therein is given to the donee.

The witness of the plaintiffs/appellants categorically deposed about the elements of fraud and, therefore, we fail to understand that what prevailed upon the learned Judge in arriving at a conclusion that the plaintiffs/appellants have failed to prove the elements of fraud.

The judgment and decree assailed in the instant appeal is hereby set aside.

The matter is remitted to the trial Court for deciding the said suit afresh.

With these observations, the instant appeal is disposed of.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)

