

Item-42. 20-01-2023

SAT 454 of 2016
CAN 1 of 2019 (old CAN 3625 of 2019)

^{sg} Ct. 8

Tarun Biswas & Ors.
Versus
Chamtkari Biswas & Anr.

Mr. Koushik Dey, Adv.
...for the appellants

Soumen Sen, J. (Oral): We have heard the learned Counsel for the appellants.

The appeal is defective. We also record that we could have dismissed the appeal for non-removal of the defects but we decide to hear the learned Counsel for the appellants on the grounds stated in the memorandum of appeal for admission.

The matter was adjourned on 19th January, 2023 on the prayer of the learned Advocate for the appellants.

The appeal is arising out of an appellate decree dated 30th June, 2016 affirming the judgment and decree dated 29th November, 2011 passed by the trial court in a suit for title, confirmation, possession and permanent injunction.

We have read the judgments of the trial court as well as of the first appellate court. We have also read the memorandum of appeal in order to ascertain whether the second appeal involves any substantial question of law.

Briefly stated, the suit was originally belonged to the predecessors of the plaintiffs and the principal defendants, namely, Surendra Nath Biswas. During his lifetime, the wife of Surendra expired. Subsequently, Surendra Nath also died leaving behind the defendant no.1 as his only son, the plaintiff and Sudha Rani as

daughters. The said legal heirs of Surendra Nath claimed to have possessed his estates by inheritance. The defendant no.1, plaintiff and Sudha Rani are co-sharers in respect of their father's properties having $\frac{1}{3}^{\text{rd}}$ share each therein. Later, Sudha Rani died leaving proforma defendant no.2 as her legal heir. The plaintiff is about 65-66 years old. At the time of her marriage, her father in the presence of all invited guests promised before the nuptial fire that he would give 16 decimals of land bearing plot no. 6328 to this plaintiff. After her marriage she went to her matrimonial house at Baduria and resided there for about three years. However, her father Surendra in keeping with his earlier promise requested her to come over and stay at the afore-described land. Accordingly, her husband constructed a house made of earthen walls and hatched roof and started residing therein. Thereafter, in course of time bathroom, kitchen and privy were constructed and they also planted fruit bearing trees thereon. Plaintiff and her family have been residing thereon for the last 45 years. She has been possessing the said 16 decimals of land exclusively and the remaining lands of her father jointly with defendant nos. 1 and 2. As she had a very cordial relationship with her brother the defendant no.1 herein, she used to rely upon him completely in managing the affairs of their ancestral properties and used to accept happily whatever he used to tender her out of the usufructs of such properties. This plaintiff and principal defendant reside in the same village on the opposite sides of the village road since the time of their father. During the ongoing L.R. operation plaintiff went to the local settlement office to get her share in the ancestral property recorded in her name in the R.O.R. However, the local settlement officials refused to record her name

in respect of her claimed share. When she asked her brother about the reason for such refusal, he told her that their father had gifted the entire suit property to him by a registered deed of gift which he gladly accepted. It is on 27.11.1998 that this plaintiff first came to know about the impugned deed of gift from principal defendant and it is on this very day that this defendant threatened to dispossess the plaintiff from the suit land.

Thereafter plaintiff immediately made arrangements to obtain certified copies of the impugned deed from the registry office. Plaintiff submits that her father died long before the date of the impugned deed and consequently, had no opportunity to execute the same by putting his thumb impression thereon. He did not get the impugned deed registered nor did he ever authorised anyone to get the same registered. Defendant no.1 had no right or authority to present the impugned deed for registration as representative of said Surendra Nath. This defendant, in close secrecy and without the knowledge of other co-sharers got the impugned deed produced in collusion with the deed writer and witnesses by forging the thumb impression of said Surendra Nath thereby practicing fraud upon the registration system. Hence the impugned deed is forged, frivolous, false, void, collusive, illegal and inoperative deed which is not at all binding upon this plaintiff. It was never acted upon nor was it created to be acted upon.

The plaintiff contended that the alleged deed is void. Surendra Nath had never executed the impugned deed in favour of the defendant. The defendant had never disclosed to the plaintiff the existence of the alleged deed previously.

The defendant no.1 contested the suit in his written

statement, it is stated that their father Surendra Nath was a discerning, practical and worldly wise person. He himself got his two daughters married who went to their respective matrimonial houses after marriage. Said Sudha Rani died after the promulgation of the Hindu Succession Act leaving behind three daughters Radha Rani, Saraaswati and Lakshmi as her legal heirs who are all necessary parties to the suit. During his lifetime Surendra Nath himself transferred certain of his properties to other persons. Thereafter he was left with only 04 acres and 01 decimals of land. At the time of the impugned deed this defendant had a wife, three sons and four daughters but he did not have the means to run the affairs of such a large family. As this defendants and his family remained in a joint mess with Surendra Nath he was completely dependent upon his father for his livelihood. The family of his defendant also looked after Surendra Nath and he remained in their care till death. Thinking about the future security of this defendant and his family, Surendra Nath decided to gift the suit property to him and also discussed the matter with his close associates and neighbours. Plaintiff and the other daughter of said Surendra Nath knew about such decision all along. At the relevant point in time Surendra Nath was almost 84 years old. Due to such advanced years he suffered from various ailments of the stomach. His blood count used to remain low as a result of which his hands, feet and face got inflamed. Consequently, he could not walk properly and it was not possible for him to get to the registry office as it was located far away. Therefore, he asked his loyal deed writer to come to his house and thence directed this defendant to purchase necessary stamp paper for the impugned deed of gift and 03 demi paper after

giving him required money for the purpose. On 24.11.1975 the impugned deed was drafted under instruction from said Surendra Nath. The donor himself executed the deed by putting his thumb impression which was duly identified by a deed writer Yusuf Ali, who has known to him. Though Surendra Nath was literate he put his thumb impression on the impugned deed as he could not muster enough strength to put his signature. However, his mental alertness and strength remained impeccable. Under instructions of his father the defendant No.1 presented the deed at the A.D.S.R.O, Baduria; for resignation and made a prayer for registration by commission. Accordingly, 30.11.1975 was fixed as the day for registration commission. Unfortunately, Surendra Nath expired in the meantime on 27.11.1975 as a result of which the commission work could not be completed. Nevertheless, as the deed had already been presented at the registry office, the legal heirs of Surendra were served with a notice by the registry office. In spite of such notice plaintiff and Sudha Rani did not appear before the registry office. Only the defendant No.1 appeared before the sub-registrar and the said authority after satisfying himself about the representation of this defendant permitted the deed to be registered on 12.12.1975. The defendants possession of claimed to have been in the entire gifted property exclusively. Plaintiff and proforma defendant no.2 do not possess the suit property jointly with the defendants. Plaintiff has been residing in the house standing on 16 decimals of land bearing plot no. 6328 by way of permissive possession given to her by their father Surendra Nath and after his death on permission of the defendant No.1. She does not have any iota of right or title over the said land. Surendra Nath had already purchased 25 decimals of land

in village Gokulpur for plaintiff to provide for her and her family a residence. Plaintiff however, sold the said land to a third person instead of residing therein. The defendant No.1 has got his name duly recorded in the L.R.R.O.R. pertaining to the suit plots and is paying Govt. land revenue in respect thereof. Out of the gifted property he has already transferred a portion to some third persons who are also necessary parties to the suit.

It was alleged that when this defendant refused to transfer the said 16 decimals of land in favour of the plaintiff, the suit was filed.

The trial court framed five issues. The plaintiff was examined. The defendant examined one Anjana Biswas (Sharma), defendant no.1 (gha), one Md. Yusuf Ali Gazi, one Santosh Kr. Mondal, one Manoranjan Mondal, one Sanjoy Tarafdar and again said Md. Yusuf Ali Gazi as DW 1, DW 2, DW 3, DW 4, DW 5 and DW 6 respectively.

The plaintiff challenged the impugned deed on the ground that the said deed was not executed in accordance with the provision of sections 122 and 123 of the Transfer of Property Act. The donor was not physically fit and mentally alert to check the deed. It was contended that there is no acceptance of gift by the donee during the lifetime of the donor. The provision of section 122 of the Transfer of Property Act was not complied with. The deed was registered after the death of the donor hence the gift made in favour of the donee is invalid. It is the very execution of the impugned instrument that this plaintiff challenged before the learned trial court.

The defendant tried to prove the said deed by bringing on

record a registered sale deed being no. 9808 of the year 1975. The said deed was alleged to have been executed by Surendra Nath in favour of one Santosh Kumar Mondal in the month of June, 1975. This deed was relied upon to show that Surendra Nath was alive well past the year 1974. The contention of the defendant to that extent was accepted. It was observed that the said plaintiff could not establish that Surendra Nath died prior to the execution of the said deeds. However, dwelling on the issue with regard the execution of the sale deed, the trial court observed that the mind of the executant must precede his physical act was not proved. It was quite evident from the evidence that he was seriously ill at the time of alleged execution. He alleged to have been put finger impression on the document. Even if it is accepted that Surendra Nath was alive at the time of execution of the said deed, he died within 3 days of executing the impugned deed out of old age. Ill health clearly goes to show that he might not be mentally agile and capable of executing the said deed. On the basis of the evidence read with the written statement, the trial court arrived at the finding that there is high improbability that Surendra Nath at all desired to execute a deed of gift. The other factors which weighed with the trial court was that the execution of such alleged deed was never conveyed to the plaintiff or other legal heirs of Surendra Nath. The plaintiff was residing in a portion of her father's property. It was improbable that Surendra Nath would not disclose the said issue. Moreover, circumstances surrounding the execution of the impugned deed raise questions with regard to the sanctity of the transaction. By noticing a decision of the Hon'ble High Court in ***Dukaribala Dasi, v. Gadadhar Paul & Ors.***, reported in AIR 1955 Cal 571 in which

it was held inter alia that when the executant of a deed of gift is dead and the Registrar registers the deed on the admission of the donee the defect in the matter of admission is merely procedural and will not invalidate the registration was not accepted by the trial court for the reasons clearly stated in the order.

The defendant while pleaded that prior to the registration of the impugned deed notices were duly served upon all the legal heirs of the donor could not establish the same at the trial. The notice alleged to have been issued by A.D.S.R., Baduria to the legal heirs of late Surendra Nath was not proved. In confirming the title to the plaintiff, the trial court has taken into consideration that the defendant had acknowledged that the plaintiff is in possession of a demarcated portion of land consisting of 16 decimals of land. However, due to lack of better evidence the learned trial Judge decreed the suit against the contesting defendants and ex parte against rest by declaring that the plaintiff has right, title, interest and joint possession over and in respect of the suit property. The deed of gift was set aside. The plaintiff was given opportunity to file a suit in order to get relief of title in respect of the 16 decimals of land. The possession of the plaintiff was duly acknowledged.

Before the first appellate court, on appreciation of the evidence has affirmed the order. The first appellate court concurred with the finding that the service of notice of the Registrar before registration could not be proved and in agreeing with the view expressed by the trial court, the first appellate court has made the following observation:

“The attending circumstances, here obviously do not support the contention of the Appellant, who was a beneficiary and donee of the impugned deed. In such a state of cascading doubt, I

have no other option but to become at one with the view of the Id. Court below on the point of registration. And hence, the document being the Exbt. A, was not registered duly and property. Consequently, the same should be deemed to be unregistered.

Now, before, having a final look to the entire matter, let me once again advert to the report submitted by Director, Finger Print Bureau, CID, West Bengal dtd. 23.08.2006, kept in the LCR carefully,.

The report in respect of enclosure (a) regd. Deed no.1 9808 dtd. 25.6.1975 results in the following form and manner:

“(a) Finger Print marked here as “X (as stated in para I(a) above, A/1, A/2, A/3 & A/9 (as stated in para I(b) above are all identical with one another.”

While the report in respect of enclosure (b) Regd. Deed of gift No.1 14944 dtd. 24.11.1975 results as follows:

“(b) Finger prints marked here as A/4, A/5, A/6, A/7 & A/8 (as stated in para I(b) above are all unfit for comparison as they are blurred bazy, indistinct and lack of sufficient number of convincing ridge details in relative positions.”

Upon the above findings, the Grounds of opinion has been established in the following stand:

“Matching ridge characteristics in their relative position for ming the grounds of opinion have been marked with red projection lines on the enlarged photographs of the identical prints.”

Therefore, from the result forwarded before the court below by the expertise shows that all the prints in respect of I(b) are all “unfit for comparison” and they are “blurred, hazy, indistinct and lack in sufficient number of convincing ridge details in relative positions”. This justifiably suggests to hold adverse inference and adverse presumption against the appellant who asserted to refer the matter for coming to a just decision, to determine their claim.”

Both the Counsels while accompanying that the registration of a deed gift on the admission of the donee is only a defect in procedure per Dasgupta, J. in ***Dukaribala Dasi, v. Gadadhar Paul & Ors.***, AIR 1955 Cal 571 and “a donor of immovable

property, after he has delivered the deed of gift to the donee, cannot resile before the document is registered, even when the gift can only be effected by a registered instrument. The gift is already complete, subject to its registration as required by the law. The Registrar cannot be restrained from registering such a document if it has been properly executed and is validly presented” per Lord Shaw in ***Venkat Subba Shrinivas Hegde v. Subb Rama Hegde*, 32 CWN 708**, upheld, the claim of the plaintiff on the ground that there are inherent contradictions in the deposition of the defendants in support of the execution of the alleged deed of gift.

The principal witness of the defendants namely defendant no.1 deposed in her cross-examination that her grand-father Surendra Nath Biswas was present at the time of scribing and registration of the impugned deed.

However, DW2 who happened to be the identifier and one of the attesting witnesses of the impugned deed in her cross-examination stated that the deed was registered in the absence of donor Surendra Nath Biswas. DW2 claimed and professed to have known the donor in her cross-examination had stated that the donor was illiterate and had accordingly put her thumb impression of the impugned deed whereas the DW1 has stated that Surendra Nath Biswas was literate. The assertion of the plaintiff that their father was seriously ill due to old age during the time when the alleged deed was executed has not been denied by the defendant. The defendant, in fact, had admitted that Surendra Nath Biswas was “gravely ill” and “so much so that in spite of being a literate person he had to put his finger impression on such deed”.

He had lost the strength to hold a pen and put his signature

thereon. This clearly shows the frail condition of Surendra Nath Biswas.

In P Ramanatha Aiyar **Advance Law Lexicon, 6th Edn.** “**Execution of the deed or other instrument**” has been defined as:

“Thus when the terms are applied to a written instrument they include the performance of all acts which may be necessary to render it complete as a deed or an instrument importing the intended obligation, of every act required to give the instrument validity, or to carry it into effect or to give it the forms required to tender it valid. (*Webster Dict.*) “The word ‘executes’ applied to a deed, rather than to a will” *Casement v Fulton*, (5 Moore PC 130, 141, 13). In a technical sense, the words necessarily include in English law the performance of three acts signing, sealing, and delivery, and in some instances the acknowledgment of the instrument, but the act of delivery is not always included; and not infrequently the terms are employed to express merely the acts of signing and sealing, or of signing only. The officer of a corporation affixing its seal to a deed is “the party executing the deed”. Execution must mean voluntary execution, the signing of the document of the executant’s free will. Where the signature to an agreement was obtained by duress and intimidation, there is no execution of the documents. [1 Cal LJ 126: (6 WR Mis 131: 1 BLROC 47: 4 MHCR 425 *Dis.*)]

“The term execution of document consists in signing a document, written out, read over and understood and does not consist of merely signing a blank paper”. AIR1976 Pat 206, **quoted.** *Birbal Singh v Harphool Khan*, AIR 1976 All 23 at 24. [Negotiable Instrument Act 26 of 1881), section 118].

Execution of a document is not mere signing of it. It is a

solemn act of the executants who must own up the recitals in the instrument and there must be clear evidence that he put his signature in a document after knowing fully its contents. *Bhutkani Nath v Kamaleshwari Nath*, AIR 1972 Assam & Nagaland 15, 17. [Registration Act (16 of 1908), section 60(2)].

Execution of deeds is the signing, sealing and delivering them in the presence of witnesses, Per FARRAN J., in *Bhawanji v Devji Panja*, 19B 635, 638.” (emphasis supplied)

In short, the term ‘execution’ does not simply connote putting ones signature or mark on a document blindly. It has a far wider connotation. In its true sense execution of document to be validly made requires that- i) executant or person putting his signature or mark must be capable of understanding the contents of the documents to be executed, ii) that after understanding the contents of such documents either by reading the same or by having the same read over and explained the executant must consent to such contents of the document, and iii) then as a token of his/her understanding and consent the executant must put his/her signature or affix a mark thereon. These three things must exists together in order to conclude that a document was duly executed. In other words, the mind of the executants must precede his physical act.

It appears from the evidence that Surendra Nath Biswas was severely ill and due to his old age and failing health he put or allegedly put his finger impression. There is no evidence on record to show that he has executed the said document after understanding or being aware of the contents of the said document. It was alleged to have been executed three days prior to his death. This creates a genuine suspicion in the mind of both the courts that the said

document does not represent the free Will or consent of Surendra Nath. He did carry his mind with the document.

The learned Counsel for the appellant has failed to convince us with any better evidence which could upset the findings of both the courts or dissuade us to take a contrary view. On the basis of the evidence on record the views taken by both the courts with regard to the execution of the alleged document cannot be said to be perverse or based on no evidence. We are also convinced that the said alleged deed could be forged or fabricated and even it is assumed to have been signed by Surendra Nath the circumstances surrounding the execution of the said deed are suspicious and there are enough materials to that effect.

On such consideration we do not find any reason to interfere with the findings of facts by both the courts with regard to the execution to the said alleged deed.

The second appeal stands dismissed at the admission stage. However, there shall be no order as to costs.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)