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THURSDAY

Court : **04**
Item : **23**
Matter : **SA**
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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

SA 221 of 2017
CAN 1 (9866) of 2016

Sanjay Mukherjee
Vs.
Minor Navonil Mukherjee & Ors.

Mr. Ayan Banerjee, Advocate
Mr. Soumou Chowdhury, Advocate
……for the Appellant
Ms. Shanta Sarkar, Advocate
……for the Respondents

1. Both the Courts have concurrently held that the plaintiff/appellant has miserably failed to prove the case and proceeded to dismiss the suit. A little prelude to the litigation is required to be adumbrated for a proper and effective determination of the points raised before us.
2. Admittedly the parents to the present appellant/ plaintiff owned and possessed several properties. During their lifetime the purported deed of gift was executed and registered in favour of the respondent no. 1, the grandson from the other son who was admittedly a minor at the time of execution and registration of the said deed of gift. The original plaintiff/appellant instituted a suit against the respondents assailing the purported deed of gift on several grounds including that those have been obtained by misrepresenting the fact and, therefore, cannot be construed to have been executed with free mind. The defence was taken by the respondents that after the due

execution and registration of the deed of gift, it was duly accepted by the natural guardian on behalf of the minor who is admittedly the attesting witness of the said deed and the custody of the purported deed of gift also remained with the said natural guardian. It is further contended that the deed of gift cannot be repudiated and/or rescinded on such ground once the right is created in favour of the donee therein by the rightful owner.

3. Undeniably, the two witnesses were called in course of the trial in order to prove the execution of the said deed of gift. Both the attesting witnesses corroborated the fact that the donors put their signatures before the Registrar and simultaneously they also put their signatures on the documents as attesting witnesses. During the pendency of the proceeding the original plaintiff died and the present appellant being one of the sons was substituted in his place.

4. Both the Courts below held that the allegation, as to misrepresentation, has not been proved by the appellant and, therefore, the decree, as sought for, cannot be granted.

5. Before us, it is submitted that the purported deed of gift has not been executed in conformity with the provisions contained under Sections 122 and 123 of the Transfer of Property Act (hereinafter referred to as 'the said Act') as there is no reflection in the said deed about the acceptance of the gift by the donee or on behalf of the donee. It is further submitted that the purported deed of

gift does not expressly contain averments that the donee is a minor and, therefore, it is presumed that a minor has accepted the gift which he is otherwise legally incompetent. It is further argued that the signatures appended on the purported deed of gift, more particularly, at the right-hand side at the top of each page, implies that the deed has not been executed in proper form.

6. According to the learned Counsel for the appellant, at least at the last page, the donors must put their signatures at the bottom immediately after execution of the said document, and having not done so, is not in conformity with the provisions contained under Section 123 of the said Act. It is further submitted that the evidence adduced by the attesting witness is not in conformity with each other and, therefore, the Court should have discarded their evidences and proceeded to decree the suit declaring the deed to be void and or non-est. It is further submitted that none of the attesting witnesses proved that the mother of the appellant has put the signature in their presence or before the Registrar and, therefore, the purported deed of gift has not been properly proved before the Court below.

7. Before we proceed to decide the aforesaid point in pursuit to ascertain whether it involves a substantial question of law, it would be apposite to quote Sections 122 and 123 of the said Act.

122. "Gift" defined.

"Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without

consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Acceptance when to be made. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

123. Transfer how effected.

For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered.

8. From the meaningful reading of the aforesaid provisions, we have no hesitation in our mind that the deed of gift is required to be executed by the donor in relation to a moveable or immoveable property made voluntarily and without consideration, and accepted by or on behalf of the donee. It further provides that such acceptance should not be immediate, meaning thereby upon execution and registration thereof it should be accepted during the lifetime of the donee so long he remain capable of giving such property.

9. The contention of the appellant that the donee must accept the gift or, in effect, has accepted the gift, is not in tune with the soul and spirit with the provisions contained under Section 123 of the said Act. What is *sine qua non*, the gift was accepted by or 'on behalf of the donee' and, therefore, if the acceptance can be seen to have been made by the natural guardian of the minor,

naturally it satisfies the ingredients of the expression 'on behalf of the donee'.

10. Admittedly, the donors instituted a suit during their lifetime assailing the said deed of gift wherein a defence has been taken that the natural guardian has accepted such gift on behalf of the minor. Mere omission to describe the donee as minor, when admittedly the donor is aware that he is a minor and the acceptance is completed by the natural guardian, it does not *ipso facto* render the said deed void or non-est.
11. The parties were *ad idem* on the aforesaid issue that the donee was minor at the time of registration and execution of the purported deed of gift and, therefore, non-describing the donee as minor in the deed cannot be construed to be fatal.
12. So far Section 123 of the said Act is concerned, it postulates that in respect of a gift of an immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. It does not provide complete modalities or the format of preparation the deed of gift but what is *sine qua non* is that the deed must be signed by the donor or on his behalf and be registered with the registering authority and attested by two witnesses.
13. We do not find that the aforesaid provision mandates the signature at the bottom of the last page or immediately after the recitals. Admittedly all the pages of the purported deed of gift contained the signature of the donor and the

attesting witnesses at the last page. Though the deed of gift affects the transfer with immediate effect but has a special feature that it must be attested by at least two witnesses.

14. We are not unmindful of the proposition of law that a document which requires attestation, have to be proved before the Court of Law in accordance with the provisions contained under Section 68 of the Indian Evidence Act. The aforesaid provision indicates that the document which is required to be attested shall not be used as evidence until at least one attesting witness has been called to provede its execution. The proviso inserted thereto takes care of the situation that it is not necessary to call all attesting witnesses to prove the due execution of the documents which have been registered following the provision of the Indian Evidence Act.

15. In the instant case, two attesting witnesses were called. One is admittedly the father of the donee. Both the attesting witnesses have uniformly submitted that they were requested to come at the Registration Office and the signatures were put in presence of the Registrar.

16. A point is sought to be taken before us that both the Courts below have wrongly relied upon the part of the cross-examination of one of the attesting witnesses to the extent that the has stated that the mother has signed in her presence but we find from the tenet of the said evidence that the said witnesses in an earlier portion deposed that both the father and mother were

asked to signed the said documents. The other attesting witness categorically deposed that the mother signed the documents in presence of the Registrar.

17. The Court should not venture to take the evidence in piecemeal manner but must taken the entire evidence in the perspective of the issues and to arrive at the conclusion whether the same has been proved through the witnesses. After meaningful reading of the depositions of both the attesting witnesses, there is no incongruity that both the donors put their signatures on the document in their presence and the attesting witnesses were also called upon to put their signatures.
18. The Counsel for the appellant sought to be contended in this regard that the attestation has not been proved by the aforesaid attesting witnesses in terms of Section 123 of the Transfer of Property Act.
19. We do not find that Section 123 of the said Act provides for proving the attestation. The documents which are compulsarily required to be attested, have a unique feature as the mode of proving the same in the evidence is different from the other documents. Section 68 of the Indian Evidence Act does not provide for proving the due attestation of the said document but its due execution. Furthermore, a registered document carries a presumption of its due execution which is rebuttable one.
20. The onus shifted upon the person denying the due

execution by cogent evidence and if there is any failure in this regard, the document cannot be presumed to be invalid or bad in law.

21. Though feebly, a point was taken up before us that the First Appellate Court has not considered the grounds taken in the memorandum of appeal and, therefore, have failed to exercise the jurisdiction in a proper manner.

22. We have taken to a written argument filed before the First Appellate Court and does not find that any other point were taken than what has been taken before us. Since both the Courts have concurrently found that the plaintiff/appellant has failed to prove the case made out in the plaint and in view of the findings made hereinabove, we do not find involvement of substantial question of law in the instant appeal.

23. The appeal being **SA 221 of 2017** is **dismissed** at the stage of admission. The connected application being **CAN 1 (9866) of 2016** also stands **dismissed**.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)