

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

S.A. 385 of 2009

**Tapan Kumar Maity
Vs
Swapan Kumar Maity & ors.**

For the Appellant : Mr. Debasis Sur
Mr. Hare Krishna Halder
Ms. Anindita Chatterjee

For the Respondents : Mr. Amal Krishna Saha
Mr. Sudipto Panda
Mr. Souvik Sarkar

Heard on : 13.02.2024

Judgment on : 03.04.2024

Ajoy Kumar Mukherjee, J.

1. This Second Appeal has been preferred against the judgment and decree dated March 16, 2009 passed by learned Civil Judge (Senior Division) 2nd Court Contai, Purba Medinipur in Title Appeal No. 6 of 2007. By the impugned judgment the court below has set aside the decree dated 11th December, 2003 passed by the learned Additional Civil Judge (Junior Division) 1st Court Contai, Purba Medinipur in T.S. No. 46 of 2002.

2. Appellant herein Sri Tapan Kumar Maity filed aforesaid T.S. No. 46 of 2002 contending *inter alia* that the “ka” schedule property to the plaint

previously belonged to one Shiba Prasad Maity and he transferred the said property in favour of the plaintiff by deed of gift which was executed on 31.03.1968 and registered on 01.04.1968. The “A” schedule and the “B” schedule property to the plaintiff are part of aforesaid gifted “ka” schedule property. In the said suit plaintiff impleaded his own brother as defendant no.1 and his father as defendant no.2. Plaintiff contended that the defendant no.2 used to possess the said land which plaintiff owned by the aforesaid gift deed dated 31.03.1968, during the minority of the plaintiff but the plaintiff has been possessing the said land since attaining majority.

3. Plaintiff’s further case is that on and from 25.05.1998, the defendants started threatening the plaintiff for dispossession from the suit property. On query, the defendants disclosed to the plaintiff about execution of the sale deed by defendant no.2(father) on 03.04.1975 in favour of defendant no.3 in respect of plaintiff’s aforesaid property mentioned in schedule “A” to the plaintiff which is within “ka” schedule, in favour of defendant no. 3 and thereafter another deed was executed by defendant no.3 on 11.07.1983 in favour of defendant no.2 in respect of the self-same property and thereafter another deed of gift was executed and registered by defendant no.2 on 22.12.1992 in favour of plaintiff and defendant no.1 in respect of self-same “A” schedule property.

4. Further plaintiff case is thereafter defendant disclosed about execution of another deed of sale allegedly executed and registered by the plaintiff in favour of defendant no.1 on 20.01.1986 in respect of ‘B’ schedule out of ‘ka’ schedule gifted property. After getting certified copy of the aforesaid deed, the plaintiff got astonished as the date on which the “B” schedule property

to the plaintiff out of “ka” schedule was sold to defendant No.1, plaintiff was a minor and he had no knowledge about the property affairs and he was fully dependent upon his father. On that day i.e. on 20.01.1986 defendant no.2/father took the plaintiff in the registry officer and got the sale deed executed and registered in the guise of execution of power of attorney. Plaintiffs further case is defendant no., 2 has no right title interest or possession over the “ka” schedule property which is the exclusive property of the plaintiff and which he got by way of deed of gift from his grandfather, Shiba Prasad Maity. Accordingly plaintiff prayed in that suit that the transfer in respect of “A” schedule property to the plaintiff out of “ka” schedule by way of sale deed dated 03.04.1975 in favour of defendant no.3 and subsequent deeds dated 11.07.1987 by defendant no.3 in favour of defendant no.2 and the deed executed by defendant no.2 in favour of plaintiff and defendant no.1 dated 22.12.1992 as void, because neither the defendant no. 2 nor the defendant no. 3 had any right to make aforesaid transfers in respect of the property which is exclusively owned by the plaintiff. In connection with B schedule property to the plaintiff under “ka” schedule, allegedly executed by the plaintiff in favour of defendant no.2 was also executed under mis-representation of fact and as such said deed dated 20.01.1986 in connection with “B” Schedule Property has also been sought to be declared as void in terms of prayer made in the plaint.

5. The defendant no.1 contested the suit by filing written statement and denied all material allegations made in the plaint. Defendant’s specific case is that the suit is barred by limitation. Admittedly ‘ka’ schedule suit property originally belonged to Shiba Prasad Maity, the grandfather of the parties and

he transferred the said property in favour of plaintiff by dint of registered deed of gift executed on 31.03.1968 and registered on 01.04.1968. On 20th January, 1986 the plaintiff transferred the “B” schedule property in favour of defendant no.1 after attaining majority and since then the defendant No.1 is possessing the “B” schedule suit property. Defendant’s further case is that so far as “A” schedule property out of “ka” schedule property to the plaintiff is concerned, said property was transferred by defendant no.2 (father) being the natural guardian in favour of defendant no.1, while plaintiff was a minor but said transfer was made by natural guardian/defendant no 2 for legal necessity for minor plaintiff on 05.04.1975. After attaining majority plaintiff filed a suit being T.S. 108 of 1983 and the dispute was amicably settled between defendant no.2 and the plaintiff and by dint of amicable settlement, defendant no. 3 transferred the “A” schedule property in favour of the defendant no. 2 with the consent of the plaintiff by a registered deed of sale on 11th July, 1983. Thereafter, the defendant no.2 transferred the A schedule property between the plaintiff and the defendant no.1 by dint of the registered deed of gift on 22.12.1992 in equal share and the plaintiff and the defendant no.1 are possessing the same accordingly. Plaintiff only to harass the defendant no. 1 had filed the said suit which is not at all maintainable in the eye of law.

6. Learned Trial Court framed as many as seven issues and after conclusion of trial decreed the suit in part declaring plaintiff’s right title interest only in respect of “A” schedule property to the plaintiff out of “Ka” schedule and thereby declared the abovementioned deeds dated 03.04.1975, 11.7.1983 and 22.12.1992 as void. However, plaintiff’s prayer for declaration

of his title in respect of “B” schedule property to the plaint was dismissed by the Trial Court. The first appellate court by the impugned judgement has set aside the judgment and decree passed by the Trial court and declared plaintiffs right title interest and possession in respect of 9 decimal in plot no. 1511, 3 decimal in plot no. 1522 and $2\frac{1}{3}$ decimal land in plot no. 1509, relying upon the recital made in Exhibit-1.

7. The Division Bench of this court while admitted the 2nd Appeal framed following substantial questions of law by an order dated 14.09.2009

- (i) *Whether the Learned First Appellate Court committed substantial error of law in declaring that the plaintiff/appellant has right, title, interest and possession in respect of 9 decimal in suit plot No. 1511, 3 decimal in Suit Plot no. 1522 and $2\frac{1}{3}$ decimal lands in suit plot no. 1509?*
- (ii) *Whether the Learned First Appellate Court Committed error of law in holding that the deed dated 20th January, 1986 executed by the plaintiff in favour of the defendant No.1 is a genuine one and by dint of that registered Deed of Sale right, title, interest and possession has been duly acquired by the defendant no.1?*

Decision

8. Admitted position in the present case is that by dint of registered deed of gift grandfather of the plaintiff Shiba Prasad Maity had transferred entire “ka” schedule property to the plaint in favour of plaintiff/appellant who accordingly became absolute owner of “Ka” schedule property. Admittedly plaintiff was a minor at that point of time. From plaintiffs own document, marked exhibit 3, it appears that plaintiff was born on 09.01.1967. Accordingly plaintiff became owner of the “ka” schedule property when he was aged about only one year. Now plaintiffs father who is defendant no.2 in the said suit, had transferred “A” schedule property out of aforesaid gifted “ka” schedule property in favour of defendant no.3 by a registered deed

dated 3rd April, 1975. The whole gamut of the case in connection with “A” schedule property, is whether defendant no.2 had any right to transfer plaintiff’s aforesaid “A” schedule land to the plaintiff, in favour of defendant no.3 or not.

9. There is no quarrel with the proposition of law that under section 8 of the Hindu Minority and Guardianship Act, a natural guardian may sell minors property with previous permission of the Court and the Court shall not give such permission to the natural guardian, except in case of necessity or for an evident advantage to the minor, though natural guardian in no case can bind the minor by a personal covenant. Under Article 60 of the Limitation Act, such minor if wants to repudiate any such transfer, which according to law is a voidable transfer, can file a suit within 3 years after attaining majority. In the present case though the aforesaid transfer by defendant no.2 (father) was made on 03.04.1974 and plaintiff has attained majority on 09.01.1985, but the present suit was filed only in the year of 2002.

10. Now on perusal of the recital of the said deed of sale executed by defendant no. 2 in favour of defendant no.3 dated 03.04.1975, it appears that defendant no.2 had sold the plaintiff’s aforesaid “A” schedule property in favour of defendant no.3, stating himself as owner of the suit property. In the said deed, defendant no.2 Khudiram Maity misrepresented himself in the deed by reciting that he became owner of the property by purchase through a registered deed dated 1st April 1968 and nowhere he has mentioned that the property actually owned by plaintiff or being natural guardian of the plaintiff he is going to transfer the said property or that he

has taken permission from the court to sell minor's property for the legal necessity of the minor. In fact the recital of the deed dated 03.04.1975 clearly shows that the said deed was executed by practising fraud and by making false representation.

11. The question of limitation would have arisen if the father of the plaintiff i.e. defendant no. 2 would have executed the said deed representing himself as natural guardian of the plaintiff, mentioning it as minor's property and in that case the impugned deed would have been categorized as "voidable deed", in respect of which Article 60 of the Limitation Act would have attracted. But in the present context from the recital of the deed it appears that defendant no.2 had sold the plaintiffs property, claiming himself as owner of the "ka" schedule property, and as such said deed is a deed which is *void ab initio*. No one can transfer a better title than he himself has which is expressed by the maxim "nemo dat quod non habet". If one deals with the property of another, without his authority, the transaction is as against that other nugatory in law. A transfer which is *void ab initio* in the eye of law is no transfer at all and hence will not come within the scope of Article 60 of the Limitation Act. Accordingly Trial Court was fully justified in cancelling the aforesaid deed dated 03.04.1975 which was registered on 05.04.1975 in favour of defendant no. 3 by defendant no. 1. Since said deed is *void ab initio*, as a corollary the subsequent deeds dated 11.07.1973 and 22.12.1992 are also liable to be declared as void.

12. Now regarding transfer of B schedule property within "ka" schedule property to the plaintiff made by plaintiff in favour of defendant no. 1 on 20th January 1986, it has been contended by the plaintiff that he was minor at

that time and he had no knowledge about the property affairs and he was fully dependent upon his father who took him to Registry office and got the said deed executed on the pretext that it was a deed of power of attorney, but it appears that such contention does not find any substance in the eye of law in the absence of cogent document or evidence. Plaintiffs own document marked exhibit 3 reveals that his date of birth is 9th January, 1967 and accordingly when the deed was executed by the plaintiff in favour of defendant no. 1 on 20th January, 1986 he was more than 19 years old and accordingly I agree with the Trial Court that it is not the case of the plaintiff that he is an illiterate person so that he can get protection like a pardanashin lady nor he has substantiated his claim that the said deed was executed by practising false misrepresentation or undue influence upon him by his father defendant no.2. Trial Court found that there is no iota of evidence to the effect of plaintiffs alleged claim of practising fraud or misrepresentation at the time of execution of said deed dated 20.01.1986. It is not understandable as to why the court below has set aside the Trial Courts judgment which was based on reason.

13. In such view of the matter the Second Appeal being **S.A. 385 of 2009** is hereby allowed. The judgment and decree passed by learned Civil Judge (Senior Division) 2nd Court contain, Purba Medinipur on March, 16th 2009 in T.A. no. 6 of 2007 is hereby set aside and the judgment and decree dated 11th December, 2003 passed by learned Additional Civil Judge (Junior Division), 1st Court contain, Purba Medinipur in T.S. no. 46 of 2002 is hereby affirmed.

14. Records of the court below be returned immediately.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(AJOY KUMAR MUKHERJEE, J.)