

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

Present:

The Hon'ble Justice Sugato Majumdar

SA/376/2008

RANU BHANDARI

VS

NILIMA DAS & ORS.

For the Appellant : Mr. P. K. Mukhrjee, Adv.
Mr. S. Ray, Adv.

For the Respondents : Mr. Rahul Karmakar, Adv.
Mr. Soumojit Saha, Adv.

Hearing concluded on : 09.06.2026

Judgment on : 18.06.2026

Sugato Majumdar, J. :

The instant Second Appeal was filed against the Judgment and Decree dated 20/12/2007 passed by the First Appellate Court being the Learned Additional District Judge, 3rd Court at Alipore in Title Appeal No.273 of 1999 whereby the Judgment and Decree dated 13/08/1999 passed by the Learned Civil Judge, Senior Division, 6th Court at Alipore in Title Suit No. 75 of 1995 was reversed and set aside.

The sum and substance of the plaint case was that the suit property belonged to the original Defendant who is the father of the Appellant/Plaintiff. The suit property was transferred by way of a registered deed of gift dated 14/09/1992 by the original Defendant in favour of the Appellant/Plaintiff. Khas possession of the suit property had also been delivered to the Appellant/Plaintiff. After delivery of *khas*

possession, the Appellant/Plaintiff requested the original Defendant, being her father, to vacate the suit premises. At that time, the original Defendant was in possession of the suit property along with his wife and a son and daughter. It was contended in the plaint that the Appellant/Plaintiff made enough financial help to the original Defendant as he had no source of income and was entangled in a criminal prosecution since the wife of his son had met with unnatural death. Subsequently, all were acquitted. The Appellant/Plaintiff had borne all the costs of litigations. Out of gratitude, the original Defendant executed the deed of gift in favour of the Appellant/Plaintiff. As the original Defendant requested for accommodation, six months' time was allowed by the Appellant/Plaintiff to continue possession on the basis of leave and license without payment of any rent or license fee. It was assured that the suit property would be vacated on expiry of the month of September, 1993. In spite of expiry of the stipulated period, the original Defendant did not vacate the suit property. Therefore, the Appellant/Plaintiff was constrained to institute the original suit praying for decree of eviction, mesne profit along with other prayers.

The original Defendant contested the suit by filing written statement. Apart from challenging the maintainability of the suit and denying all the allegations, it was contended that the suit property was a three storied structure, two of which were tenanted whereas the original Defendant was in occupation of the entire second floor along with his family. The Appellant/Plaintiff was not in possession of the suit premises. It was denied that the suit property had been transferred to the Appellant/Plaintiff by way of gift. Taking advantage of the old age of the original Defendant, the Appellant/Plaintiff forced the original Defendant to execute the deed of gift. It was also alleged that the deed of gift in question was a fraudulent one. The

Appellant/Plaintiff got the alleged deed of gift executed by the original Defendant representing the same as a power of attorney. It was further pleaded that the original Defendant cancelled the alleged deed of gift by another registered deed dated 01/04/1997. It was denied that the original Defendant was a licensee in the suit premises and was liable to vacate the same. In nutshell, the original Defendant pleaded that the suit should be dismissed.

On the basis of the rival pleadings, following issues were framed:

1. *Is the suit maintainable in the present form and in law?*
2. *Has the Plaintiff any cause of action to file the suit?*
3. *Is the Defendant a licensee in respect of the suit property?*
4. *Is the Plaintiff entitled to get decree as prayed for?*
5. *To what other relief or reliefs, if any, is the Plaintiff entitled?*

The Learned Trial Court decreed the suit. It was observed and concluded that the deed of gift was accepted by the Appellant/Plaintiff. It was also noted that the original Defendant sent letter of attornment to one of the tenants asking him to pay rent to the Appellant/Plaintiff. The original Defendant also sent letters to the other tenants asking them to pay rent to the Appellant/Plaintiff. On appreciating the whole evidence, the Learned Trial Court allowed the suit and passed decree of eviction.

On being aggrieved and dissatisfied, an appeal was preferred.

In view of death of the original Defendant, his legal heirs and successors were substituted.

The Learned First Appellate Court reversed the judgment and order passed by the Learned Trial Court. Among others, the Learned First Appellate Court observed that the deed of gift was not a genuine one; none of the attesting witnesses were examined since the deed of gift was challenged, thus not complying with the provision of section 68 of the Indian Evidence Act. It was also noted that the Appellant/Plaintiff was the best person to depose but she avoided to depose in this case. Therefore, in terms of the impugned judgement and appellate decree dated 20/12/2007, the First Appellate Court set aside the decree passed in the suit.

Hence, the present appeal.

The following substantial questions of law were framed for hearing of the instant appeal:

- I. Whether the Learned Lower Appellate Court committed substantial error in coming to the conclusion that absence of examination of the attesting witness to the deed of gift by the plaintiff leads to suspicion about its due execution although execution of such deed need not be proved in terms of section 68 of the Evidence Act?
- II. Whether both the courts below substantially erred in law with the suit without taking into consideration that the proceeding ought not to have proceeded on death of both the licensor and the licensee?
- III. Whether both the courts below substantially erred in law in delving into the question of execution of the gift deed which had been revoked under section 126 of the Transfer of Property Act, 1882?

- IV. Whether both the courts below substantially erred in law in not observing that a donor can unilaterally revoke a gift under section 126 of the Transfer of Property Act, 1882 and the failure of the donee to challenge such revocation amounts to acceptance of such revocation?

The first limb of argument of the Learned Counsel for the Appellant/Plaintiff was that the original Defendant after voluntarily executing the deed of gift (Ext. 1) acted on it. He issued letter of attornment to one of the tenants sent to Bhushan Majumder asking him to pay rent to the Appellant/Plaintiff. He referred to Ext.2, namely, municipal tax receipt as well as Calcutta Municipal Assessment Book (Ext.3) and also gift (Ext.B) which evidence that the gift deed was acted upon and mutation was made. The Learned Counsel also referred to the testimony of DW-5, one of the tenants who stated that he had been paying rent to the Appellant/Plaintiff. The Learned Counsel also referred to (Ext.11) which letter dated 22/09/1993 written by the original Defendant himself addressed to the Appellant/Plaintiff seeking permission to occupy one room. According to the Learned Counsel, the original Defendant fully understood the deed of gift not only executed voluntarily but also acted upon it which cannot be subsequently assailed.

The second limb of argument the alleged deed of cancellation was executed unilaterally on 01/04/1997, beyond the statutory period prescribed for suit seeking cancellation of instrument. No explanation is there by the original Defendant as to why he did not take any step except unilateral cancellation of deed of gift challenging the original deed of gift. Deed of gift did not reserve any right of cancellation. According to the Learned Counsel, the deed of cancellation offends Section 126/127/128 of the Transfer of Property Act, 1882; this deed of cancellation has no

value in the eyes of law, since it offence Section 126 of the Transfer of Property Act, 1882. To substantiate the argument, the Learned Counsel referred to **N. P. Saseendran Vs. N. P. Ponnamma [(2025) 7 SCC 502]**.

The Learned Counsel also argued and discussed at length on interplay between gift and settlement as well as term consideration in their context.

Next, it was argued that referring to **Satya Pal Anand Vs. State of M. P. [SCC 793]**, the Learned Counsel submitted that even if fraud is pleaded or claimed the authorities under the Registration Act, cannot unilaterally cancelled document and the parties should only approach the jurisdictional civil court.

Per contra, the principle limb of argument of the Learned Counsel for the Respondent was that the essential element for a valid gift under Section 122 of the Transfer of Property Act, 1882 is that the transfer has to be made voluntarily and without consideration. The gift for consideration is void ab initio and the plaint thus is based on an instant gift for consideration. Referring to **N. P. Saseendran Vs. N. P. Ponnamma [(2025) 7 SCC 502]**, it was contended that the consideration may take various forms in this case financial assistance. It was argued that cancellation deed was validly made as the gift could be cancelled or revoked in terms of Section 126. In this case, it was alleged that misrepresentation was made and Section 126 permits revocation in that case referred to **Ningawwa Vs. Byrappa Shiddappa Hireknrabar & Ors. [AIR 1968 SCC 956]**. Referring to **Prem Singh & Ors. Vs. Birbal & Ors. [(2006) 5 SCC 303]** it was submitted that a document is void *ab initio*, no decree is required for setting it aside.

Thirdly, it was argued that the plaint case was not proved by the Appellant/Plaintiff. The husband of the Appellant/Plaintiff came to depose in favour

of herself. The authority of DW-1 being the husband to depose is limited to the extent of his personal knowledge and is governed by Section 120 of Evidence Act, 1872. DW-1 had no personal knowledge with respect to the execution of the deed of gift. Therefore, his evidence should not be relied upon to conclude anything on due execution of the deed of gift. In this context it was argued that Section 68 of the Indian Evidence Act, 1872 requires testimony of one of the attesting witnesses or the testimony of the Appellant/Plaintiff, since it was specifically challenged by the original Defendant. The right sought to be enforced in the suit, namely, recovery of possession is based on this deed of gift which has not been proved. Therefore, the suit should fail. In this context, it was further argued that the Appellant/Plaintiff's non-appearance to depose in this case leaves scope to invoke adverse inference.

Next, it was argued that the deed of cancellation was not challenged by the Appellant/Plaintiff, keeping the same alive and binding the result of which is nullification of the deed of gift.

I have heard rival submissions.

The suit is for recovery of possession from a licensee on revocation of the license. The licensor was the daughter and the licensee was the father, as averred. The original Defendant was previously the owner of the suit property. Subsequently, he executed the deed of gift in favour of the original Defendant which the original Defendant challenged as being executed under misrepresentation. A subsequent deed of cancellation was executed by the original Defendant. The Appellant/Plaintiff sought for recovery of possession on the strength of the deed of gift as she derived title and right to recover possession on the basis of the said deed of gift.

On the other hand, the deed of gift itself was challenged as being obtained by misrepresentation and subsequently it was cancelled by a subsequent registered deed. The main thrust of argument of the Learned Counsel for the Appellant/Plaintiff was that the deed of gift itself was acted upon by the original Defendant which eliminates the case of misrepresentation, demonstrating that deed of gift was voluntarily executed and acted upon. On the other hand, the deed of cancellation was not challenged by the Plaintiff, either by the Plaintiff in this suit or in another suit. The Learned Counsel for the Respondent argued that the service of Section 68 of the Indian Evidence Act, 1872.

Section 68 of the Indian Evidence Act reads as follow:

“68. Proof of execution of document required by law to be attested.

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence :[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]”

In Rosammal Issetheenammal Fernandez (Dead) by Lrs. & Ors. Vs. Joosa Mariyan Fernandez & Ors. [(2000) 7 SCC 189] the Supreme Court of India held that the main part of Section 68 of the Indian Evidence Act puts an obligation on the party tendering any document that unless at least one attesting witness has been called for proving such execution the same shall not be used as

evidence. Under the proviso of the Section 68 the obligation to produce at least one attesting witness stands withdrawn if the execution of the document is not denied. It was observed:

“11. Under the proviso to Section 68 the obligation to produce at least one attesting witness stands withdrawn if the execution of any such document, not being a will which is registered, is not specifically denied. Therefore, everything hinges on the recording of this fact of such denial. If there is no specific denial, the proviso comes into play but if there is denial, the proviso will not apply. In the present case as we have held, there is clear denial of the execution of such document by the plaintiff, hence the High Court fell into error in applying the said proviso which on the facts of this case would not apply. In view of this the very execution of the gift deed, Exhibit B-1 is not proved. Admittedly in this case none of the two attesting witnesses has been produced. Once the gift deed cannot be tendered in evidence in view of the non-compliance of Section 68 of the Indian Evidence Act, we uphold that the plaintiff has successfully challenged its execution. The gift deed accordingly fails and the findings of the High Court contrary are set aside. In view of this no rights under this document accrue to the respondent concerned over Schedule A property which is covered by this gift deed.”

This provision contemplates making specific denial of the execution, distinct from general or evasive denial. Here, a specific plea was taken that the gift deed was signed by the donor on representation of power of attorney. DW-2 and 3 being the wife and son of the original Defendant, who were present at the time of execution, deposed to that extent. DW-2 and 3 specifically stated in course of evidence that signatures were obtained in a deed of gift on representation of execution of power of attorney. In view of this specific denial, it was incumbent on the Appellant/Plaintiff

to depose and prove of the execution of the deed in terms of the Section 68 of Indian Evidence Act, 1872. One of the attesting witness should be produced to prove due execution of the will, since specific denial was there of the execution. The Donee, being the Appellant/Plaintiff did not appear before the court to depose. Neither of the attesting witness was examined. Therefore, it cannot be said the due execution of the deed of gift has been proved. Though the Learned First Appellate Court observed that the document is not genuine one, yet it would be better to say that due execution of the document, namely, Ext.1 has not been proved and the same cannot be relied upon to conclude that the Appellant was able to establish title on the basis of the deed of gift.

Another aspect of the matter is there. The suit is for recovery of possession of a licensee. There is no prayer for passing declaratory decree on the title of the Appellant/Plaintiff. As observed above, deed of gift has not been proved as a result of which title of the Appellant/Plaintiff became seriously clouded. It is also in pleading that a deed of cancellation was executed subsequently, the effect of which is to nullify the gift. That deed of cancellation has not been challenged. This doesn't mean that this Court is of opinion that the cancellation deed eclipsed the deed of gift or that the gift was duly revoked by the said cancellation deed but the presence of the cancellation deed without being challenged, casts a serious doubt on the title of the Plaintiff. The Appellant/Plaintiff in that situation should have suitably amended the plaint to introduce a prayer for declaration of title. There was no such amendment of plaint. In absence of declaratory decree, the Appellant/Plaintiff right to recover possession becomes diluted; in absence of proof of deed of gift is entitlement to recover possession becomes cannot be established.

So far as the Point No. I is concerned, this Court is of opinion that the Learned First Appellate Court did not commit any error in coming to conclusion that the valid execution of the deed of gift in terms of section 68 of the Indian Evidence Act has not proved. Several corollaries follow from this. The first one is that the title of the Appellant is not established in the suit property. Once the title is not established, the Appellant cannot exert her right as the licensor, since existence of title is the prior requirement. The second is that the licensor-licensee relationship not being established, no decree can be passed for recovery of possession from an alleged licensee. The Point No. II, therefore, demands no cerebation further. So far as the Point No. III & IV are concerned, the original Defendant pleaded execution of a deed of revocation but no suitable amendment had been made in the plaint demanding adjudication on the deed of revocation or on its valid execution or propriety. Consideration of the deed of revocation is, therefore, outside the ambit of the present litigation. This Court, therefore, refrained from commenting on the Point No. III & IV.

For reasons stated above, this Court concurred with the finding and upheld the finding of the First Appellate Court that the deed of gift is not proved and the Appellant failed to establish right to recover possession as a licensor.

In nutshell, the Second Appeal fails.

The instant appeal is disposed of along with all pending applications.

T.C.R be returned.

(Sugato Majumdar, J.)