

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE HARISH TANDON

And

THE HON'BLE JUSTICE PRASENJIT BISWAS

FMA 299 of 2023

Smt. Astasakhi Ghosh and Anr.

Vs.

Sri Narendranath Ghosh and Anr.

For the appellants : **Mr. Arunava Pati, Adv.**

Judgment on : **17.10.2023**

Prasenjit Biswas, J:-

1. The instant appeal has been preferred by the appellant challenging the impugned judgment and decree passed by the first Appellate Court in connection with Title Appeal No. 4 of 2019.

2. By passing the impugned judgment dated 11.08.2022, the first Appellate Court remanded the case record to the Trial Court to decide the case on the issue of validity of deed of gift being No. of 1992 after giving opportunity to the parties to lead evidence.

3. Being aggrieved by and dissatisfied with the impugned judgment and order of the first Appellate Court, the instant appeal has been preferred by the appellants.

4. The suit property originally belonged to one Bijoy Chandra Ghosh and during his old age he was taken care of by the plaintiffs and on being pleased he executed a deed of gift in favour of the plaintiffs and proforma defendant No. 3 of the suit to the extent of equal share in suit property. Both the plaintiffs and proforma defendant No. 3 accepted the gift and got the possession of the suit property and, subsequently, present Records of Rights have been prepared in their names. Thereafter, they developed the suit property by constructing residential building thereon. Disputes and disturbances have been cropped up after the death of said Bijoy Chandra Ghosh and his wife and defendants Nos. 1 and 2 started causing disturbance to the peaceful enjoyment of the suit property, although, they have/ had got no right, title or interest over the suit property as the same had already been gifted to the plaintiffs and proforma defendant No. 3.

5. It is stated by the plaintiffs that the deed of gift was genuinely executed by the executor Bijoy Chandra Ghosh and knowing fully well about the fact, the defendants with malafide intention started to disturb the possession of the plaintiffs and finding no other way they knocked the door of the Court for getting appropriate relief.

6. The defendants/respondents (herein) entered their appearance in the suit and contested the same by filing written statement wherein they took specific plea that the suit property never belonged to plaintiffs and they are claiming the same on the strength of a forged deed. They denied the execution of the deed of gift by Bijoy Chandra Ghosh in favour of the plaintiffs by stating that the said executor of the deed of gift was never looked after by the plaintiffs and proforma defendant No. 3.

7. Learned Trial Court after appreciation of evidences on record decreed the suit in favor of the plaintiffs. Thereafter, the defendants preferred first appeal and

after opportunity of being heard, learned first Appellate Court remanded back the case to the Trial Court on the issue to decide afresh as to whether the deed of gift being No. 1603 of 1992 is valid or not after giving opportunity to the parties to lead evidences. Being aggrieved by the said order these appellants preferred this instant appeal.

8. It is the specific standpoint of the defendants/present respondents that the deed of gift was never executed by Bijoy Chandra Ghosh in favour of the plaintiffs and virtually they have challenged the execution of the deed of gift which was marked as exhibit 8 in that case.

9. Normally, both the donor and the witnesses are required to be examined for proving the deed of gift, this is mandatory provision of Section 68 of the Indian Evidence Act. The material question is whether the respondents have specifically discharged the duties to prove the execution of the gift deed in terms of the proviso to Section 68 of the Indian Evidence Act.

10. 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 cannot be 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, unless it is executed by the person by whom, it purports to have been executed is specifically denied. So, section 68 of the Evidence Act makes it mandatory to examine one of the attesting witnesses for the purpose of proving of the execution of the gift deed. It is an undisputable fact that the deed of gift is registered and attested by two attesting witnesses.

11. Learned Counsel appearing for the respondents strenuously argued that the gift deed is fabricated and no title was passed by dint of that deed. Moreover, no attesting witnesses came before the Court to prove the execution of the said deed of gift as required by the Act. We further find that rights of both the parties wholly depend upon the deed of gift.

12. The first Appellate Court rightly came to the conclusion that no issue has been framed by the Trial Court regarding validity of the said deed of gift and no opportunity was given to the parties to adduce evidence on that score and accordingly, first Appellate Court rightly remanded back the case to the Trial Court to decide issue on the point whether deed of gift is valid or not and the same is to be decided by the Trial Court after giving opportunity to parties to lead evidence on that count.

13. Accordingly, we find that there is no merit in the instant appeal and accordingly, the same is dismissed.

14. However, there is no order as to costs.

15. Learned Trial Court is hereby directed to expedite the suit and to conclude the same preferably within 6 months from this date without giving unnecessary adjournment to either of the parties unless it is necessitated by any uncalled-for incident.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)