AIR 2015 Guw 99

Gauhati High Court

Case No: Regular Second Appeal Nos. 129 of 2002 and 1 of 2003

Golap Borah and Others		APPELLANT
	Vs	
Korneswar Borah and Others		RESPONDENT

Date of Decision: May 7, 2015

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 145
- Evidence Act, 1872 - Section 68, 69
- Transfer of Property Act, 1882 - Section 123, 3

Citation: AIR 2015 Guw 99

Hon'ble Judges: Suman Shyam, J

Bench: Single Bench

Advocate: B.D. Deka, for the Appellant

Judgement

Suman Shyam, J
RSA No. 129/2002 has been filed by the appellants challenging the judgment and decree dated 26.04.2002 passed by the learned Civil Judge (Senior Division), Lakhimpur, at North Lakhimpur in Title Appeal No. 2/1999 thereby reversing the judgment and decree dated 12-7-1999 passed by the learned Civil Judge (Junior Division), Lakhimpur at North Lakhimpur in Title Suit No. 2/1998 dismissing the counterclaim of the respondent/defendant No. 1. RSA No. 1/2003 has been preferred by the appellants against the judgment and decree dated 26.04.2002 passed by the learned Civil Judge (Senior Division), Lakhimpur, at North Lakhimpur in Title Appeal No. 3/1999 dismissing the appeal thereby affirming the judgment and decree dated 12.07.1999 passed by the learned Civil Judge (Junior Division), Lakhimpur, at North Lakhimpur in Title Suit No. 2/1998 whereby the suit of the appellants/plaintiffs had been dismissed. Since both the Second Appeals arise from Title Suit No. 2/1998 wherein the present appellants were the plaintiffs and the respondent No. 1/defendant No. 1 was the defendant No.

1/counter-claimant and having regard to the fact that common questions of law arises for adjudication in both the Second Appeals, hence I propose to dispose of RSA No. 129/2002 as well as RSA No. 1/2003 by this common judgment. The plaintiffs/appellants case, in brief, is that the plaintiff Nos. 1 and 2 as well as the defendant No. 2/respondent No. 2 are the sons of Late Rashram Borah. The proforma defendant Numali Borah alias Baruah is the married daughter of Late Rashram Borah. The defendant No. 1/respondent No. 1 is the son of the defendant No. 2/respondent No. 2. The suit land described in the plaint originally belonged to Rashram Borah forming a part and parcel of the land and property owned and possessed by him. On 24.06.1962 Late Rashram Borah had affected a partition of his moveable and immoveable properties amongst his three sons i.e. the plaintiffs and the defendant No. 2 whereby the entire property was divided into four parts. One part each'' went to both the plaintiffs and the defendant No. 2 whereas Rashram Borah retained the fourth part for his own benefit. In order to honour the aforesaid partition, Rashram Borah had even started living at Sumanibari by constructing a new house thereat wherein he used to stay with his wife and the defendant No. 1 i.e. his grandson. Rashram Borah died in the year 1975. After the death of Rashram Borah, as per his wishes expressed during the lifetime the share held by Rashram Borah was amicably partitioned amongst his three sons i.e. plaintiff Nos. 1, 2 and the defendant No. 2. However, while the plaintiffs were enjoying the possession of their share of the land pursuant to the amicable partition between the three brothers, the defendant No. 1 without the knowledge of the plaintiffs had attempted to get his name mutated in respect of the land described in Schedule-A & B to the plaint, being the land falling in the share of Rashram Borah. However, on the face of objection raised by the plaintiffs, the Deputy Commissioner, Lakhimpur had passed an order dated 29.03.1996 in Misc. Case No. 9/1993 directing the parties to maintain status quo in respect of the old recorded mutation. It is the case of the plaintiffs that the defendant No. 1 had also filed a proceeding under Section 145 of the Cr.P.C. vide Misc. Case No. 159/1994 in which proceeding the defendant No. 1 had disclosed that on 12.04.1975 Rashram Borah had executed a gift deed in his favour gifting away the Schedule-A & B land to the defendant No. 1. Asserting that Late Rashram Borah had never executed any gift deed in favour of the defendant No. 1 and that the said defendant No. 1 was never in possession of the Schedule-A & B land, the plaintiffs had instituted Title Suit No. 2/1998 in the Court of Civil Judge (Junior Division), Lakhimpur, inter alia, praying for a decree declaring the right, title and interest of the plaintiffs in respect of the suit land as well as for confirmation of possession. In the aforesaid suit the appellants/plaintiffs had also prayed for cancellation of the registered deed of gift bearing No. 810/75 dated 12-04-1975 on the ground that the same was invalid, void and inoperative in the eye of law.

2. The defendant Nos. 1 and 2 contested the suit by filing a joint written statement-cum-counter-claim urging that there was no cause of action for the suit and that the same was not maintainable in law as well as in facts. The contesting defendants had also urged that the plaintiff''s suit was barred by law of limitation. In their written statement, the same defendants, while admitting the fact of partition of the properties of

Late Rashram Borah on 24-06-1962, asserted that pursuant to such partition Late Rashram Borah had separated himself from the plaintiffs as well as the defendant No. 2 but the defendant No. 1 being his grandson continued to live with Rashram Borah and his wife. The defendant No. 1 used to look after his grandparents very well and, therefore, they also used to treat him like their own son. Being highly satisfied with the services rendered by the defendant No. 1, Late Rashram Borah, during his lifetime, had gifted away his entire share of land to the defendant No. 1, out of love and affection, by means of the registered deed of gift dated 12-04-1975 and the gift was also accepted by the defendant No. 1. Since then the defendant No. 1 has been in possession of the suit land and his name has also been mutated in the land records based on such deed of gift and his possession. The contesting defendants had also denied that Late Rashram Borah had ever advised his sons to partition his share of land amongst themselves after his death. On such basis the contesting defendants while praying for dismissal of the plaintiffs" suit had also made a counter-claim for passing a decree declaring their right, title and interest over the land based on the registered deed of gift dated 12.04.1975 and also for confirmation of possession in respect of the land covered by dag No. 447; alternately, a decree for recovery of khas possession of the land if the same is found not to be in possession of the defendant No. 1.

3. The plaintiffs had also filed their written statement opposing the counter-claim generally denying the averments made in the counter-claim. The plaintiffs had also categorically denied the execution of the gift deed by Rashram Borah as has been claimed by the contesting defendants.

4. Based on the pleadings of the parties, the learned trial Court framed as many as 8 issues, which are as follows:-

"1. Whether there is a cause of action for the suit?

2. Whether the claim for cancellation of the registered gift deed No. 810/75 is time barred?

3. Whether the suit land described in the plaint and counter-claim are properly identifiable?

4. Whether the gift deed No. 810/75 was executed by Late Rashram Borah and whether the same is valid?

5. Whether the defendant No. 1 was possessing the suit land as his own since the execution of gift deed No. 810/75 and is still possessing a part of the suit land and is residing in the house of Late Rashram Borah?

6. Whether the plaintiffs have continuously possessed the suit land since the date of effecting partition of the parental properties on 24.06.62?

7. Whether the plaintiffs have right, title and interest over the suit land?

8. To what relief/reliefs, the parties are entitled?"

5. In the course of trial the plaintiffs'' side had examined four witnesses and exhibited four documents whereas the defendants'' side had examined six witnesses and exhibited six numbers of documents. After hearing the leaned counsel for the parties and on appreciation of the materials available on record the learned trial court was pleased to record a finding in respect of Issue No. 2 against the plaintiffs by holding that the gift deed being one pertaining to the year 1975 and the suit having been filed in the year 1998 the same was barred by law of limitation in view of the prescriptions of Article 56 of the Limitation Act, 1963. Having held so, the learned trial Court had also decided the Issue No. 4 against the counter claimant by holding that the counter claimant/defendants could not prove the due execution of the gift deed (Ext-Ga) and that the said gift deed was not valid in the eye of law. The Issue Nos. 2 and 4 having been answered against the plaintiffs and the defendants/counter claimants, respectively, the learned trial Court had dismissed the suit filed by the plaintiffs as well as the counter-claim made by the defendants by the common judgment and order dated 12.07.1999.

6. Being aggrieved by the judgment and decree dated 12.07.1999 passed by the learned trial Court in Title Suit No. 2/1998 the defendant No. 1/counter claimant as appellant had preferred Title Appeal No. 2/1999 in the Court of learned Civil Judge (Senior Division), North Lakhimpur. Similarly, aggrieved by the aforesaid judgment and decree dated 12.07.1999 the plaintiffs as appellants had also preferred Title Appeal No. 3/1999.

7. By the judgment and decree dated 26.04.2002 passed in Title Appeal No. 2/1999 the learned Civil Judge (Senior Division), North Lakhimpur had reversed the judgment and decree passed by the learned trial Court and went on to decree the counter-claim filed by the defendant No. 1 thereby reversing the findings and conclusions recorded by the trial Court in respect of Issue No. 4. The learned First Appellate Court was of the view that the execution of the gift deed had been duly proved by the DW 1 i.e. the defendant No. 1/counter claimant himself by identifying the signatures of Rashram Borah as Exts-Ga(1), Ga(2) and Ga(3). It was further held that the plaintiffs'' side did not raise any objection while exhibiting the gift deed and also no objection was raised while exhibiting the signature of the donor Late Rashram Borah. Therefore, the execution of the gift deed stood proved and established in the eye of law. The learned First Appellate Court had also gone on to hold that since the defendant No. 1 had accepted the gift made by the deed No. 810/75, hence the Ext-Ga gift deed executed by Rashram Borah in favour of the said defendant No. 1 was a valid one. Based on such finding the learned First Appellate Court had decreed the counter-claim filed by the defendant No. 1.

8. By a separate judgment dated 26.04.2002 passed in Title Appeal No. 3/1999 the learned First Appellate Court had dismissed the Title Appeal filed by the plaintiffs/appellants, primarily, on the ground that the claim for cancellation of registration

of the gift deed No. 810/75 was barred by time. It was further held that the suit land described in the plaint was not properly identifiable and therefore, the plaintiffs'' suit could not be decreed. On such observation the judgment and decree of dismissal passed by the trial Court was upheld by the First Appellate Court.

9. Being aggrieved and dissatisfied with the judgment and decree dated 26.04.2002 passed in Title Appeal No. 2/1999 the plaintiffs as appellants have preferred the Second Appeal No. 129/2002. RSA No. 1/2003 has been preferred by the plaintiffs as appellants so as to challenge the judgment and decree dated 26.04.2002 passed in Title Appeal No. 3/1999.

10. RSA No. 129/2002 was admitted by this Court by the order dated 10.12.2002 to be heard on the following substantial questions of law:

"1. Whether the first Appellate Court committed illegality in declaring the right, title and interest on the basis of the Gift Deed not attested by two witnesses, not proved by any person acquainted with the signature of the donor and without any mention of love and affection therein.

2. Whether the learned Court below committed illegality in holding the gift without any proof of acceptance of the gift and of delivery of possession of the gifted property?"

11. Subsequently, RSA No. 1/2003 was also admitted by this Court by the order dated 26.02.2007 by framing the same substantial questions of law.

12. I have heard Mr. B.D. Deka, learned counsel appearing for the appellants in both the appeals. None appeared for the respondents in both the appeals either on 06.05.2015 or today when the matter was taken up for hearing despite the fact that the names of the learned counsels have been duly reflected in the cause list.

13. Mr. Deka, learned counsel for the appellants, submits that the execution of the gift deed having been disputed and denied in categorical terms by the plaintiffs, it was incumbent upon the defendant No. 1/counter claimant to prove and establish the execution of the same in accordance with law. The counter claimant having failed to do so, the learned trial Court had rightly rejected his claim of having acquired title over the suit land on the basis of the said registered deed of gift. There was no apparent justification for the First Appellate Court to reverse such finding of fact in respect of Issue No. 4 by ignoring the fact that the counter-claimant had not been able to examine the attesting witness or prove the execution of the deed in accordance with law.

14. By inviting the attention of this Court to the provision of Section 123 of the Transfer of Property Act, Mr. Deka further submits that as per the said provision a gift deed in order to be valid in the eye of law is required to be attested by at least two witnesses. A bare perusal of the Ext-Ga gift deed would go to show that there was only one person by the name "Bogamal Das" who had purportedly signed in the column of attesting witness. The

defendants had, however, not examined Bogamal Das as a witness.

15. Relying upon a judgment and decision rendered by the Hon''ble Apex Court in the case of M. L. Abdul Jabbar Sahib Vs. M. V. Venkata Sastri and Sons and Others, AIR 1969 SC 1147 : (1969) 1 SCC 573 : (1969) 3 SCR 513 Mr. Deka further submits that in the said decision the Hon''ble Apex Court has laid down in clear terms as to the true import and meaning of the definition "attested" in Section 3 of the Transfer of Property Act. It has been categorically held that in the case of attestation the person putting his signature in the document must put his signature for the purpose of attesting the document and not for any other purpose. Therefore, it was incumbent upon the counter-claimant to establish that there were two attesting witnesses who had put their signature in the Ext-Ga for the purpose of attesting the same. The defendant No. 1 having failed to discharge such obligation cast upon him under the law, the learned First Appellate Court committed manifest illegality in decreeing the counter-claim filed by the defendant No. 1.

16. Mr. Deka, learned counsel for the appellant has submitted in all fairness that since no substantial question of law arising out of the dismissal of the plaintiff''s suit had been framed by this court at the time of admission of the appeal hence, he is unable to urge at this stage that any such question arises for decision of this court in RSA No. 1 of 2003.

17. I have considered the submissions made by Mr. Deka, learned counsel for the appellants and have also perused the records. It is not in dispute that the moveable and immoveable properties that originally belonged to Late Rashram Borah had been divided into four parts in the year 1962 during his lifetime pursuant whereto the plaintiff Nos. 1, 2 and the defendant No. 2 had been put in possession in respect of one part each whereas Rasharam Borah had retained one part for his own possession and benefit. Such being the position, the rights and possession of the plaintiff Nos. 1, 2 and the defendant No. 2 can be said to have crystallised as regards the land in their respective possession pursuant to the partition carried out on 24.06.1962 which fact has not been denied or disputed by either parties. The core question that would, therefore, arise for determination is as to the rights and entitlement of the legal heirs in respect of that part of the property held by Rashram Borah himself until his death in the wake of the claim made by the defendant No. 1 based on the registered deed of gift.

18. Under the provisions of the Hindu Succession Act, the properties of a person dying intestate would devolve upon his legal heirs by operation of law. Therefore, after the death of Rashram Borah the property belonging to him would automatically devolve upon his surviving legal heirs which in the present case would be the plaintiff Nos. 1, 2 and the defendant No. 2 and the pro-forma defendant Numali Borah, since the wife of Rashram Bora had already died in the year 1992. If, however, the claim made by defendant No. 1 based on the registered deed of gift is found to be valid then, of course, the position would be different.

19. From a perusal of the gift deed Ext-Ga it is apparent on the face of the record that the said gift deed, although a registered document, has not been attested by two witnesses as per the requirement of Section 123 of the Transfer of Property Act. Section 123 of the Transfer of Property Act reads as follows:

"123. Transfer how effected. For the purpose of making a gift of 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.

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."

20. A reading of the provisions of Section 123 of the Transfer of Property Act goes to show that gift of immoveable property can be effected by (1) a registered instrument signed by or on behalf of the donor and (2) attested by at least two witnesses. The usage of the term "at least" in section 123 makes the attestation of the registered instrument by minimum two witnesses as mandatory. Therefore, if a gift deed is not attested by at least two witnesses the same would not be a valid gift within the meaning of Section 123 of the Transfer of Property Act and hence, confer any title to the donee in respect of the immoveable property.

21. There is another aspect of the matter which needs to be pointed out herein. A perusal of the pleadings contained in the plaint goes to show that the plaintiffs had unequivocally denied the execution of the deed of gift by Rashram Borah. Such being the position the burden of proving the due execution of the gift deed was wholly cast upon the defendant No. 1 who was claiming the benefit under the said document.

22. Section 68 of the Indian Evidence Act, 1872 lays down the manner of proof of execution of document required by law to be attested. As per Section 68, once the execution of a document, required by law to be attested, by the person by whom it purports to be executed is specifically denied, the said document shall not be used in evidence unless at least one attesting witness had been called for the purpose of proving its execution. In the instant case, from a perusal of the evidence on record it is apparent that the defendant No. 1 had not called the attesting witness to depose before the Court nor has the scribe of the deed been examined as a witness. As a matter of fact, there was no identification of the signature of the donor and the attesting witness by examining any independent witness. Even assuming that the sole attesting witness was not alive at the relevant point of time even in that case the due execution of the gift deed ought to have been proved as per the provision of Section 69 of the Indian Evidence Act, 1872 by proving the fact that attestation of one attesting witness at least is in his own handwriting and that the signature of the person executing the document is in the handwriting of that person.

23. From a scrutiny of the evidence on record, there is no doubt about the fact that in the instant case the defendant/counter-claimant has failed to prove the due execution of the registered deed of gift (Ext-Ga) under which he was claiming title in respect of the suit land. The fact that the plaintiffs had not raised any objection when the document was marked as an exhibit cannot dispense with the requirement of proof of Exhibit-Ga deed in accordance with law particularly when its execution had been categorically denied by the plaintiff side in their pleadings. The execution of the gift deed not having been proved in accordance with law, the question as to whether the donee had accepted the gift or not would be wholly inconsequential in the facts and circumstances of the case.

24. In the above context it would be useful to refer to the observations made by the Hon"ble Apex Court in the case of M. L. Abdul Jabbar Sahib Vs. M. V. Venkata Sastri and Sons and Others, AIR 1969 SC 1147 : (1969) 1 SCC 573 : (1969) 3 SCR 513 which reads as follows:

"8. Section 3 of the Transfer of Property Act gives the definition of the word "attested" and is in these words:" "Attested" in relation to an instrument, means and shall be deemed to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary."

It is to be noticed that the word "attested", the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under Section 3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."

25. From the above discussions, it is, therefore, clear that in case of a registered deed of gift within the meaning of section 123 of the Transfer of Property Act, the same is required to be compulsorily attested by at least two witnesses. When the execution of the gift deed is denied by taking a plea that the same had not been executed by the person by whom it purports to have been executed, the due execution of the same will have to be proved in accordance with section 68 of the Evidence Act, 1872 failing which the document itself cannot be used as evidence. The donee must also prove and establish

the fact that the attesting witness had signed the document animo attestendi. For the purpose of compliance with the requirement of section 68 if no attesting witness is found to be alive or even if alive is found to be incapable of giving evidence, then the donee will be mandatorily required to prove the execution of the gift deed as per section 69 of the Evidence Act. Unless the requirements of section 68 or section 69 of the Evidence Act, as the case may be, is complied with, the gift deed itself will be in admissible in evidence.

26. From a meticulous examination of the evidence on record this court has no hesitation in holding that the defendant/counter-claimant has not been able to prove the execution of the gift deed as per sections 68 or 69 of the Evidence Act. Since in the present case, the defendant No. 1 has failed to prove and establish the due execution of the gift deed in accordance with law, hence the counter-claim filed by the defendant No. 1 could not have been decreed by the learned First Appellate Court. Such being the position, it is held that the judgment and decree dated 26.04.2002 passed in Title Appeal No. 2/1999 is not sustainable in the eye of law and the same is hereby set aside. The first substantial question of law framed by this court stands answered accordingly.

27. Since it has already been held that the defendant/counter-claimant has failed to prove the due execution of the gift deed exhibit-Ga, hence an answer to the second substantial question of law is deemed to be redundant in the facts and circumstances of the case. In view of the fact that the judgment and decree dated 26-04-2002 passed in Title Appeal No. 2/1999 has already been set aside by this court, it is axiomatic that the immoveable properties of late Rashram Borah would devolve upon his surviving legal heirs as per law. Since the fact of amicable partition of the suit land amongst the plaintiff Nos. 1, 2 and the defendant No. 2 remains disputed and in view of the fact that the plaintiffs suit was not for partition of the suit land hence, it will be open to the legal heirs of Late Rashram Borah to institute appropriate proceeding for partition and for declaration of separate possession in respect of the plot of land in question. In the event such a proceeding is instituted by any of the legal heirs of Late Rashram Borah, the same shall be considered and decided on merits and in accordance with law. In view of the discussions made above, RSA No. 129/2002 stands allowed. RSA No. 1/2003 stands disposed of in the light of the observations made above.

Having regard to the facts and circumstances of the case, there will be no order as to cost.

The Registry to send back the LCR.