

(2001) 05 CAL CK 0034

Calcutta High Court

Case No: S.A. No. 685 of 1989

Kumaresh Majumdar

APPELLANT

Vs

Binapani Sarkar and Others

RESPONDENT

Date of Decision: May 24, 2001

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 11
- Evidence Act, 1872 - Section 2, 68

Citation: 107 CWN 620

Hon'ble Judges: Subhro Kamal Mukherjee, J

Bench: Single Bench

Judgement

Subhro Kamal Mukherjee, J.

This is a plaintiff's appeal against a judgment of affirmance in a suit for eviction of a licence and permanent injunction. On or about August 2, 1971 Title Suit No. 271 of 1971 was instituted by the plaintiff in the court of learned Munsif. Third Court at Sealedah District : 24 Parganas alleging that by a registered deed of gift dated September 8, 1970 Shrimati Braja Bala Sarkar, the owner of permaises No. 14/H/5, Ratanbabu Road Cossipur gifted the property in suit in favour of the plaintiff including structures standing thereon. The plaintiff applied for amendment of the plaint and by such amendment contended that the plaintiff by virtue of a deed of purchase executed on September 19, 1970 by Jagat Jyoti Seal purchased the land measuring about 3 kothas. 1 chittack and 12 sq.ft. appertaining to premises No. 14. Ratanbabu Road and, thus became the absolute owner of the land as well as structures standing thereon. That after purchase, the plaintiff has applied for mutation of his name in the records of the Calcutta Municipal Corporation and the name of the plaintiff has been duly recovered in the records of the Calcutta Municipal Corporation. It was contended that a fresh leave or licence was granted by the plaintiff to the defendants on his becoming owner of the suit property.

2. The defendants contested the suit by filing a written statement.

3. In paragraph 1 of the plaint of the said suit the plaintiff contended that the said Brajabala Sarkar executed a register deed of gift in favor of the plaintiff on September 8, 1970

4. In reply to the said statements, the defendant contended in paragraph 1 of the written statement as under:

That the defendants deny the statement of para 1 (one) of the plaint as Braja Bala Sarkar was never the owner of the premises No. 14/H/5. Ratan Babu Road. P.S. Cossipore, Calcutta 2".

5. In the additional written statement filed on January 14, 1986 the defendants alleged in paragraph 3 that the plaintiff has not acquired any right, title or interest in the suit property either by alleged deed of gift or by deed of purchase".

6. The defendants applied for amendment of the written statement and by such amendment paragraph 7(a) was inserted in the written statement. In the said paragraph 7(a) the defendants contended "the defendants do not admit the truth and statement regarding the execution of deed of gift on 8th September, 1970 in favour of the plaintiff by Broja Bala Sarkar who was the owner of the suit property as stated in para 1 of the plaint. The plaintiffs have not acquired any right, title or interest in the suit property. The so-called deed of gift in favour of the plaintiffs is false, vague and fraudulent and it was never acted upon"

7. It was, further, contended in the written statement that the defendants became the owners of the suit property as they have acquired title by adverse possession and that the defendants have been living there by making construction therein since 1953.

8. By the judgment and decree dated May 29, 1986. the learned Munsif. Third Court at Sealdah dismissed the suit on contest with cost against the defendants although alleged that the deed of gift was a forged document, they did not adduce any evidence as to the forgery and as such the allegation of forgery was not proved. It was held that the deed has been properly registered under the provisions of Indian Registration Act, 1908 and the original deed has been brought in order to elucidate the matter in dispute. The learned Munsif accepted the plaintiffs claim of ownership in respect of land-in-question. but the claim of ownership of the defendants by adverse possession was rejected as the defendants have failed to produce any paper in support of their claim or ownership. The learned Munsif categorically found that the status of the defendants in relation to the suit property was nothing but as that of licensees, but held that it was not proved that they are licensees under the plaintiff. The learned Munsif dismissed the suit mainly on the ground that the deed of gift by virtue of which the plaintiff claimed ownership in respect of the structures has not been proved; the learned Munsif refused to make the deed as an

exhibit in the suit although the learned Munsif observed that in the written statement execution of the deed was not challenged. The learned Munsif observed, "So the position is that the execution of the deed is unchallenged."

9. The plaintiffs preferred Title Appeal No. 535 of 1986 in the court of the learned District Judge at Alipore. District 24 Parganas (South) against the said decree of dismissal and the defendants have, also, filed a cross objection in connection with the aforesaid appeal.

10. Eventually, the appeal and the cross objection were transferred to the court of the learned Additional District Judge, twelvth Court at Alipore, District: 24 Parganas (South) and by the judgment and decree dated June 27, 1987 the learned Additional District Judge dismissed both the appeal and the cross objection.

11. The learned Additional District Judge observed as under:

"Now the plaintiff claims to be the owner of the structure and of land. The evidence on the point is most unsatisfactory. I have already decided that the document marked X cannot be admitted in evidence for non-compliance with the provision of Section 68 of the Evidence Act. Therefore, there is no documentary evidence to show that the plaintiff, appellant became the owner of the suit structure. Accordingly, the finding of the Id. Munsif on the point cannot be said to be erroneous. It follows, therefore, that the plaintiff appellant cannot claim that the defendant-respondents are his licensee. It can thus be said that the plaintiff-appellant has failed to prove that the defendant-respondents are licensees. Therefore, the findings of the learned Munsif on that point cannot be and/ or should not be disturbed and it should be upheld."

12. At the hearing of the appeal under Order 41. Rule 11 of the CPC the following substantial questions of law was formulated :

13. For that the Deed of Gift (Ext. X for identification) being a registered document and the very execution thereof not having been denied or challenged by the defendants, the courts below erred in law in not appreciating inter alia that in view of the proviso to the Section 68 of the Evidence Act, it was not necessary for the admissibility of such document that the execution of the same should be proved by the attesting witnesses and therefore the findings as well as the judgment and decree as passed by the Courts below should be set aside.

14. I have heard Mr. Joytinnoy Bhattacharya, learned Advocate, in support of the appeal, and Mr. Saptangshu Basu, learned Advocate on behalf of the respondents.

15. In order to appreciate the rival contentions of the parties. I am required to consider the provisions of Section 68 of the Evidence Act, 1872. The said section runs as under:

"Proof of execution of document required by law to be attested.- If a document is inquired 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 thereby an attesting witness is 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, 1906 (16 of 1908), unless its execution by the person to whom it purports to have been executed is specifically denied."

16. The Supreme Court of India in the case of *Khushalchand Swarup Chand Zabak Jain vs. Sureshchandra Kanhaiyalal Kochar & Anr.*, reported in 1995 23 SCC 36, held as under:

4. Section 68 of the Evidence Act prescribes proof of execution of the document required by law to be attested. It says that 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 the 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, unless its execution by the person by whom it purports to have been executed is specifically denied.

17. The Supreme Court of India in the case of *Rosammal Issetheenammal Fernandez (dead) by [Rosammal Issetheenammal Fernandez \(Dead\) By Lrs. and Others Vs. Joosa Mariyan Fernandez and Others](#)*, held that "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."

18. Therefore, everything depends on the recording of the fact of specific denial of the execution of the document. The specific denial is something over and above a general denial. The proviso to Section 68 of the Evidence Act, 1872 was added by Section 2 of Indian Evidence (Amendment) Act, 1926 and the rigour of the Section has been relaxed to some extent and it is, therefore, not required to call an attesting witness, except in case of a Will, unless the execution of the document is specifically denied. I have quoted hereinabove the statements made by the defendants in the written statement and in the additional written statement and I hold that there is no specific denial regarding the execution of the deed of gift by Brajabala. Specific denial means, in my view, that the denial must be express, distinct and definite,

ambiguous, vague, casual and evasive denial is insufficient. A mere general denial is, also, not sufficient. Under such circumstances, examination of the attesting witness for the purpose of proof of the execution of the document was not necessary.

19. Admittedly, the document was properly registered in Book No. 1; Volume No. 99 at pages 1 to 3 being No. 6151 for the year 1970 in the Office of the Sub-Registrar, Cossipur, Dum Dum. In my view, the courts below substantially erred in law in refusing to mark the deed of gift as an exhibit in the suit in the absence of specific denial by the defendants.

20. The Supreme Court of India in the case of [Ishwar Dass Jain \(Dead\) Thr. Lrs. Vs. Sohan Lal \(Dead\) By Lrs.,](#) held that there are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where the court has arrived at a finding by placing reliance on inadmissible evidence, which if. was omitted, an opposite conclusion was possible. In either of the above situations, substantial question of law can arise.

21. In my view, the courts below committed substantial error of law in refusing to admit and consider the registered deed of gift executed by the admitted owner of the structures in favour of the plaintiff.

22. The defendants have failed to prove their ownership in respect of property-in-suit. The plaintiff has proved his title in respect of both the land and the structures standing thereon. The defendants were licensees under the donor of the plaintiff. After the deed of gift was executed in favour of the plaintiffs, it can be safely presumed that fresh licence was granted in favour of the defendants.

23. In any view of the matter, the plaintiff is having right, title or interest in respect of property-in-suit and defendants have none. There is no justification in refusing a decree for eviction in favour of the plaintiffs against the defendants. Accordingly, the appeal is allowed and the judgment and decree passed by the courts below are set aside. Title Suit No. 271 of 1971 is decreed. The defendants are liable to be ejected from the suit premises and the plaintiff gets a decree for recovery of possession of the suit premises on eviction of the defendants therefrom and the defendants are restrained by a decree of permanent injunction from interfering with the possession of the plaintiff in respect of the suit property.

There will be no order as to costs.