

(2011) 08 CAL CK 0119**Calcutta High Court****Case No:** S.A 486 of 2006

Sankar Chakraborty and Others

APPELLANT

Vs

Chittoranjan Dutta and Others

RESPONDENT

Date of Decision: Aug. 12, 2011**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 27

Hon'ble Judges: Prabhat Kumar Dey, J**Bench:** Single Bench**Advocate:** Mrinal Kanti Mukherjee, for the Appellant; Pratima Mishra, for the Respondent**Final Decision:** Dismissed

Judgement

Prabhat Kumar Dey, J.

This appeal is directed against the judgment and decree dated 7th April, 2006 passed by the Ld. Civil Judge (Senior Division), Ranaghat, Nadia in Title Appeal No. 17 of 2003 whereby set aside the judgment and decree dated 3rd March, 2003 passed by the Ld. Civil Judge (Junior Division), 2nd Court, Ranaghat in Title Suit No. 33 of 1995.

2. During admission of the appeal the Ld. Division Bench formulated the following substantial questions of law:

1. Whether the Ld. Court of appeal below committed the substantial error of law in setting aside the judgment and decree passed by the Ld. trial Judge by entering into the question whether the Government in this case executed the deed of gift in favour of the Plaintiff in accordance with law by totally overlooking the fact that the Defendants did not file any suit disputing the said deed of gift.
2. The Plaintiff having acquire title to the property by virtue of the deed of gift executed by the Governor of West Bengal, whether the learned court of appeal below committed substantial error of law in refusing to grant declaration of title and

recovering of possession from the Defendants, who admittedly had no better title than that of the government.

3. In absence of any suit filed by the Appellant challenging the deed of gift executed in favour of the Plaintiff, whether the learned court of appeal below committed substantial error of law in dismissing the suit filed by the Plaintiff on the ground that he did not acquire valid title by virtue of the said deed of gift.

In order to decide the aforesaid points, it is not necessary to make the detail reference to the backdrop of the litigation between the parties. We may, however, briefly narrate the facts.

3. The Appellant herein was the Plaintiff before the trial court in Title Suit No. 33 of 1995. The Plaintiff Sankar Chakraborty made out the specific case in the plaint that his father Nihar Ranjan Chakraborty after migrating from East Pakistan to India in 1953 after partition started residing in the refugee camp of Coopers and thereafter he went to "Ka" schedule property and started residing therein after raising Pucca construction. Thereafter, the father of the Plaintiff gifted the said property to the Plaintiff and since then the Plaintiff was in possession of the suit property by residing thereon. The Relief and Rehabilitation Department of Govt. of West Bengal executed a gift deed in favour of the Plaintiff and transferred the ownership of "Ka" schedule property on 29th June, 1989. On 4th September, 1990, principal Defendants forcibly raised structure of tiled roof, bamboo pole and fence made of darma on 1 1/2 Cottahs of land on the extreme southern side "Ka" schedule property. When the mother of the Plaintiff went to obstruct the Defendants, she was assaulted by them. On 4th February, 1993, principal Defendants started raising pucca privy and bathroom on the suit property and threatening the Plaintiff that they will forcibly enter into the remaining portion of "Ka" schedule property and will cut away Mango tree, Sirish tree etc., planted by the Plaintiff in the "Ka" schedule property. As a result, the Plaintiff filed the suit for declaration of title and recovery of possession and permanent injunction.

4. The Defendant No. 1 contested the suit by filling written statement containing inter alia that the Plaintiff has no title in "Ka" schedule property and the West Bengal Government had no locus standi to execute any gift deed in favour of the Plaintiff. This Defendant, possesses 8 annas i.e. 2 1/2 cottahs of land in Lay Out Plot No. 648. The Plaintiff does not possess any portion of Lay Out Plot No. 648. Lay Out Plot No. 649 is adjoining south of suit Plot No. 648. The Defendant No. 3 resides in Lay Out Plot No. 649. The Defendant No. 1 further stated that the father of the Plaintiff all along used to reside in Lay Out Plot No. 647 and he never resided in "Ka" schedule property. There was long standing dispute between the Plaintiff and the Defendants and so as to restore peace, the respectable persons of the locality settled the dispute of the Plaintiff and Defendants by way of salish. By the said salish, the suit property was divided into 2 halves which were accordingly, transferred to both the Plaintiff and the Defendants and each got 2 1/2 cottahs of land. The Plaintiff himself

signed on that salishnama. Since then both the parties are residing thereon with their families by raising house thereon. It is further case of the Defendant No. 1 that the gift deed executed in favour of the Plaintiff is a fraudulent deed and is not binding upon the Defendant. He prayed for dismissal of the suit.

5. Before the trial court, the Plaintiff examined two witnesses including himself as P.W-1 and produced documentary evidence (gift deed) which was marked as Exhibit.1. Neither the Defendants nor any person was examined on behalf of the Defendants.

6. The trial court after hearing both the parties and on appreciation of the evidence on record declared Plaintiff's title and possession in the suit property and thereafter decreed the suit and restrained the Defendants permanently from interfering with the Plaintiff's possession in the suit property vide judgment dated 3rd March, 2003.

7. Being aggrieved by the judgment and decree of the trial court, the Defendant No. 1 approached the Civil Judge (Senior Division), Ranaghat, Nadia in Title Appeal No. 17 of 2003. The first appellate court by its judgment dated 7th April, 2006 set aside the judgment and decree passed by the learned trial court and thereby allowed the appeal against which the present appeal being No. S.A. 486 of 2006 has been preferred.

8. During hearing of the appeal, it was contended by the learned advocate appearing on behalf of the Appellant that the private Respondents did not challenge the alleged deed of gift granted by the State-Respondents in favour of the Appellant in a separate proceeding. It was also contended by him that the Appellant/Plaintiff acquired title and interest over the suit property by the appropriate authority. He further contended that the Plaintiff was forced to sign on the alleged salishnama and such salishnama will not help the private Respondents in absence of any document issued by the Govt. in their favour. Lastly, he contended that the gift deed was executed by the appropriate authority of the Govt. in favour of the Plaintiff who is a refugee.

9. Ld. Advocate appearing on behalf of the Respondents opposed the contention of the advocate appearing for the Appellant and submitted that the Plaintiff was born in India and he cannot claim to be a refugee. He also contended that the alleged gift deed was obtained by the Plaintiff by fraudulent means from the government without any knowledge of the Defendants. He further contended that the Defendant intended to adduce evidence before the trial court but it was refused by the court concerned and being aggrieved the Defendants came up before the Hon'ble Court. He also contended that although the revisional application was dismissed by the Hon'ble Court but the point raised by the Defendants regarding execution of the alleged gift deed can be taken into consideration. However, he contended that salish was held in between the Plaintiff and Defendants in presence of the villagers of the locality and the Plaintiff, the Defendants as well as the villagers put their

signature in the salishnama. He further contended that again there was salishnama in between the parties in presence of the local people and both parties put their signature and person present in the salish also put their signature in the salishnama and no question was raised for taking forcible signature of the Plaintiff in that salishnama. He also contended that the Plaintiff did not take any step before the appropriate authority and even before the police for taking his signature on the salishnama by force. He lastly contended that there was no perversity in the finding of the first appellate court and no ambiguity arises and as such the instant appeal be dismissed.

10. Having scrutinized the entire materials available before me what I have gathered is that Shankar Chakraborty/Appellant claimed title in respect of Lay Out Plot No. 648 (in short LOP 648) of Mouza No. 2 Bhaduri measuring 5 cottahs on the basis of the deed of gift dated 29th June, 1989 executed by R.R. Department, Govt. of West Bengal as described in "Ka" schedule to the plaint. Learned trial court declared Plaintiff's title and also passed a decree for recovery of Khas possession in respect of 1 ♦ cottahs out of 5 cottahs as described in "Ka" schedule. But the learned first appellate court set aside the judgment and decree with the observation that the alleged deed of gift was executed not in accordance with law and it was fraudulently obtained.

11. The substantial question of law before this appellate authority under second appeal is whether the first appellate court committed susbtantial error of law in dismissing the suit entering into the question as to whether the deed of gift was executed in favour of the Plaintiff in accordance with law and/or fraudulently obtained in-spite of fact that neither any separate suit nor any counter-claim has been filed by the Defendants challenging the deed. To my mind, in order to decide such point, evidence on record both oral and documentary is to be scrutinized and discussed at length. That apart, there is catena of decisions of the Hon"ble Supreme Court reported in Damadilal and Others Vs. Parashram and Others, , Hero Vinoth (minor) Vs. Seshammal, and Dinesh Kumar Vs. Yusuf Ali, wherein this Court sitting in second appeal has been empowered to look into the pleadings, evidence and/or to re-appreciate the same in adjudging the substantial question of law. Therefore, let me now go through the pleadings and evidence on record.

12. Plaintiff's specific case is that the suit property i.e. LOP No. 648 pertaining to C.S. Plot No. 1510 of Mouza No. 2 Bhaduri under PS Ranaghat, Nadia belonged to R.R. Department, Govt. of West Bengal and Plaintiff's father was admittedly a resident of East Pakistan and after partition, migrated to India in 1953 and residing at Cooper's camp as a refugee.

13. Further case is that father of Plaintiff came over to "Ka" schedule property i.e. LOP No. 648 measuring 5 cottahs and started residing therein with his family comprising himself and his three sons but for want of sufficient accommodation, he left "Ka" schedule property after giving the same to his eldest son i.e. the Plaintiff.

Since thereafter the Plaintiff was in exclusive possession of "Ka" schedule property and in course of such possession the concerned R.R. Department transferred the said property by a registered deed of gift dated 29th June, 1989 in favour of the Plaintiff and thus he acquired title over the same.

14. Specific allegation as made out in the plaint is that the principal Defendant Chittoranjan Dutta son of late Rai Mohan Dutta forcibly occupied 1 $\frac{1}{2}$ cottahs of land on the extreme southern side of "Ka" schedule property and constructed one tile shed therein on 4th September, 1990 and threatening to dispossess the Plaintiff from the rest portion of the suit property.

15. On the other hand, on behalf of the contesting Defendant No. 1, specific case as made out in written statement is that he possesses 8 annas i.e. 2 $\frac{1}{2}$ cottahs of land in Lay Out Plot No. 648. It is his further case that the father of the Plaintiff all along used to reside in Lay Out Plot No. 647 and he never resided in "Ka" schedule property. There was long standing dispute between the Plaintiff and the Defendants. The respectable persons of the locality settled their dispute by way of salish and by such salish the suit property was divided into 2 halves which were accordingly transferred to both the Plaintiff and the Defendants and each got 2 $\frac{1}{2}$ cottahs of land.

16. It is the further case of the Defendants that the gift deed executed in favour of the Plaintiff is a fraudulent deed and is not binding upon the Defendants.

17. Needless to mention that the onus entirely lies upon the Plaintiff to prove his plaint case by cogent and sufficient evidence. On scrutiny of the lower court record it has come to my notice that the Plaintiff/Appellant examined himself as P.W-1 and one Krishna Kanta Malakar as supporting witness as P.W-2 and the alleged deed of gift dated 29th June, 1989 was marked as Exhibit.1. No further oral or documentary evidence was adduced on behalf of the Plaintiff.

18. I am aware that no evidence was adduced from the side of the Defendants but I can say with much emphasis that the first appellate court rightly observed in his judgment that the Plaintiff is to prove his own case and he cannot succeed basing on the latches or lacuna of the Defendants.

19. On a plain reading of the evidence of the Plaintiff (Sankar Chakraborty) P.W-1 I find that he has totally given a go-bye to his own plaint case regarding his father's coming over to the suit land and residing therein with his family after constructing house therein. At the very beginning of his evidence the Plaintiff stated that the government gifted the suit property to him in 1989. Strangely enough, in his examination-in-chief the Plaintiff did not utter a single word as regards his father, far to speak of saying his father came from East Pakistan in the year 1953 (although pleaded). In a very slipshod manner the Plaintiff deposed in examination-in-chief just producing his alleged deed of gift and stated that the Defendants forcibly dispossessed him from the suit property in the year 1990.

20. It is significant to mention that even he did not say in his examination-in-chief that the Defendants have dispossessed him from 1 ½ cottahs of land out of entire "Ka" schedule property. However, fortunately, truth came to light from the mouth of the Plaintiff himself during his cross-examination which being relevant, will be presently discussed in details.

21. The Plaintiff deposed before the trial court on 27th March, 1996 and categorically stated his age as 38 years while the bench clerk filled-in the deposition form. In cross examination also the Plaintiff said that he was born at Taherpur (Nadia) and he is 38 years old but at the beginning of his cross-examination he stated that he is in possession of the suit property for 40 years.

22. We must recapitulate at this juncture that in his examination-in-chief he claimed to be the owner and in possession of the suit property since 1989 on the strength of the alleged deed of gift by the R.R. Department, Govt. of West Bengal. Then how he stated that for the 40 years he is in possession of "ka" schedule property.

23. During further cross-examination, he stated that his father was a resident of East Bengal (Pakistan) and after coming to West Bengal as a refugee he (father) was allotted plot being No. LOP No. 647. I am compelled to reiterate at this juncture that in the plaint specific case has been made out by the Plaintiff that "Ka" schedule property i.e. LOP No. 648 measuring 5 cottahs used to be occupied by his father since 1953 as a refugee wherein after construction of a pucca building his father used to reside with his family but subsequently he gave the said "Ka" schedule property to the Plaintiff (eldest son) and left the place with his family members. It is pertinent to mention that in Paragraph 7 of the plaint, the Plaintiff clearly stated that in this manner Plaintiff was/is in occupation of "Ka" schedule property along with its building. But from the evidence (cross examination) of the Plaintiff himself it has been proved that the suit property i.e. LOP No. 648 was never allotted to his father. Rather the land which was allotted to his father from R.R. Department was LOP No. 647. It is note-worthy that the Defendants' specific case is also that LOP No. 647 was allotted to the Plaintiff's father and not LOP No. 648 as described in "Ka" schedule property.

24. I have no hesitation to say that in spite of knowing fully well that the suit property (LOP No. 648) was never allotted to his father, the Plaintiff for unlawful gain made out false story in his plaint regarding allotment of suit property i.e. LOP No. 648 suppressing the material fact of allotment of LOP No. 647 in favour of his father.

25. We should bear in mind that the Plaintiff cannot make out a new case beyond his pleading. In other words, it is not the case of the Plaintiff that although his father was in possession of LOP No. 647 as a refugee and subsequently gave the said LOP to him wherein he continued to reside, but in spite of that the R.R. Department executed the alleged deed of gift in his favour in respect of LOP No. 648.

26. It may be mentioned here that during cross-examination the Plaintiff (P.W. 1) has admitted that in the suit plot one Atul Sil was in possession. No oral or documentary evidence is forthcoming that the suit land was ever allotted to the said Atul Sil and thereafter it was re-allotted to the father of the Plaintiff as alleged. No evidence is forthcoming that after the said Atul Sil the Plaintiff's father came into possession of the said land. Thus, the Plaintiff has himself falsified his own case. I am not at all unmindful that there is existence of one deed of gift alleged to have been executed by the R.R. Department in respect of LOP No. 648 in favour of the Plaintiff and substantial question of law formulated in this appeal is whether in absence of any separate suit or counter-claim challenging the deed of gift filed by the Defendants/Respondents first appellate court rightly set aside the decree with the observation that the Plaintiff has obtained the said deed of gift misleading the government of West Bengal or by fraudulent means.

27. I must say that the learned first appellate court rightly observed "the Plaintiff's case that the suit property occupied by his father Nihar Ranjan Chakraborty has not been established by way of evidence. The Plaintiff took birth at Taherpur which is within the jurisdiction of this State and his father came to India before his birth. The Plaintiff did not come from East Pakistan as a refugee. He along with his father used to reside in plot No. 647 which is never the suit property".

28. On scrutiny of the alleged gift deed I found nothing to interfere with his further following observations:

On perusal of the deed of gift I find that to obtain the plot by virtue of that gift deed the donee is to satisfy the conditions viz (i) he was a resident of former East Pakistan crossed over and came to the territory of State of West Bengal, (ii) the Govt. of West Bengal offered all reasonable facilities to such persons (Refugees) for residence in West Bengal and (iii) such person was compelled by circumstances to use vacant land in the urban areas for home stead purpose.

If those conditions are fulfilled by a refugee, the government would execute a gift deed in favour of the said refugee with regard to that piece of land which had been occupied by said refugee for home stead purpose.

In the present case, the Plaintiff could not establish that he is a refugee coming from East Pakistan.

29. In my considered view, when it has been established from the evidence of the Plaintiff that his father was allotted LOP No. 647 and not suit Plot No. LOP 648 and further when it has been conclusively proved that none of the conditions as mentioned in the deed of gift was fulfilled while alleged deed of gift was executed, coupled with the fact that the Plaintiff did not come from East Pakistan as a refugee, rather admittedly was born in West Bengal, the Plaintiff/Appellant was not supposed to acquire title in LOP No. 648 on the strength of the said deed which is void ab initio. It goes without saying that a void document is no more required to be

declared as void by a court of law. I like to reiterate that the Plaintiff cannot succeed merely on the ground that no separate suit or counter-claim for declaring the said deed as void or fraudulently obtained has been filed by the Defendants/Respondents.

30. I must say that the learned first Appellate Court applied his judicial mind from a correct angle of vision and did not commit any error by setting aside the judgment and decree of the trial court. But before parting with this judgment, one more relevant fact is required to be discussed which came to light not only during evidence of the Plaintiff/Appellant but even at the time of hearing of this appeal learned Counsel of both sides argued over the said relevant fact which is nothing but relating to salish taken place at the intervention of the respectable persons of the locality.

31. Hearing was taken by this Court not suo moto but due to filing of an application from the side of the Respondent No. 1 Chittaranjan Dutta dated 01.09.2009 registered as CAN 8040 of 2009 against which affidavit-in-opposition was submitted by the Appellant and affidavit-in-reply was also submitted along with xerox copies of salishnames dated 27.02.1983, 15.08.1990 and 21.11.1993, copy of Advocate Commissioner's report, copy of letter dated 17.08.1996 written by the convenor of Colony Committee addressed to the O/C R.R., Ranaghat, etc.

32. In the affidavit-in-opposition, the Appellant took the plea that his signature was obtained under threat and pressure and he did not execute the said documents under free will and as such the Respondents are not entitled to get any benefit in support of the alleged documents.

33. In course of hearing of the said application also same argument was advanced from the side of the Appellant while the Ld. Counsel for the Respondents raised before this Court the factum of salish and submitted that in the salish it was settled that both parties to this appeal would occupy 2 ½ cottahs each in respect of LOP No. 648 i.e. the suit property. In the written statement also the contesting Defendant No. 1 specifically stated that there was long standing dispute between the Plaintiff and the Defendants and to restore peace, the respectable persons of the village adjudicated the dispute and by such salish the suit property was divided into two halves and accordingly was transferred to both the Plaintiff and the Defendants 2 ½ cottahs of land each.

34. The Plaintiff in his cross-examination has admitted that there was long standing dispute and there is existence of Tarun Sangha club. He has further admitted that Niranjan Mistri, Chairman of the local municipality called for a meeting to settle their dispute. Although he (Plaintiff) denied that the dispute was settled mutually and/or he put his signature freely but at the same time he stated that he did not lodged any diary after his signature was taken forcibly in the salish. It is also his clear admission that Defendant No. 3 Khokan Dutta resides in LOP No. 649. In the written statement

also Defendant No. 1 stated that LOP No. 649 is adjacent to LOP No. 648 (suit property).

35. In this context it is worthwhile to mention that in the written statement also the Defendants pleaded about salish and categorically stated that Plaintiff Shankar Chakraborty signed therein.

36. It is interesting to note that in his further cross-examination at page-4, the Plaintiff has stated that his father was alive while the dispute was going on with the Defendant Chitto Dutta and his father put signature in the document of settlement. On perusal of the salishnama, dated 27.02.1983 it appears that in fact there is signature of Nihar Ranjan Chakraborty, the father of the Plaintiff and many others. The Plaintiff nowhere said his father challenged the document of salish ever, which indicates that after the death of his father the Plaintiff/Appellant in order to grab the entire suit plot No. 648, managed to obtain the alleged gift deed in collusion with the R.R. Department and started creating trouble which prompted to hold salish on 15.08.1990 and 21.11.1993.

37. I am not at all unmindful that the documents of salish were not brought into evidence before the trial court by the Ld. counsel for the contesting Defendant but from the judgment of the first Appellate Court it is clear that the application was filed on 15.07.1996 in order to tender those documents of salish as evidence. However, the same was rejected and revisional application was rejected by the District Judge, Nadia and afterwards by this High Court.

38. It is also revealed from the judgment of the first Appellate Court that one application under Order 41 Rule 27 CPC was filed but the Ld. court clearly observed that on perusal of the xerox copies of papers relating to salish he does not find any cogent ground to allow the application. He also clarified that the evidence relating to salish which the Appellant intends to tender will not hit the merit of the case.

39. I can say with much emphasis that such observation was rightly made by the learned first Appellate Court since the main instrument i.e. the deed of gift on the basis of which title was claimed by the Plaintiff is void ab initio.

40. From the foregoing discussion it is crystal clear that LOP numbers 647 and 649 are intervened by suit property i.e. LOP No. 648 and since after leaving of LOP No. 648 by the original occupier Atul sil tug of war was started by adjoining plot owners of both sides. Of course, the fact remains that the suit property i.e. LOP No. 648 is occupied by both parties in the same status. Now, it is up to the concerned department (R.R. Department) to act in accordance with law relating to LOP No. 648 i.e. the suit property after giving opportunity of hearing to both the parties. It will not be out of place to mention that in CAN No. 8040 of 2009 Respondent No. 1 prayed for directing the Appellant to register a deed of conveyance in his favour in respect of 2 ♦ cottahs of land on the western part of LOP No. 648. Needless to say that the Plaintiff/Appellant has no authority or locus standi to execute the said deed

as he is not the owner of the suit property.

41. The matter does not end here because from the record of this second appeal it transpires that the Respondent No. 1 through an application being No. CAN 8557 of 2007 sought for permission to remove one of the trees which had fallen down. From the order dated 10.01.2008 passed in the said application by Mr. Justice S.K. Gupta of this Court, it appears that the Respondent claimed to have planted several trees in course of his long possession of the suit property, one of which had fallen and such prayer was although opposed but factum of possession was admitted. That is why Justice Gupta observed " It is admitted position that the Petitioner/Respondent is in possession of the suit property where the tree was planted".

42. However, the application was allowed and Respondent was permitted to remove the tree in question after depositing Rs. 1200/- in the trial court. Further order was passed that this amount will not be disbursed till the disposal of this appeal and it will abide by the result of the second appeal in question.

43. It goes without saying that when this appeal fails on merit, the Respondent No. 1 will be at liberty to withdraw the deposited amount from the trial court.

44. In view of what I discussed above, CAN No. 8040 of 2009 which was heard along with this appeal also stands disposed of. I like to reiterate that this appeal fails and accordingly stands dismissed. There will be no order as to cost.

45. Let the L.C.R. be sent down to the Court below at once.

46. Urgent xerox certified copy if applied, be supplied to the party after observing necessary formalities.