

ORISSA HIGH COURT : CUTTACK

S.A. NO. 198 OF 2000

From a judgment and decree dated 29.3.2000 and 15.4.2000 respectively passed by Shri M.R. Hazra, learned Second Additional District Judge, Bhubaneswar in T.A. No. 48/43 of 1990/1988 reversing the judgment and decree dated 31.10.1988 and 16.11.1988 respectively passed by Shri P.K. Hota, learned Munsif, Bhubaneswar in O.S. No.8/1986-I.

Purna Chandra Badu Appellant

-versus-

Ratnamani Badu Respondent

For Appellant: M/s. S.P. Mishra, Sr. Advocate,
S.K. Mishra-I & S. Dash.

For Respondent: M/s. A.R. Dash, N. Lenka,
N.Das, & R.N.Behera,

Decided on 30.10.2013

P R E S E N T:

THE HONOURABLE SHRI JUSTICE M. M. DAS

M.M. DAS, J.

This Second Appeal has been filed by the sole defendant in O.S. No.8/1986-I against the judgment and decree passed by the learned lower appellate court after the matter was remanded by this Court in an earlier Second Appeal.

2. The suit was filed by one Bamadeb Badu for declaration that the registered deed of gift dated 17.01.1983 is void and not binding on the plaintiff and for further declaration that the defendant is not the adopted son of the plaintiff. Subsequently, on the

death of the original plaintiff, the present plaintiff has been substituted as the sole legal representative. Thereafter, the plaint underwent an amendment.

3. The plaintiff's case was that late Bamadeb Badu, the original plaintiff is the paternal uncle of the substituted plaintiff. He was an old and helpless person suffering from defect in his vision since six years before his death. His wife pre-deceased him and his old mother also expired ten years back and his only son Gunanidhi died 13 years back. The defendant is related to late Bamadeb Badu as an agnatic nephew. Taking advantage of the helplessness and precarious condition, in which late Bamadeb Badu was the defendant, prevailed upon him to execute a deed of adoption and in the process, obtained a registered deed of gift. The terms as well as the recitals of the documents were not within the knowledge of the deceased Bamadeb Badu and he never intended to execute a deed of gift nor the same was accepted by the defendant, nor was possession given to the defendant pursuant to execution of the said gift deed. Coming to know of existence of such a gift deed, late Bamadeb Badu filed the suit.

4. The defendant-appellant, in his written statement, apart from denying the allegations made by the plaintiff, took a plea that the present plaintiff, who was substituted in place of the original plaintiff Bamadeb, had no locus standi to challenge the transaction. It was further pleaded that the natural father of the present plaintiff

had been adopted to another family and, as such, the present plaintiff, who was substituted in place of late Bamadeb Badu was not the nearest heir. A stand with regard to non-joinder of necessary parties on the ground that other brothers and sisters of the plaintiff had not been impleaded as parties was also taken. It was asserted that the deed of gift had been duly executed by late Bamadeb Badu. A further pleading was made that the defendant had been adopted by late Bamadeb Badu and the transaction is valid and binding on all concerned and the same was not vitiated by fraud.

5. After trial of the suit, the learned trial court found that the defendant was not adopted by late Bamadeb Badu. The deed of gift has not been duly executed nor has it been acted upon. It was further found that the plaintiff, being the daughter of brother of late Bamadeb Badu, had locus standi to challenge the deed of gift and the suit was not bad for non-joinder of necessary parties. On the above findings, the suit was decreed.

6. The present appellant preferred an appeal against the said judgment and decree of the learned trial court registered as T.A. No.48/43 of 1990/1988. It was heard by the learned 2nd Additional District Judge, Bhubaneswar and disposed of by the judgment dated 27.03.1992. The learned lower appellate court confirmed the finding that the defendant was not the adopted son of late Bamadeb Badu, but was an agnatic nephew. It was further found that the plaintiff, being

one of the children of the brother of the deceased – Bamadeb, had locus standi to prosecute the suit. The learned lower appellate court had also found that the deed of gift had not been fraudulently obtained. On the above findings, the decree of the learned trial court was reversed and the suit was dismissed. The unsuccessful plaintiff, who was substituted in place of the original plaintiff Bamadeb, preferred Second Appeal No.280 of 1992 before this Court, which was disposed by the judgment dated 18.11.1999. This Court in paragraph – 8 of the judgment found thus:-

“8. On going through the judgment of the lower appellate court, it appears that the discussion regarding execution of the deed of gift appears to be perfunctory. Since the matter is going on remand to the lower appellate court to consider the aspect as to whether the deed of gift had been accepted or not, the question of due execution of the gift deed is also required to be reconsidered by the lower appellate court.

7. While holding as above, this Court concluded the issue with regard to non-joinder of the necessary parties by holding that such a plea is not acceptable and further holding that, if it is ultimately found that the defendant has not derived any right on the basis of the deed of gift, the status of the defendant would be just like a trespasser and he cannot succeed on the plea that the title of the property in its entirety does not vest with the plaintiff alone, but with the plaintiff and others. This Court also concluded that the plea of the defendant that the father of the plaintiff was substituted in place of Bamadeb having been negated by the learned courts below, the

same being a finding of fact, the said finding is not available to be re-agitated.

8. Thus holding, this Court remanded the matter back to the learned lower appellate court for reconsideration on the question as to whether the deed of gift had been duly executed and whether the same had been accepted during the life time of the donor. Remitting the matter back on the above question, this Court concluded that the other findings relating to status of the plaintiff and the finding that the defendant was not adopted son are confirmed.

9. After remand, the learned lower appellate court heard and disposed of the appeal in accordance with the remand order by its judgment dated 29.03.2000, against which this Second Appeal has been preferred. The learned lower appellate court considering the scope and extent, to which it can enter into the question in accordance with the remand order of this Court and relying upon the decision in the case of **Natabar Mohanty and others v. Tanka Thanapati**, 77 (1994) CLT 341 held that the defendant has to establish (i) whether Bamadeb Badu executed the instrument voluntarily ? (ii) whether the instrument is for consideration ? (iii) whether it has been attested ? and, (iv) whether the gift has been accepted ?

10. The above questions were framed as issue No. VI by the learned trial court. The learned lower appellate court, in the

impugned judgment, appreciating the materials on record and discussing the evidence in details, further taking the admission of the defendant made during his cross-examination that Bamadeb called him to make an adoption deed, concluded that late Bamadeb never executed the gift deed. He further found that the said alleged gift deed was without any consideration. He, further discussing the evidence of the attesting witnesses, came to a finding of fact that the gift deed has not been duly attested, taking note of the fact that admittedly the original gift deed has not been produced by the defendant. On the other hand, the certified copy thereof has been marked as Ext.8. Though it was pleaded in the written statement that late Bamadeb Badu had himself executed the deed in question in favour of the defendant and was aware of the contents thereof and the original gift deed was also obtained by the defendant, finding such contradictory statement in the evidence and further finding that there is no recital in the gift deed that possession has been delivered in respect of the gifted property to the defendant by late Bamadeb, coupled with the evidence adduced by the plaintiff with regard to the possession over the said property, he concluded that the deed in question was never accepted by the defendant. Thus finding, he dismissed the appeal while confirming the judgment and decree of the learned trial court by which the suit was decreed.

11. This appeal has been admitted on the following substantial questions of law :-

“9(a) When the plaintiff has taken a specific plea that the gift deed vide Ext. B has been obtained by practicing fraud;

Whether the learned court below is justified in placing the burden of proof on the defendant to prove the validity of gift deed and whether the learned court below should have placed the burden on the plaintiff first to establish her plea of fraud during the execution of gift deed ?

(b) When the plaintiff has proved the due execution of the deed in terms of section 91 of the Evidence Act;

Whether the plaintiff can be permitted to adduce oral evidence for contradict the gift deed and whether the conclusion of the lower court declaring the gift deed void by taking into consideration the oral evidence adduce by the plaintiff is hit by section 92 of the Evidence Act ?”

12. It was argued by Mr. S.P. Mishra, learned senior counsel for the appellant that when a specific stand was taken by the plaintiff that the gift deed has been obtained by practising fraud, the learned court below should not have placed onus of proof with regard to the validity of the gift deed on the defendant-appellant, as fraud, if alleged by a party, should be proved by him. He further contended that when due execution of the deed has been proved in terms of Section 91 of the Evidence Act, the plaintiff could not have been permitted to adduce oral evidence for contradicting the gift deed and

the finding of the learned lower appellate court basing on such oral evidence is not acceptable.

13. Mr. A.R. Dash, learned counsel for the respondent, however, submitted with vehemence that for judging due execution of the gift deed and its acceptance, provision of Section 122 of the Transfer of Property Act is required to be fulfilled. He further submitted that as per the averments made in the plaint, it is clear that neither Bamadeb Badu had any intention to execute the gift deed nor was it brought to his knowledge prior to the date of cause of action for the suit. The only impression which he carried was that he was executing a deed of adoption, for which he had given signature in good faith. Bamadeb has never stated in the plaint that the defendant was residing with him nor that he has delivered the alleged gift deed or the property covered thereunder to the defendant. The defendant has also not produced the original gift deed. He, therefore, contended that in such circumstances, neither there was voluntary execution of gift deed nor there was acceptance by the defendant during the life time of Bamadeb, as required under Section 122 of the T.P. Act.

14. While answering whether the gift deed was accepted during the life time of the donor, the learned lower appellate court has vividly discussed the admission of the parties, evidence on record, the circumstances leading to the case and thereafter has come to a well

reasoned finding that the gift deed was not accepted during the life time of the donor.

15. Section 122 of the T.P. Act defines gift to be a transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. The said Section further provides that such acceptance must be made during the life time of the donor and while he is still capable of giving.

16. In the instant case, the grounds on which the Second Appeal has been admitted, in my considered view, do not arise. It is well settled that the allegation of fraud, if made by a party, the said party is required to prove the same, for which specific pleading must be there. It is seen that in the instant case, such a situation does not arise. This Court, in the order of remand, framed only one question requiring the learned lower appellate court to return its finding thereon. While doing so, this Court foreclosed all other issues raised between the parties in the suit. The questions that were to be dealt with by the learned lower appellate court were as to whether the deed of gift has been duly executed and whether the same had been accepted during the life time of the donor.

17. The learned lower appellate court has answered both the aforesaid questions in the impugned judgment by recording a finding that the gift deed was not duly executed as well as the same

was not accepted by the donee during the life time of the donor, which is a requirement of Section 122 of the T.P. Act. The learned courts below have gone to the extent of saying that while mere possession by or on behalf of the donee may amount to acceptance of the gift, but, however, when the subject-matter of the gift was enjoyed jointly by the donor and the donee, mere possession cannot be treated as evidence or acceptance. (See **Bancha Bhol and others v. Saria Bewa and others**, AIR 1973 Orissa, 18)

18. Applying the aforesaid ratio, even assuming that the defendant was residing with Bamadeb jointly, such conduct on the part of the defendant cannot amount to acceptance of the alleged gift. The matter would have been otherwise, had the gift deed been proved by the defendant, who pleaded that the original of the said gift deed was in his possession, but never produced the same.

19. In the instant case, however, the learned lower appellate court, on analyzing the material evidence, both oral and documentary available on record threadbare, having found that the deed of gift was not duly attested, which under law requires compulsory attestation and further having found that there is absolutely no evidence of acceptance of such a gift by the defendant, question of examining as to whether the learned court below was wrong in not placing the onus on the plaintiff to prove that the gift deed is an outcome of fraud becomes redundant.

20. In my view, therefore, this is not a case where either the onus has been wrongly placed or the finding is based on no evidence or there has been substantial error or defect in the procedure adopted by the learned lower appellate court after the matter was remitted back to it by this Court in the earlier Second Appeal.

21. I, therefore, find no reason to interfere with the impugned judgment. The Second Appeal, being devoid of merit, stands dismissed. The judgments of the learned courts below stand confirmed and the suit of the plaintiff stands decreed. In the circumstances, however, the parties shall bear their own cost in respect of this appeal.

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M. M. Das,

J.

***Orissa High Court, Cuttack.
 October 30th, 2013/Biswal.***
