

**HIGH COURT OF TRIPURA  
AGARTALA**

**RFA No.14 of 2024**

**Sri Gour Gopal Saha (Age 61 years)**

S/O- Lt. Hari Mohan Saha,  
Resident of Badarmokam, Badar Saheb Bari Road,  
P.O.- R.K. Pur. P.S.- R.K. Pur, Sub-Division- Udaipur  
Pin- 799120, District- Gomati Tripura.

**.... Defendant No.1 (ii)- Appellant.**

**Versus**

**1. Smt. Asmita Saha**

D/O Sri Nitai Lal Saha  
Resident of Vill. Ashrampara  
P.O.- Aurangbad, P.S.- Suti  
District- Murshidabad, West Bengal,  
Pin- 742133.

**.....Plaintiff-Respondent.**

**2. Smt. Manju Roy**

W/O Jaharlal Roy  
D/O Late Hari Mohan Saha  
Resident of North-East Noapara,  
P.S.- Noapara, P.O.- Noapara, Barasat  
District- 24 Paragana (North), West Bengal  
Pin- 700125

**3. Smt. Anju Roy**

W/O- Utpal Roy  
Resident of West Jogendranagar, Kata Shola  
(Ram Krishna Road), Near Benimadhab Bidyapity  
P.S.- East Agartala, P.O.- Jogendranagar,  
Pin- 799004.

**4. Smt. Sanjusree Roy**

W/O- Jasoda Lal Roy  
D/O- Late Hari Mohan Saha  
Resident of Milan Chakra,  
P.S.- A.D. Nagar, P.O.- A.D. Nagar  
(Near Milan Chakra Club, Agartala)  
District- West Tripura  
Pin- 799003

**5. Smt. Ranjusree Roy**

W/O- Arindam Bakshi  
D/O- Late Hari Mohan Saha  
Bakshi Apartment,  
(Near Hridaypur Rail Station) Hridaypur,

P.O.- Hridaypur, P.S.- Barasat  
24 Pargana (North), West Bengal  
Pin- 700127

**6. Sri Nitai Lal Saha**

S/O Late Hari Mohan Saha  
Ashrampara,  
P.O.- Aurangbad, P.S.- Suti  
District- Murshidabad, West Bengal  
Pin- 742133

**.....Defendant No.1(iii) to (vii)- Respondents**

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For Appellant(s)	:	Mr. Suman Bhattacharjee, Adv.
For Respondent(s)	:	Mr. B. N. Majumder, Sr. Adv, Mr. K. Deb, Adv, Mr. E. Debbarma, Adv, Ms. R. Majumder, Adv, Mr. B. Banerjee, Adv.
Date of Hearing	:	27.01.2025
Date of delivery of Judgment and Order	:	31.01.2025
Whether fit for Reporting	:	YES

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**HON'BLE MR. JUSTICE BISWAJIT PALIT**

**Judgment & Order**

This appeal is preferred under Section 96 of CPC challenging the judgment dated 09.03.2021 and decree dated 15.03.2021 delivered by Learned Civil Judge, Senior Division, Court No.2, Udaipur, Gomati District in connection with case No.T.S.38 of 2016.

**02.** Heard Learned Counsel, Mr. Suman Bhattacharjee appearing on behalf of the appellant-defendant No.1(ii) and also heard Learned Senior Counsel, Mr. B. N. Majumder assisted by Learned Counsel Mr. K. Deb, Mr. E. Debbarma and Ms. R. Majumder appearing on behalf of the respondent-

plaintiff. Learned Counsel, Mr. B. Banerjee also appeared on behalf of the respondent-defendant Nos.1(iii)-(vii).

**03.** Before proceeding with the merit of the appeal, let us discuss about the subject matter of the dispute amongst the rival parties. The respondent-plaintiff filed one suit for declaration and recovery of possession of the suit land measuring 0.084 acres appertaining to Khatian No.1870 under Mouja- Udaipur as described in the schedule of the plaint before the Court of Learned Civil Judge (Sr. Div.). The respondent-plaintiff, being a minor instituted the suit through her father before the Learned Trial Court Sri Nitai Lal Saha as a natural guardian and next friend with a prayer for declaration of title over the suit land, recovery of possession thereof with further claim for mesne profits against the original defendant Sikha Rani Saha (since dead). The case of the respondent-plaintiff was that the original defendant Sikha Rani Saha (since dead) who was her grandmother was the owner of the aforesaid suit property. On 17.04.2009 said Sikha Rani Saha executed a deed of gift in favour of the plaintiff gifting the suit property in her favour. The gift deed was registered at the house of the principal defendant on commission. Since the respondent-plaintiff was on that relevant point of time a minor, so, the gift was accepted by her father Sri Nitai Lal Saha on her behalf. After execution of the gift deed, Sikha Rani Saha also delivered possession of the suit property to the plaintiff which

was accepted by her father as her natural guardian. As the plot of land is attached to the residential plot of the original defendant, so, it remained under the constructive possession of the respondent-plaintiff through the original defendant Sikha Rani Saha as she allowed said Sikha Rani Saha being her grandmother to utilize the land for the purpose of growing plants and vegetables. After few months of execution of deed of gift when the respondent-plaintiff through her father applied for mutation of the suit land before the Revenue Authority that time it was denied on the ground that the respondent-plaintiff did not have possession over the suit land and her appeal against such order of refusal is pending. It was also the case of the respondent-plaintiff that said Sikha Rani Saha in collusion with other near relatives and pressure from daughters started showing hostile title to the suit property and also started declaring that the principal defendant did not execute any such gift deed and the father of the respondent-plaintiff got some signatures on some stamp papers and by pressurizing her got the gift deed executed. The original defendant before the Learned Trial Court contested the suit by filing written statement denying the assertions of the respondent-plaintiff and also took the plea that the suit was not maintainable, the description of the suit property was not proper and it was not properly stamped. It was further asserted that she never executed any gift deed in favour of the plaintiff nor she handed

over possession of the suit land to the plaintiff. Further, according to the principal defendant of the original suit, Nitai Lal Saha, the father of the respondent-plaintiff is her younger son and on his invitation she, i.e. the principal defendant and her husband went to Aurangabad to stay therein for a considerable period and during that period, Nitai Saha took all care of his parents for which the defendant gained some confidence upon her son and taking advantage of the trust, Nitai Saha deceived and derived all signatures and thumb impression of Sikha Rani Saha on papers without letting her know the purpose of those papers. However, on receipt of notice from the Court of Deputy Collector and Magistrate, she for the first time came to know that Nitai Lal Saha obtained one fraudulent deed of gift on the papers taking signature of his mother Sikha Rani Saha. She also submitted objection against the prayer for mutation and accordingly, the same was denied and rejected. She further asserted that the respondent-plaintiff did not derive any title to the suit land by the alleged deed of gift and also did not get possession. She filed amended written statement wherein she asserted that she did not execute any gift deed voluntarily and she did at the instigation and pressure of Nitai Lal Saha. It is to be noted here that during the pendency of the suit, the respondent-plaintiff attained majority and elected to proceed with the case in her own name and the sole defendant, Sikha Rani Saha also died

and she was substituted by her legal heirs, so, the Learned Trial Court by order dated 05.12.2018 included the names of all the legal heirs of said deceased Sikha Rani Saha and thereafter, as the substituted defendant No.1(i), Sri Harimohan Saha, being the husband of said Sikha Rani Saha was also expired, so, his name was also struck off from the record as per order dated 23.04.2019. However, upon the pleadings of the parties, Learned Court below framed total five nos. of issues which are mentioned herein below:

**ISSUES**

- i) Whether the suit is maintainable ?
- ii) Whether the gift deed No. 1-675 dated 17.04.2009 is valid or caused to be executed by misrepresentation or otherwise illegally?
- iii) Whether the plaintiff is the owner of the suit land ?
- iv) Whether the defendant is the license (sic licensee) of the plaintiff or permissive possessor of plaintiff?
- v) Whether the plaintiff is entitled to the relief as prayed for including the decree of mesne profit and if so what is its extant and/or any other relief or reliefs in this suit?

**04.** To substantiate the issues, both the parties have adduced oral/documentary evidence on record which are as follows:

**APPENDIX**

**(A) Plaintiff's Witnesses:**

**P.W. 1 :- Sri Nitai Lal Saha;**

**P.W.2 :- Sri Ratan Chakraborty.**

**B) Defendants' Witnesses:**

**D.W.1 :- Smt. Manjusree Roy;**

**D.W.2 :- Smt. Sanjusree Roy;**

**D.W.3 :- Smt. Ranjusree Bakshi.**

**(C) Plaintiffs' Exhibits:**

**Ext. 1 :- Original registered gift deed No.1-675 of 2009;**

**Ext. 1/1 series:- Signatures of the original defendant in gift deed as executrix;**

**Ext. 1/2 :- Signature of the P.W. 1 in gift deed as acceptor of gift for minor;**

**Ext. 1/3 series:- Signatures of the P.W. 2 in the gift deed as attesting witness;**

**Ext. 2 :- Certified copy order dated 12.01.2015 of DCM, Udaipur;**

**Ext. 3 :- Certified copy of order dated 30.01.2015 of DCM, Udaipur;**

**Ext. 4 :- Certified copy of order dated 10.02.2015 of DCM, Udaipur;**

**Ext. 5 :- Registered Power of Attorney dated 14.06.2018.**

**(D) Defendants' Exhibits: Nil**

**05.** Finally on conclusion of trial, Learned Trial Court below decreed the suit in favour of the respondent-plaintiff by the aforesaid judgment and decree. The operative portion of the judgment/order is mentioned herein below:

**ORDER**

**37. The suit of the plaintiff is decreed on contest with cost.**

**38. It is declared that the plaintiff has right, title and interest over the suit land on the basis of the Ext. 1 gift deed. The defendants are accordingly asked to hand over possession of the suit land in favour of the plaintiff within 30 days from the date of decree.**

**39. Prepare a decree accordingly and place before me for my signature within 15 days from today.**

**40. The record shall be consigned to the Record Room after due compliance.**

**06.** Challenging that judgment, this present appeal is preferred. However, at the time of hearing of argument, Learned Counsel for the appellant first of all drawn the attention of the Court referring page No.10 of the paper book and submitted that as per order dated 05.12.2018 of the Learned Trial Court, all the legal heirs of deceased Sikha Rani Saha were brought on record as substituted defendants but

surprisingly the substituted defendant No.1(vii), Nitai Lal Saha as defendant appeared in the case on behalf of the respondent-plaintiff and filed his written statement admitting the case of the respondent-plaintiff. So, according to Learned Counsel that the suit was a collusive one and the suit was not maintainable. Learned Counsel, Mr. S. Bhattacharjee appearing on behalf of the appellant further submitted that before the Learned Trial Court below all along the respondent-plaintiff remained absent. So, the suit was contested by her father, Nitai Lal Saha who also has been arrayed as defendant No.1(vii) which was not permissible in the eye of law. Finally, Learned Counsel drawn the attention of the Court that Exhibit-1, i.e. the registered gift deed No.1-675 of 17.04.2009 was marked by the Learned Court below subject to objection by the contesting defendant on the ground that the same was not duly executed and proved in accordance with Section 67 of the Evidence Act. Learned Counsel, Mr. S. Bhattacharjee further submitted that since the deed was not proved in accordance with the provision of Section 67 of the Evidence Act and the author of the same was not produced, even the deed writer who drafted and scribed the deed was not tendered for examination by the respondent-plaintiff for examination before the Learned Trial Court, so, the deed was not proved in accordance with law and at the same time the contents of the deed were also not proved. So, in summing up, Learned Counsel submitted that the judgment of the Learned Court below suffers from infirmity



as such the same cannot be sustained in the eye of law and finally urged for allowing this appeal by setting aside the judgment and decree of the Learned Trial Court. Learned Counsel, Mr. Bhattacharjee in support of his contention relied upon one citation of the Hon'ble Supreme Court of India in **Malay Kumar Ganguly & Anr. vs. Sukumar Mukherjee (Dr.) and Others** dated 07.08.2009 reported in **(2009) 9 Supreme Court Cases 221** wherein in para No.37 Hon'ble the Apex Court observed as under:

"37. It is true that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as an exhibit, he is estopped and precluded from questioning the admissibility thereof at a later stage. It is, however, trite that a document becomes inadmissible in evidence unless the author thereof is examined; the contents thereof cannot be held to have been proved unless he is examined and subjected to cross-examination in a court of law. The document which is otherwise inadmissible cannot be taken in evidence only because no objection to the admissibility thereof was taken."

Referring the same, Learned Counsel submitted that Exhibit-1 becomes inadmissible in evidence as the author was not examined and the contents were not proved in accordance with law by the respondent-plaintiff.

**07.** On the other hand, Learned Senior Counsel, Mr. B. N. Majumder assisted by Learned Counsel Mr. K. Deb, Mr. E. Debbarma and Ms. R. Majumder appearing on behalf of the respondent-plaintiff first of all drawn the attention of the Court referring the prayer portion made by the respondent-plaintiff in the plaint and submitted that in the prayer portion, the

respondent-plaintiff clearly sought reliefs in respect of the suit filed by her. He also thereafter, drawn para Nos.6, 7, 11, 14, 15 and 16 of the written statement filed by the original defendant, Smt. Sikha Rani Saha, in the main suit and submitted that on perusal of the written statement, it is clear that nowhere the original defendant denied her signatures on Exhibit-1, i.e. the suit deed. Even, there was no such prayer from the side of the original defendant for cancellation of the gift deed, i.e. the suit deed. Thereafter, Learned Counsel further drawn the attention of the Court referring page No.10 of the paper book wherein it was mentioned that the said attorney, Nitai Lal Saha, being the father of the respondent-plaintiff was added as defendant as per order of the Court on 05.12.2018 as defendant No.1(vii), but he submitted his examination-in-chief in affidavit under Order 18, Rule 4 of CPC on behalf of the respondent-plaintiff on 09.07.2018 before the Learned Court below, i.e. prior to the date of inclusion of his name in the suit as defendant No.1(vii). So, according to Learned Senior Counsel, the fact asserted by Learned Counsel for the appellant that the suit was a collusive one is not true, rather it is a baseless and manufactured allegation. Learned Senior Counsel in course of hearing, in addition to the above, further drawn the attention of this Court referring the provision of Section 3 of the Transfer of Property Act, wherein in the "interpretation clause" the meaning of "attested" is given.

Learned Counsel, thereafter, referred the provision of Section 122 and 123 of the Transfer of Property Act and submitted that the gift was lawfully accepted on behalf of the minor by her father, Sri Nitai Lal Saha as required under Section 122 of Transfer of Property Act and referring Section 123 of the Transfer of Property Act, he further drawn the attention of this Court that the respondent-plaintiff to prove the suit adduced one attesting witness as required by law to support the case of the respondent-plaintiff although according to Learned Senior Counsel the deed was attested by two attesting witnesses, i.e. Ratan Chakraborty, one of the witness as PW-2 and another one was Hari Mohan Saha, who was the husband of the original defendant, Sikha Rani Saha and the contesting defendants in their written statement or at the time of evidence, nowhere stated that said Hari Mohan Saha did not stood as attesting witness at the time of execution of Exhibit-1, i.e. the suit deed. For the sake of convenience, I would like to refer herein below the relevant provisions of Section 3, Section 122 and Section 123 of Transfer of Property Act:

**Section 3 of Transport of Property Act:**

**3. Interpretation-clause.—In this Act, unless there is something repugnant in the subject or context,—**

**“immoveable property” does not include standing timber, growing crops or grass: “instrument”, means a non-testamentary instrument:**

**“attested”, in relation to an instrument, means and shall be deemed always 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 acknowledgement 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;]

**Section 122 of Transport of Property Act:**

**122. "Gift" defined.**—"Gift" is the transfer of certain existing moveable or immoveable 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.

**Acceptance when to be made.**—Such acceptance must be made during the lifetime of the donor and while he is till capable of giving,

If the donee dies before acceptance, the gift is void.

**Section 123 of Transport of Property Act:**

**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.

Learned Senior Counsel, thereafter, further referred the provision of Section 68 of the Evidence Act which provides as under:

**Section 68 of the Evidence Act:**

**68. Proof of execution of document required by law to be attested.**—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.

Referring the same, Learned Senior Counsel further submitted that to prove Exhibit-1, i.e. the suit deed it was the duty of the respondent-plaintiff to comply with the provision of Section 68 of the Evidence Act. Accordingly, the respondent-plaintiff discharged the burden by adducing one Ratan Chakraborty, who was one of the attesting witness to support her case and furthermore, according to Learned Senior Counsel Section 67 of the Evidence Act was not required to prove the document as alleged by Learned Counsel, Mr. S. Bhattacharjee for the appellant at the time of hearing of argument. In support of his contention, Learned Senior Counsel relied upon one judgment of the Hon'ble Supreme Court of India in **Brij Raj Singh (dead) by L.R.S. and Ors v. Sewak Ram and Anr.** dated 22.04.1999 reported in **(1999) 4 Supreme Court Cases 331** wherein in para Nos. 17 & 18 the Hon'ble Apex Court observed as under:

"17. The High Court, however, has rightly noticed that the gift deed was executed by Kanwar Chander Raj Saran Singh. However, the High Court held that the gift deed has not been duly attested as required under Section 123 of the Transfer of Property Act. The High Court in the course of judgment observed as follows:

'From a perusal of the gift deed, it is quite evident that this was executed by Kanwar Chander Raj Saran Singh

on 18-1-1961. No one has signed as a witness to the document. The scribe Ram Saran Dass has written 'dated 18th January, 1961 Bakaia Ram Saran Dass'. Later on, on 9th of February, 1961, the said document was presented for registration by one Janardhan Sharma who claimed himself to be the Mukhtiar-a-Aam of donor Kanwar Chander Raj Saran Singh. The necessary power of attorney in his favour dated 18th of February, 1953 was also produced before the Sub-Registrar as is evident from his endorsement made on 9th of February, 1961. He was identified before the Sub-Registrar by Ram Saran Dass — the scribe and one Sobha Ram. According to the learned counsel for the appellant, since Janardhan Sharma, the Mukhtiar-a-Aam of the donor Kanwar Chander Raj Saran Singh admitted the execution of the document before the Sub-Registrar and Ram Saran Dass, the scribe and Sobha Ram attested the same before the Sub-Registrar, it will amount to attestation as required under Section 123 of the Transfer of Property Act. In support of this contention, he relied upon *Girja Datt Singh v. Gangotri Datt Singh: AIR 1955 SC 346* and *Narain Singh v. Parsa Singh: 1971 CLI 195*.

After hearing the learned counsel for the parties at a great length, as observed earlier, it appears that before the trial court no such objection was taken specifically either at the time of admission of the document Exhibit PW-6/1 or at the time of the arguments. It was only at the appellate stage that this objection was taken on behalf of the defendant that the gift deed on the basis of which the plaintiff claimed himself to be owner of the site in dispute, is not a valid document as it was never attested by any of the witnesses as required under the Transfer of Property Act. This objection prevailed with the lower appellate court. The argument of the learned counsel for the appellant that the admission made by Janardhan Sharma, Mukhtiar-a-Aam of the donor and signed by the

scribe Ram Saran Dass and Sobha Ram before the Sub-Registrar, will amount to attestation, has no merit. The document was required to be attested at the time when it was actually executed on 18-1-1961 by Kanwar Chander Raj Saran Singh. Since no one attested the document at that time, the subsequent signatures of the scribe and Sobha Ram who identified the Mukhtiar-a-Aam Janardhan Sharma before the Sub-Registrar, could not fill up the lacuna. Under sub-section (2) of Section 35 of the Registration Act, the Registering Officer may, in order to satisfy himself that the persons appearing before him are the persons they represent themselves to be or for any other purpose contemplated by this Act, examine anyone present in his office. Thus Ram Saran Dass and Sobha Ram only identified the Mukhtiar-a-Aam Janardhan Sharma in order to satisfy the Registering Officer. In *Timmavva Dundappa Budihal v. Channava Appaya Kanasgeri*: AIR 1948 Bom 322 it has been held that signatures made by the Sub-Registrar while he made endorsement on the document admitting it to registration and the signatures of the identifying witnesses made by them when they identified the executant before the Sub-Registrar cannot be regarded as the signatures of attesting witnesses. Moreover, at the time of registration the donor himself did not appear. It was only his Mukhtiar-a-Aam Janardhan Sharma who presented the same for registration on his behalf. The authorities relied upon by the learned counsel for the appellant, are not at all applicable to the facts of the present case and are clearly distinguishable. Since, there was no attestation witness at the time of the execution of the document on 18th of January, 1961, the lower appellate court rightly came to the conclusion that the gift deed, if is taken away as not duly executed, the plaintiff cannot be held to be the owner of the suit land because he claimed his title on the basis of the gift deed alone."

18. At this stage, let us extract the relevant section in the Transfer of Property Act and the Evidence Act:

**Transfer of Property Act**

"3. In this Act, unless there is something repugnant in the subject or context,

'attested', in relation to an instrument, means and shall be deemed always 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; 123. For the purpose of making a gift of immovable 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.

123. 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."

**Indian Evidence Act**

"68. Proof of execution of document required by law to be attested.- 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 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 (16 of 1908), unless its



**execution by the person by whom it purports to have been executed is specifically denied.”**  
**[only relevant portion is set out]**

Referring the same, Learned Senior Counsel submitted that since the respondent-plaintiff has complied with the provision of Section 122 and 123 of the Transfer of Property Act, read with Section 68 of the Evidence Act before the Learned Court, so, Learned Court below on conclusion of the trial rightly decreed the suit in favour of the respondent-plaintiff.

Learned Senior Counsel in support of his contention also referred another citation of the Hon'ble Supreme Court in **V. Prabhakara v. Basavaraj K. (Dead) by LR.** dated 07.10.2021 reported in **(2022) 1 Supreme Court Cases 115** wherein in para No.16 Hon'ble the Apex Court observed as under:

**“16. Section 68 of the Evidence Act, 1872 speaks of a requirement of proving the execution of a document required by law to be attested. This provision being mandatory as the word employed is “shall”, meaning thereby it shall not be used as evidence unless one attesting witness at least has been called for to prove its execution. When it comes to proving a will, Section 68 of the Act is mandatorily to be followed. This provision has to be seen and read along with Section 63 of the Succession Act which not only mandates a compulsory attestation but reiterates compliance of Section 68 of the Evidence Act.”**

Referring the same, Learned Senior Counsel further drawn the attention of the Court that since the respondent-

plaintiff has proved Exhibit-1 in accordance with Section 68 of the Evidence Act, so, there was no requirement by the respondent-plaintiff to comply with the provision of Section 67 of the Evidence Act and as such, Learned Court below rightly delivered the judgment in favour of the respondent-plaintiff.

In addition to that Learned Senior Counsel also relied upon another citation of the Hon'ble Supreme Court of India in **Renikuntla Rajamma (D) by LRs. v. K. Sarwanamma** dated 17.07.2014 reported in **(2014) AIR SCW 4256** wherein in para No.16, the Hon'ble Apex Court observed as under:

"15. The matter can be viewed from yet another angle. Section 123 of the TP Act is in two parts. The first part deals with gifts of immovable property while the second part deals with gifts of movable property. Insofar as the gifts of immovable property are concerned, Section 123 makes transfer by a registered instrument mandatory. This is evident from the use of word "transfer must be effected" used by Parliament insofar as immovable property is concerned. In contradiction to that requirement the second part of Section 123 dealing with gifts of movable property, simply requires that gift of movable property may be effected either by a registered instrument signed as aforesaid or "by delivery". The difference in the two provisions lies in the fact that insofar as the transfer of movable property by way of gift is concerned the same can be effected by a registered instrument or by delivery. Such transfer in the case of immovable property no doubt requires a registered instrument but the provision does not make delivery of possession of the immovable property gifted as an additional requirement for the gift to be valid and effective. If the intention of the

**legislature was to make delivery of possession of the property gifted also as a condition precedent for a valid gift, the provision could and indeed would have specifically said so. Absence of any such requirement can only lead us to the conclusion that delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property."**

Referring the same, Learned Senior Counsel drawn the attention of the Court that Section 123 of Transfer of Property Act deals in two parts. According to Learned Senior Counsel, the 1<sup>st</sup> part deals with the gifts of immovable property and the 2<sup>nd</sup> part deals with the gifts of movable property and so far as the gifts of immovable property are concerned, Section 123 of Transfer of Property mandates that that should be done by a registered instrument, which is mandatory. Further, according to Learned Senior Counsel, even delivery of possession is also not required in case of Gift Deed. Here in the given case, according to Learned Senior Counsel Exhibit-1, i.e. the suit deed was a registered instrument, so, no further interpretation is required to be made on the said part. Finally, Learned Senior Counsel drawn the attention of the Court that based on the pleadings Learned Court below framed issues and considering the evidence on record rightly decreed the suit in favour of the respondent-plaintiff and there is no scope to interfere with the judgment delivered by Learned Trial Court below.

Learned Senior Counsel also referred the provision of Order VI, Rule 4 of CPC and submitted that the written statement of the contesting defendants did not contain the requirements of Order VI, Rule 4 of CPC and he further drawn the attention of the Court Sub-Rule 4 of Rule 15 of Order VI and submitted that the written statement of the answering defendants did not contain any affidavit. So, on the face of record, the plea of the appellant needs to be dismissed and furthermore, the contesting defendant in their pleading did not clearly raise any explanation in respect of misrepresentation, fraud, breach of trust, wilful default, or undue influence against the plaintiff to substantiate the defence. So, Learned Senior Counsel, finally, urged for dismissal of this appeal with costs.

**08.** I have heard detailed argument of both the sides and gone through the record of the Learned Court below including the judgment and decree delivered by Learned Court below. Now, after hearing argument both the sides, I would like to determine the following point for decision of this appeal.

*(i) Whether the judgment and decree of the Learned Court below suffers from any infirmity to be interfered with?*

To answer this point, I have already narrated the oral arguments raised by Learned Counsels of both the sides at length in detail as above.

**09.** The respondent-plaintiff filed the suit for declaration of title to the suit land, recovery of possession thereof and with further claim for mesne profits against the original defendant. On perusal of the pleadings of the parties, Learned Trial Court below framed in total five nos. of issues. At the time of determination of issues, it appears that Learned Trial Court after hearing both the sides and perusal of the pleadings of the parties came to the observation that the suit property is situated within the territorial jurisdiction of the Court and the suit was filed within the pecuniary jurisdiction of the Court also. The suit property was properly valued and as the suit property was duly identified both by revenue plots nos. as well as the boundary, so, it was the observation of the Learned Trial Court that the suit land was duly identifiable. It was also observed that at the time of institution of the suit, the respondent-plaintiff was a minor, so, she filed the suit through her father and next friend Sri Nitai Lal Saha and during the pendency of the suit she attained majority and she opted to proceed with the case of her own name and appeared, acted through her father as her recognized agent by executing power of attorney. Further, according to Learned Trial Court Order 3, Rule 1 of CPC allows a party to appear, act and apply by a recognized agent and since, according to the Learned Trial Court the respondent-plaintiff was minor and she was duly represented by her constituted attorney. So, Learned Trial

Court finally came to the conclusion that the suit was maintainable. On perusal of the findings of the Learned Trial Court, I do not find any infirmity in the judgment of the Learned Trial Court in respect of determination of said issue No.1 and as such the same is also answered in favour of the respondent-plaintiff.

**10.** Learned Trial Court thereafter, conjointly took up issue Nos.2, 3 and 4 for decision. In deciding the issues, Learned Trial Court discussed the evidence on record of the parties and relied upon different decisions. Finally, decided all the issues in favour of the respondent-plaintiff. Now for the sake of convenience, I would like to discuss herein below the evidence on record of the parties. To substantiate the issues the respondent-plaintiff has adduced two witnesses and the contesting-defendants, i.e. the appellant herein adduced three witnesses.

PW1, Sri Nitai Lal Saha in his examination-in-chief in affidavit narrated all the assertions made in the plaint on behalf of the respondent-plaintiff as PW1. Before the Court he identified the registered gift deed No.1-675 dated 17.04.2009 in 11 sheets which was marked as Exhibit-1 subject to objection by the defence. He further stated that Exhibit-1 was executed by his mother Sikha Rani Saha, so, he identified the signatures of his mother in the deed as executant marked as Exhibit-1/1 series and he also identified his signature on

Exhibit-1 as 'donee' or as 'acceptor of gift' deed marked Exhibit-1/2. He further identified the certified copy of order dated 12.01.2015 delivered by D.C. & Magistrate, Udaipur, Gomati in a proceeding under Section 46 & 81 of TLR and LR Act in 03 sheets marked as Exhibit-2. Certified copy of order dated 30.01.2015 passed by D.C. & Magistrate, Udaipur, Gomati in a proceeding under Section 46 and 81 of TLR & LR Act in 04 sheets marked as Exhibit-3, certified copy of order dated 10.02.2015 passed by D.C. & Magistrate, Udaipur, Gomati in a proceeding under Section 46 & 81 of TLR and LR Act in 03 sheets marked as Exhibit-4 and identified the registered power of attorney on 14.06.2018 executed by plaintiff in his favour in 09 sheets marked as Exhibit-5.

During cross-examination by the contesting defendant, he admitted that his wife Soma Saha applied for mutation for 0.174 acre of land comprising in Dag No.4476, 4477 and 4478. He further admitted that on behalf of the Ashmita Saha, he applied for mutation in respect of land measuring 0.084 acre of land of Dag No.4482 and 4483. Soma Saha on behalf of Pritish Saha applied for mutation in respect of land measuring 0.023 acre of land of Dag No.2182 and 2183 and land of Dag No.4482, 4483, 4476, 4477 and 4478 stands in the name of the defendant. He further stated that they have got two brothers and four sisters and Shivam is the son of his elder brother and his mother was well and healthy on

17.04.2009. He also stated that his parents resides with his elder brother at Udaipur in the same mess and since 1997 he is living in Aurangabad, West Bengal and since that time his parents have been living with his elder brother in the same mess and also stated that his mother made objection against the prayer for mutation of the suit land in the name of the respondent-plaintiff.

**11.** PW2, Sri Ratan Chakraborty in his examination-in-chief in affidavit stated that he is a friend of Nitai Lal Saha, father and constituted attorney of the plaintiff, Smt. Ashmita Saha. He also stated that he is one of the attesting witnesses of gift deed executed by Sikha Rani Saha, grandmother of plaintiff, Smt. Ashmita Saha in favour of plaintiff. Said gift of deed was executed on 17.04.2009 in the house of Smt. Sikha Rani Saha at Badarmokam and said Sikha Rani Saha executed the said deed of gift in front of him. He again stated that Sikha Rani Saha first put her signature on the said deed of gift. Thereafter, on behalf of the minor Nitai Saha put his signature for acceptance for the deed and after that he himself and other as attesting witnesses signed the deed and the other witnesses were Harimohan Saha, grandfather of the plaintiff and one Shyamal Kanti Chowdhury of Ramnagar, Road No.5. Said Harimohan Saha first of all put his signature and thereafter, he put his signature and after his signature, Shyamal Kanti



Chowdhury also put his signature on the deed. He identified his signature marked as Ext.1/3.

During cross-examination nothing came out relevant save and except denial.

**12.** DW1, Manju Roy, defendant No.1(iii) tried to support the assertions made in the WS .

During cross-examination, she stated that in the affidavit she did not give specific details of the suit land.

**13.** DW2, Sanjusree Roy also deposed in the same manner like DW1 in her examination-in-chief in affidavit.

During cross-examination she stated that she did not mention the revenue plot no. of the suit land nor she submitted any document in the case.

**14.** DW3, Ranjusree Bakshi as DW1(iv) tried to support the assertions made in the written statement in her examination-in-chief.

During cross-examination she stated that she is settled at Barasat and she did not mention revenue plot no. of the suit land. Nothing more came out relevant.

**15.** Learned Trial Court below in deciding the issue Nos.2, 3 and 4 relied upon the evidence on record of the parties and relied upon the following citations:

(i) Renikuntla Rajamma (D) by LRs. v. K. Sarwanamma reported in 2014 AIR SCW 4256.

(ii) Kashmir Singh vs. Union of India reported in 2008 (7) SCC 259.

(iii) Subhas Chandra Das Mushib vs. Ganga Prosad Mushib & Ors. reported in AIR 1967 SC 878.

(iv) Janki Vashdeo Bhojwani & Anr. vs. Indusind Bank Ltd. reported in (2005) 2 SCC 217.

(v) Vidhyadhar vs. Mankikrao & Anr. reported in (1999) 3 SCC 573.

And Learned Trial Court finally decided all the issues in favour of the respondent-plaintiff of the suit. I have also perused those judgments.

**16.** At the time of hearing of this appeal, as already stated Learned Counsel of both the sides referred few citations which have already been discussed earlier. Learned Counsel for the appellant at the time of hearing drawn the attention of the Court that Section 67 of the Evidence Act was not complied with by the respondent-plaintiff. For the sake of convenience, I would like to refer herein below the relevant provision of Section 67 of the Evidence Act which reads as under:

**Section 67 of the Evidence Act:**

**67. Proof of signature and handwriting of person alleged to have signed or written document produced. -- If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.**

**17.** I have gone through the aforesaid provision and also the provisions of Section 68 of the Evidence Act along with

Section 3, 122 & 123 of Transfer of Property Act. On perusal of Section 3 of the Transfer of Property Act i.e. the interpretation clause, the meaning of 'attested' is given which means in respect of any instrument, the instrument shall be attested by two or more witnesses, each of whom has seen the executants signed and affix his mark to the instrument and it is also interpreted that it shall not be necessary that more than one of such witnesses shall be present at the same time of execution and no particular form of attestation shall be necessary. Now, if we go through the provision of Section 122 of Transfer of Property Act where the definition of gift is defined. From the said provision it appears that the gift shall be accepted by or on behalf of the donee and Section 123 of the Transfer of Property Act, says for the purpose of making a 'gift' of immovable property, the transfer must be affected by a registered instrument signed by or on behalf of the done and attested by at least two witnesses. Further, Section 68 of the Evidence Act also provides that if a document is required by law to be attested as mentioned in Section 123 of the Transfer of Property Act, it shall not be used as evidence until one attesting witness has been called for the purpose of proving its execution. Here in the given case, Nitai Lal Saha, the father of the plaintiff accepted the gift made by his mother in favour of his daughter (Exhibit-1) which was attested by witnesses namely, Ratan Chakraborty, Harimohan Saha and Shyamal Kanti Chowdhury. Harimohan Saha, the grandfather of the

respondent-plaintiff by this time has expired and Ratan Chakraborty, one of the attesting witness appeared and gave evidence in favour of the respondent-plaintiff as a attesting witness and identified his signature. Nitai Saha as donee on behalf of the minor identified his signature and also identified the signature of his deceased mother. Shyamal Kanti Chowdhury was not produced or required to be produced by the respondent-plaintiff. So, after going through the aforesaid provisions and also after going through the principles of law laid down by the Hon'ble Apex Court in the aforementioned cases, it appears that here in the given case Section 67 of the Evidence Act would not attract to prove the execution of document rather Section 68 read with Section 3, 122 & 123 of Transfer of Property Act are to be taken into consideration at the time of proving the contents of the documents which the respondent-plaintiff has successfully discharged in proving the Gift deed (Exbt.1).

Learned Trial Court below at the time of delivery of judgment relied upon the judgment of **Man Kumar (dead) by LRs. vs. Hartar Singh Sangha** reported in **(2010) 10 SCC 512** of the Hon'ble Apex Court and the Hon'ble Apex Court in deciding the said judgment referred another judgment of the Hon'ble Apex Court in **Janki Vashdeo Bhojwani vs. Indusind Bank Ltd.** reported in **2005 (2) SCC 217** and in para No.31 Learned Trial Court below made the following observation:

**"31. In the case of Man Kumar (dead) By LRs. Vs. Hartar Singh Sangha reported in (2010)10 SCC 512 the Hon'ble Supreme Court while referring to its earlier decision in the case of Janki Vashdeo Bhojwani vs. Indusind Bank Ltd. - 2005 (2) SCC 217 (relied on by the learned defence counsel) has summarised the legal position as to who should give evidence in regard to matters involving personal knowledge and held that an attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about validity of the power of attorney and the filing of the suit. But if the attorney holder has done any act or handled any transaction, in pursuance of the power of attorney by the principal, he may be examined as a witness to prove those acts or transaction. If the attorney holder along has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved. It is also held that where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad. We may gainfully refer to the relevant portion of the judgment hereunder:-**

**"18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:**

- (a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge**

of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference

to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad. [emphasis supplied]"

**18.** Here in the given case, the respondent-plaintiff was minor at the time of execution of the deed. So, naturally on her behalf, the gift was accepted by her father being attorney as natural guardian, although her father applied for mutation but that was not considered as already stated. As Nitai Lal Saha, being the father of the respondent-plaintiff had the direct and personal knowledge of the transaction between the plaintiff and her grandmother, so, he is the only one competent person to testify the facts involved in the suit. So, the contention of the appellant that the original plaintiff did not appear before the Court to depose as a witness cannot be accepted and for that

no adverse presumption can be drawn against her and Learned Trial Court below rightly dealt with the matter.

**19.** As already stated from the side of the defendant, there was no allegation of misrepresentation, fraud, breach of trust, wilful default, or undue influence from the side of defendant and the original defendant made different assertions in support of her contention. In one place, she stated that she never executed any gift of deed and in another place, she stated that she did not execute the gift deed voluntarily, rather, she did it at the instigation of the father of the plaintiff who pressurized her. So, it also appears to this Court that in the written statement the defendant did not narrate all the assertions as required under Order 6, Rule 4 of CPC. Learned Trial Court after hearing both the sides and based upon the judgments, decided the issue Nos.2, 3 and 4 in favour of the respondent-plaintiff and here in this appeal, after elaborate hearing of both the sides and also on perusal of the said provisions of law and also the citations referred by Learned Counsel for the parties specifically the respondent-plaintiff, it appears that Learned Court below rightly decided those issues in favour of the respondent-plaintiff and I find no infirmity in respect of deciding those issues by the Learned Trial Court in favour of the respondent-plaintiff and accordingly, I do hereby concur with the views of Learned Trial Court and accordingly,



those issues are also decided in affirmative in favour of the respondent-plaintiff.

Since, at the time of hearing, nothing was raised by Learned Counsel for the appellant in respect of issue No.V and there was no further argument from the side of the respondent-plaintiff in respect of that issue. So, in my considered view the said issue was also rightly decided by the Learned Court below. So, after hearing argument of both the sides and on perusal of the record of the Learned Court below and also after going through the principles of citations referred by Learned Counsel for the respondent-plaintiff, it appears that there was no infirmity in the judgment and decree delivered by Learned Trial Court below in favour of the respondent-plaintiff, rather it appears that the present appellant has failed to make out any case for interference, as such the same is liable to be dismissed.

**20.** In the result, the appeal filed by the appellant stands dismissed being devoid of merit. The judgment dated 09.03.2021 and decree dated 15.03.2021 delivered by Learned Civil Judge, Senior Division, Court No.2, Udaipur, Gomati District in connection with case No.T.S.38 of 2016 is hereby upheld and accordingly, the same is affirmed. The plaintiff is entitled to all the reliefs as granted by Learned Trial Court in the judgment. But considering the facts and circumstances of the case, no order is passed as to costs.

With this observation, this appeal stands disposed of.

Prepare decree accordingly and send down the LCR along with the copy of this judgment.

Pending application(s), if any, also stands disposed of.

**JUDGE**



**MOUMITA  
DATTA**  
*Purnita*

Digitally signed by MOUMITA  
DATTA  
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