

Niranjan Deb Vs. Nibaran Ch. Deb

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Court : Guwahati

Decided On : Jan-04-2006

Judge : A.B. Pal, J.

Acts : Transfer of Property Act - Sections 1, 41, 122 and 123; Benami Transactions (Prohibition) Act, 1988; Suit Valuation Act, 1987 - Sections 8; Court Fees Act - Sections 7; Hindu Law

Appeal No. : Second Appeal No. 14 of 1999

Appellant : Niranjan Deb

Respondent : Nibaran Ch. Deb

Advocate for Def. : S. Bhattacharjee, Adv.

Advocate for Pet/Ap. : D.K. Bhattacharjee, Adv.

Disposition : Appeal dismissed

Prior history : A.B. Pal, J. 1. By this Second Appeal the judgment dated 31st January, 1998 passed by the learned District Judge, West Tripura, Agartala in Title Appeal No. 35/1997 affirming the judgment and decree dated 31.3.1997 in Title Suit No. 17/1991 passed by the learned Civil Judge (Jr. Divn.), West Tripura, Agartala has been impugned by the defendant-appellant herein. 2. The relevant facts giving rise of the present proceeding originates from a dispute over certain lands (suit land) between the two b

Judgement :

A.B. Pal, J.

1. By this Second Appeal the judgment dated 31st January, 1998 passed by the learned District Judge, West Tripura, Agartala in Title Appeal No. 35/1997 affirming the judgment and decree dated 31.3.1997 in Title Suit No. 17/1991 passed by the learned Civil Judge (Jr. Divn.), West Tripura, Agartala has been impugned by the defendant-appellant herein.

2. The relevant facts giving rise of the present proceeding originates from a dispute over certain lands (suit land) between the two brothers, of whom the plaintiff-respondent herein is the younger one. He filed the Title Suit No. 17/1991 alleging that his brother, the appellant herein, dispossessed him from his lands measuring 3 kanis, 17 gandas, 3 karas, 2 krantas and 15 dhurs of which he became owner by virtue of two sale deeds and one gift deed. The two registered sale deeds were executed by Smti Suprava Shil and Shri Premananda Das and the registered gift deed was executed by his father Upendra Chandra Roy. The defendant-appellant, being his or elder brother was cultivating the said lands on his behalf but, in the year 1397 BS on 2nd Paush, the said brother dispossessed him from the suit lands which fact constitute the cause of action for filing the suit.

3. The defendant-appellant while admitted genuineness of the two registered sale deeds and the gift deed whereby plaintiff-respondent became ostensible owner of the suit lands, but in the same breathe raised a hostile claim that the suit lands were actually purchased by him with his money in the name of the plaintiff-respondent out of affection. Even the lands of the gift deed were also purchased by him in the name of their father. Never the plaintiff-respondent was in a possession of the suit lands as he was doing business in Assam with the capital loaned by him as elder brother. An amount of Rs. 20,000 was given by the defendant-appellant to the plaintiff-respondent for the said business which was not repaid causing thereby acrimony between the two. The elder brother proposed that the plaintiff-respondent should execute a bainapatra in his favour and if he fails to repay the loan, he would execute registered sale deed for the suit lands in

lieu thereof. But that was not agreed to and as a result the dispute persisted.

4. During the course of trial the two sale deeds and the gift deed were exhibited and the witnesses were examined by both the parties. The learned trial court observed that the defendant-appellant in his deposition admitted that he filed a suit against his younger brother for declaration of right, title and interest in respect of a part of the suit land on the plea that the plaintiff-respondent herein had borrowed Rs. 20,000 from him for the purpose of business and there was an agreement between them that on the failure to repay the money the lands covered by that agreement would be transferred in his favour. But the said suit was dismissed. Because of this factual position, the defence taken by the defendant-appellant that the lands covered by the two registered sale deeds in the name of the plaintiff-respondent were actually purchased with his money in the name of his younger brother is not adaptable in law. This apart, under the provision of Section 41 of the Transfer of Property Act a benamdar is an ostensible owner, and the plea of benami transaction cannot be taken after the enactment of Benami Transactions (Prohibition) Act, 1988. It is not necessary for this Court to enter into this question for adjudication particularly when the claim that the land was purchased by the defendant-appellant in the name of the plaintiff-respondent has been rejected by the Court in a separate proceeding. No appeal having been filed against that order of rejection, it is not open to the appellant to raise same issue again. The principles of res judicata stand in the way. As regards the gift deed (Exbt. 6) the learned trial court held that it being a registered deed and duly proved, the burden to prove that it is not admissible in evidence lies with the defendant-appellant who failed to discharge the same. The two sale deeds and the gift deed established firmly the title in the suit lands in favour of the plaintiff-respondent and, therefore, learned trial court decreed the suit declaring his right, title and interest with a further direction for recovery of possession.

5. In the appeal before the learned District Judge, the same question of right, title, interest, and the validity of the gift deed was raised. An argument was placed that the gift deed was invalid for the reason that handing over of possession of the land by the doner to the donee did not take place following execution and registration of the deed. The question of benami transaction was also raised in order to show that

the part of the suit lands covered by the two registered sale deeds in the name of the plaintiff-respondent were actually purchased by the defendant-appellant. It has been observed by the first Appellate Court that from the perusal of the statement of witnesses it appeared that the elder brother was possessing the land on behalf of the younger brother and there has been no claim of acquiring title by adverse possession. The sale deeds and the gift deed being not in dispute unmistakably establish the title of the plaintiff-respondent and as there was no plea of adverse possession it was observed that the suit had been correctly decreed by declaring title and ordering recovery of possession.

6. In this Second Appeal, the following substantial questions of law were framed by order dated 31.3.1998:

(1) Whether the decisions of the courts below in respect of issue No. 1 is perverse and not inconsonance with the provisions of Section 8 of the Suit Valuation Act, 1987 ; and

(2) Whether the deed of Gift in question can be relied on in absence of the proof that it was accepted.

7. I have heard Mr. D.K. Bhattacharjee, learned Counsel for the defendant-appellant and Mr. S. Bhattacharjee, learned Counsel for the plaintiff-respondent.

8. Adverting to the question of ad valorem court fee which formed the first substantial question of law, it would appear from the body of the plaint of T.S. 17/1991 that for declaration of title and consequential' relief of khash possession, court fees has been paid under Section 7(iv)(c) of the Court Fees Act. In para 7 of the a said plaint it has made clear that the ad valorem court fee has been paid under that provision. In the written statement with regard to payment of ad valorem court fee under Section 7(iv)(c) of the Court Fees Act, it has been averred in para 11 that the defendant-appellant had no comment, as it was a fiscal matter to be looked into by the Court. No question with regard to payment of insufficient court fee has ever been raised before the courts below. Section 8 of the Suits Valuation Act provides that valuation for the purpose of court fee shall be same as valuation for the purpose of jurisdiction and the term 'value' denotes market value. The

plaintiff-respondent has paid court fee on the tentative valuation of the suit. But nowhere in the written statement the defendant-appellant raised the question that the suit had not been properly valued for the purpose of jurisdiction or the court fee and, therefore, in the absence of any materials on record about correct market value of the lands at the relevant time, the defendant-appellant cannot raise this question in the Second Appeal.

9. The other question is in respect of the gift deed, whether, it is reliable in the absence of any proof that it was accepted. Again, this question that there is no proof of acceptance of the gift deed by the donee, the plaintiff-respondent herein, has not been at all whispered in the pleadings of the defendant-appellant. The only contention placed before the courts below by him is that the lands of the gift deed was in his possession and he had purchased the same in the name of his father during his lifetime. But a perusal of the registered gift deed will go to show that the lands gifted to the plaintiff-respondent was possessed by the donor only, the father of the contending brothers. No evidence has been led to show that the gift deed was not accepted by the plaintiff-respondent. Section 122 of the Transfer of Property Act has denned 'gift' which is the transfer of certain existing movable 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. It has further been provided that acceptance must be made during the lifetime of the donor and while he is still capable of giving. In the plaint the plaintiff-respondent has clearly averred about the part of the suit lands he received from his father by way of registered gift deed and the lands so gifted along with the other lands purchased by him by registered sale deed constituted the suit lands which were being possessed by his elder brother on his behalf. In the written statement nothing has been stated by the defendant-appellant that the gift deed was invalid because of its non-acceptance and for that reason such a plea in the Second Appeal cannot be adverted to as the same is beyond the pleadings.

10. Mr. D.K. Bhattacharjee, learned Counsel for the defendant-appellant made an endeavour to bring home the point that as the defendant-appellant was in possession of the suit land meaning thereby that the plaintiff-respondent had never been possessing the same even after execution and registration of the deed

of gift, it has to be held that the said gift deed was invalid. In support of his contention he has placed reliance on a decision in *Moti v. Roshan* reported in . The relevant provision containing in para 22 is reproduced below:

22. It is stated by learned Counsel for both sides that a registered document was not necessary in Himachal Pradesh for effecting a gift because under Some notification said to have been made under Section 1 of the Transfer of Property Act the territory now in Himachal Pradesh was excluded from the operation of the provisions of Section 123 of that Act. It was, therefore, argued that the District Judge had erred in requiring the production of a registered document to evidence the gift. The District Judge had not required a registered document as a condition for validating the alleged gift in the instant case. He had only observed that the plaintiff had stated that there was a registered gift-deed in his favour but had not produced it. In other words, he relied upon the well-known presumption from the non-production of material evidence that b was admitted to be in existence. Even if the explanation given by the learned Counsel for the appellant is accepted, that the plaintiff was under a misapprehension and only meant that there was a mutation proceeding, the statement of the plaintiff-appellant indicates how little he knew about the exact nature of the transaction on which he relied. In any case, the plaintiff-appellant had not been able to prove that, as a result of some gift to him, a delivery of possession of any part of the plots in dispute took place at all. Under the ordinary Hindu Law delivery of possession is essential to complete a gift, and even registration of a deed of gift has been held to be insufficient to overcome the defect of want of delivery of possession.

This decision is of no avail for the reason that the facts situations in two cases are different. In the present case there has been no contention from the side of the defendant-appellant that the gift deed was invalid either for non-acceptance or for non-delivery of possession. It was also never contended that the suit lands were possessed by the defendant- e appellant adversely meaning thereby that the was possessing the same on behalf of the rightful owner. The gift deed and the two sale deeds, the genuineness of which was not disputed unmistakably prove that the plaintiff-respondent is the owner of the suit lands and for that reason the question of acceptance and possession have no relevance in f the present stage.

11. For the discussions and the reasons noted above this Second Appeal is found to have merit and consequence the same is dismissed leaving the parties to bear their own cost.

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