

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

**F.A. 104 of 2017
IA No: CAN 3 of 2022**

**Mandira Chowdhury and others
Vs.
Rama Devi Chowdhury and others**

For the appellant : Mr. Indranath Mukherjee
Mr. Sourav Kr. Mukherjee

For the respondents Mr. Asit Baran Raut
Mr. Asit Kumar Chowdhury
Mr. Tuhin Subhra Raut
Ms. Ishita Raut

Hearing concluded on : 13.02.2025

Judgment on : 24.02.2025

Sabyasachi Bhattacharyya, J.:-

1. The defendants/appellants have challenged a judgement and decree whereby the learned Trial Judge declared that the instrument dated May 22, 1985 is void and not binding on the plaintiff and granting permanent injunction restraining the defendants/appellants from selling, mortgaging, encumbering or alienating the suit property on the strength of the said document.
2. The instrument-in-question is a deed of gift executed by the original plaintiff Smt. Rama Devi Chowdhury (since deceased), the donor in the

disputed deed of gift, in respect of her fifty per cent share in the subject property.

- 3.** The learned Trial Judge proceeded primarily on the premise that there was a violation of Clause II (6) of the original lease deed of 99 years which was executed by the Calcutta Improvement Trust (CIT) in favour of the donor and one Namita Devi on July 26, 1961. The said Clause prohibited the lessees from assigning or transferring in any way or from mortgaging the subject-property without the previous consent in writing of the Chairman of the Board of Trustees of the CIT.
- 4.** Learned counsel for the appellants argues that the suit was barred by limitation. Whereas the original plaintiff executed the deed of gift on May 22, 1985, the suit was filed in the month of August, 1992, that is after 7 years. Since the Trial Court has not held that the deed was vitiated by fraud, the limitation of 3 years would commence from the date of execution of the deed, to which the original plaintiff Rama Devi was a party.
- 5.** Learned counsel for the appellant next argues that the original plaintiff, in answer to question no.89 put to her in her cross-examination, stated that the disputed deed was not forged and false. Furthermore, the plaintiff Rama Devi, as PW2, in her cross-examination, admitted having signed papers in the Registration Office and put her LTI (Left Thumb Impression), although she feigned ignorance regarding whether the LTI was put on the disputed gift deed, which was tendered to her in her cross-examination, was vague about the identity of the deed. Nonetheless, she admitted that she went to the Registration Office and

signed a deed. Not only that, PW2 admitted that she had put her LTI on a deed after understanding everything.

6. It is insinuated by learned counsel for the appellant that the substituted defendant no.1 Durga, the son of the said Rama Devi, is the architect behind the suit. Even in her cross-examination, Rama Devi admitted that her youngest son Durga was making *Tadbir* for her.
7. Learned counsel appearing for the appellant next contends that the original plaintiff Rama Devi herself sent a letter to the CIT seeking permission to donate the property to the defendant no.1/appellant, which has been marked as Exhibit-E and admitted by PW2 in her evidence.
8. Insofar as the effect of Clause II (6) of the lease deed executed by CIT in favour of Rama Devi and Namita Devi is concerned, learned counsel contends that the said clause requiring prior permission of the CIT is directory, since no sanction has been provided in the deed for violation thereof. At best, the deed provides that there would not be any further renewal of the same in the event of breach of any condition thereof. However, the absence of prior permission does not vitiate the transfer as such.
9. Moreover, it is argued, the CIT itself did not challenge the deed of gift or take any steps against the same. Rather, the CIT virtually ratified the transfer in favour of the appellant no.1 while negating the application of the original plaintiff Rama for permission to transfer the property to Durga. The said order was passed by the Officer-on-Special Duty of the CIT on October 25, 1990, pursuant to a direction to decide the

application of Rama issued by a learned Single Judge of this Court in a writ petition filed for such purpose by Rama herself.

- 10.** Learned counsel also seeks to place on record certain further letters and documents in support of the contention that there are several documents pertaining to Rama's application to CIT, by way of an application under Order XLI Rule 27 of the Code of Civil Procedure.
- 11.** Learned counsel contends that Clause II (6) of the original lease deed between CIT on the one hand and Rama and Namita on the other could not operate as a fetter in execution of the deed of gift in favour of appellant no.1 in view of Section 108(j) of the Transfer of Property Act, which empowers the lessee to assign the whole or part of its interest in the let-out property in favour of third parties.
- 12.** Learned counsel next argues that no issue was framed in the suit as to breach of Clause II (6) and as such, the decision thereon was perverse and without jurisdiction.
- 13.** It is further argued by the appellant that Durga, the younger son of the original plaintiff, deposed as the first witness of the plaintiff (PW1) before the plaintiff herself, without obtaining any leave under Order XVIII Rule 3-A of the Code of Civil Procedure, which vitiates such evidence of Durga. Subsequently, leave was granted vide order no.87 dated August 10, 2004, which is challenged in the present appeal on the ground that such leave could not be obtained *post facto*. Learned counsel place reliance on an Orissa High Court decision in *Jagannath Nayak v. Laxminarayan Thakur and others*, reported at AIR 1978 Ori 1, in support of such contention. It is argued that although a contrary

view was expressed by the same High Court in the judgment of *Maguni Dei v. Gouranga Sahu and others*, reported at AIR 1978 Ori 228, the latter judgment does not lay down the correct proposition of law.

- 14.** Learned counsel for the respondents argues that the Exhibit-4 in the suit is a letter by Ram Chandra Chowdhury, father of Durga, which shows that he did not approve of the execution of the deed of gift.
- 15.** It is argued by the respondent that there is no proof of the deed of gift having been read over and explained to Rama, the alleged donor, despite the donor being an illiterate lady.
- 16.** It is further argued that the DW2, in his cross-examination, admitted that he does not remember whether the contents of the deed were read over and explained to the executor. Also, DW2, the alleged attesting witness, admitted in his cross-examination that he knew about nothing except the signature of Rama in the deed.
- 17.** DW3, the scribe of the document, stated in his evidence that he does not know Ashish whereas Ashish, the husband of the original defendant no.1/appellant Mandira (the donee), states in his evidence (as DW4) that DW3 is his friend, which are contradictory.
- 18.** Lastly, it is argued that valuable property was transferred by Rama by virtue of the purported deed of gift to the daughter-in-law of her husband's elder brother, thereby depriving her own children, that is, four daughters and two sons, which itself creates a suspicious circumstance. Learned counsel for the respondent cites *Ningawwa v. Byrappa Shiddappa Hireknrabar and Ors*, reported at AIR (1968) SCC OnLine SC 956 for the proposition that if there is a fraudulent

misrepresentation not merely as to the contents of the documents but as to its character, the transaction is void.

- 19.** Learned counsel also cites a judgment of a learned Single Judge of the Rajasthan High Court reported at *AIR 2004 RAJ 196, (Virendra Singh v. Kashiram)*, where a Will was disbelieved since the executor was not related to the person in whose favour such Will was executed and no reason has been pleaded or proved as to why the Will as well as the subsequent gift transferring his entire agriculture land in favour of a stranger were executed on the same day.
- 20.** Upon hearing learned counsel for the parties, we arrive at the following conclusions:
- 21.** The appellants' argument as to the suit being time-barred was not dealt with by the learned Trial Judge at all, although it is incumbent upon the court to decide such issue, even irrespective of any objection, within the contemplation of Section 3 of the Limitation Act.
- 22.** We find that despite the original plaintiff Rama having herself executed the disputed deed of gift, she pleaded ignorance of the character of the same at the relevant point of time and contended that only upon receiving the subsequent letters immediately prior to the filing of the suit, she learnt that the document was purported to be a deed of gift, whereas allegedly she intended to execute a power of a attorney in favour of Ashish, the husband of the original defendant no.1 Mandira, the donee. Thus, on the basis of such pleading and in the absence of any evidence to the contrary, it cannot be said the suit was time-barred.

- 23.** Insofar as the allegation of fraud/misrepresentation is concerned, the very premise of the allegation that the donor was under the impression that she was executing a power of attorney to empower Ashish, the husband of the donee, to collect rent for her Kolkata property, is not substantiated by any foundational evidence. There is nothing on record to indicate that Ashish used to collect rent on behalf of Rama, nor has any document come forth before the court to substantiate that Ashish used to collect such rent and deposit the same with Rama.
- 24.** That apart, Rama, the donor, herself as PW2 categorically admitted that she had written a letter to the CIT seeking permission to donate the property in favour of Mandira, the donee. Such letter has been marked as Exhibit-E. Thus, the intention of the donor to execute a gift deed in favour of the donee is borne out clearly by such evidence.
- 25.** The original plaintiff/donor, in her cross-examination as PW2, admitted certain other crucial aspects of the matter. Whereas, in answer to question no. 47 in her cross-examination, she said that she did not go to the Registration Office or execute any registered deed regarding the Calcutta house, in answer to question no. 48, she admitted that she went to the Registration Office and in answer to question no. 50, stated that she had signed papers in the Registration Office. In the answers to the next three questions, bearing question nos. 51, 52 and 53, PW2 states that she cannot say whether the gift deed, which was tendered to her, was the deed on which she put her LTI in the Registration Office or whether the LTI on the deed was hers. Thus, she does not specifically deny the execution of the deed. Rather, in answer to the next few

queries in her cross-examination, the donor/plaintiff admits that she went to the Registration Office once and signed one deed and put her LTI on the deed after understanding everything.

- 26.** We also find from the evidence of DW2, the attesting witness of the gift deed, that he categorically mentioned that the contents of the deed were read over and explained to the donor and she put her LTI thereon upon understanding the contents of the deed.
- 27.** The same statement was echoed by DW3, the scribe, in his examination-in-chief, stating that the deed was read over and explained to the donor, which statement could not be shaken in his cross-examination.
- 28.** Thus, there is comprehensive proof on record to show the valid execution of the deed by Rama, whereas the allegation of fraud/misrepresentation has not been substantiated by evidence.
- 29.** The arguments of the respondent regarding alleged discrepancies are irrelevant. The letter of Ramchandra, the father of Durga, which was marked as Exhibit-4, does not prove anything but his own opinion on the issue.
- 30.** The argument that the attesting witness (DW2) does not remember whether the contents of the deed were read over and explained to Rama are not correct, since the exact statement was that he could not remember whether the contents were read over and explained “entirely” or not. It may very well be that the irrelevant parts of the agreement were not read over and explained, which is not *ipso facto* fatal to the

corroborative evidence otherwise adduced on behalf of the propounder to substantiate valid execution of the Will.

- 31.** The statement of the attesting witness that he does not know anything except the LTI being put by Rama in the deed is also not fatal to the veracity of his evidence. An attesting witness is not supposed to know anything else than the actual execution of the deed in front of him. The knowledge of the attesting witness about the contents of the deed is not required to prove valid execution of the same in law.
- 32.** The respondents seeks to make much out of the purported discrepancy between the statement of DW3, the scribe, that he did not know Ashish whereas Ashish, as DW4, said that he was a friend of DW3. In fact, DW3 stated that he does not know Ashish but also mentioned that Ashish might have come as a client sometimes to his office. The perception of friendship is personal and nothing hinges on the same in respect of the veracity of the deed. The friendship or otherwise between Ashish and the scribe is immaterial in the context of the suit.
- 33.** More importantly, the learned Trial Judge has not returned any finding as to the disputed deed being vitiated by fraud or misrepresentation, nor has any cross-objection been filed by the respondents in that regard. No arguments have been advanced before this Court specifically challenging the absence of any such finding by the trial court on fraud/misrepresentation. Hence, the said ground of challenge to the deed fails.

- 34.** The sole focus of the adjudication of the learned Trial Judge was the violation of Clause II (6) of the lease deed executed by the CIT in favour of Rama and Namita.
- 35.** The Trial Court, conspicuously, did not frame any issue on the said point.
- 36.** In fact, the entire impugned judgment does not reflect formulation of any issue at all, although issues have been supposedly decided by their respective numbers. The issues originally framed in the suit, which are a part of the paper book, also do not reflect any issue on violation of Clause II (6). Rather, the learned Trial Judge observed in her judgment that the “only” bone of contention between the parties was fraud, whereas she does not adjudicate in favour of the plaintiff on such count by holding that the deed was vitiated by fraud at all.
- 37.** By such observation regarding the only bone of contention being fraud, the learned Trial Judge made it explicitly evident that she did not formulate the alleged violation of Clause II (6) as an issue for the parties to address.
- 38.** Also, we find that there is no discussion in the impugned judgment as to the issue of Clause II (6) violation being addressed in arguments by either of the parties. Hence, the judgment to the effect that the disputed deed was vitiated due to violation of Clause II (6) is perverse and without jurisdiction, being beyond the issues framed and/or the arguments advanced by the parties.
- 39.** Even on merits, insofar as the violation of Clause II (6) of the lease deed between the CIT and Rama Devi and Namita Devi is concerned, the bar

incorporated in the said clause is not backed up by any sanction or penal provision in the lease deed itself, thus indicating that the said clause is directory and not mandatory.

- 40.** Clause II (6) provides that the lessees shall not assign or transfer in any way or mortgage the subject land without the previous consent in writing of the Chairman of the Board of Trustees of the CIT. However, we do not find any clause within the four corners of the lease deed which invalidates such a transfer, even if made without such written prior permission.
- 41.** The only provision which requires consideration in this context is Clause (2) of paragraph III of the deed, which provides that the Board will, on the written request of the lessees made three months after the expiration of the term of the lease, at the expense of the lessees, grant a further lease for a period of 99 years from the expiration of the said term, unless, at the time of such request, there is an existing breach or non-observance of any of the covenants on the part of the lessees. Thus, the maximum consequence which might have visited the lessees in the event of breach of any of the covenants of the lease deed, including Clause II (6), would be non-renewal of the lease after the expiry of its normal tenure of 99 years.
- 42.** Hence, the violation of Clause II (6) is not otherwise fatal to the validity of such transfer, made without any prior written consent of the CIT.
- 43.** A further factor which cannot be ignored is that the CIT itself did not take any penal action or step for rescinding the lease deed for violation of Clause II (6); rather, from the records it is found that such act was

condoned and substantially ratified by the subsequent action of the CIT in dismissing the application of Rama, the donor, for transferring the property in favour of her younger son Durga.

- 44.** We find from the records that a learned Single Judge of this Court, in CO No.16062 (W) of 1991, a writ petition preferred by Rama with the grievance that her application for permission to transfer the subject-property in favour of Durga was not being disposed of by the CIT, directed the Officer-on-Special Duty, CIT to decide such application.
- 45.** In the order passed pursuant to such direction of this Court, dated October 25, 1990, the then Officer-on-Special Duty of the CIT concluded that in view of the fact that the transfer in favour of the defendant no.1 Mandira was executed in 1985 and also that the petitioner therein (Rama) did not take action as categorically specified in Clause II (6), part II of the lease deed dated July 26, 1961, executed between the Trust and the petitioner as a co-lessee, read with Section 108(j) of the Transfer of Property Act, 1882, the application of the petitioner (Rama) dated October 25, 1990 to the lessor was not maintainable. Thus, the CIT itself proceeded on the premise that the transfer in favour of the original defendant no.1 Mandira came within the contemplation of Section 108(j) of the Transfer of Property Act and, in view of the gift deed executed in favour of Mandira, no further permission to transfer could be granted to Rama Devi. Hence, in effect, the transfer in favour of Rama by the disputed gift deed was ratified and validated by the CIT by its conduct.

- 46.** Hence, the violation of Clause II (6), which was the only ground recorded in the impugned judgment for invalidating the disputed deed, is not tenable in the eye of law.
- 47.** With regard to the argument of the respondent that the subject-matter of the gift deed was a valuable property and the execution of the same in favour of the daughter-in-law of the donor's elder brother-in-law by depriving her own children gives rise to suspicious circumstances, the same, by itself, is not sufficient justification for invalidating the deed. The execution of the gift deed and its registration having been validly proved by corroborative evidence by the plaintiffs/appellants, we do not find any reason to hold that the deprivation, by itself, tantamounted to suspicious circumstance sufficient to dispel the presumption of correctness raised by the corroborative evidence in support of the valid execution of the deed.
- 48.** Moreover, in the gift deed itself, sufficient explanation for transfer of the property in favour of the donee in exclusion of the donor's children was given. The donor stated that she had great love and affection for the donee, who happened to be her daughter-in-law and the donee maintained great regards and esteem in her behaviour and dealings with the donor. It was further stated that the sons and daughters of the donor were well established in their lives. The husband of Rama, who subsequently shot off a letter which has been relied on by the respondent, was a confirming party to the deed and endorsed the transfer of the said land and premises in favour of the donee by way of gift by reason of natural love and affection for the donee, which is also

recorded in the deed itself. The donor further asserted in the gift deed that she was executing the same in consideration of natural love and affection for the donee and out of her free will and consent without any fraud, coercion or undue influence or misrepresentation from anybody whomsoever.

- 49.** Hence, in view of the intrinsic evidence available in the disputed deed itself, there is no reason why the court should go behind the deed and try to read into the mind of the donor any intention contrary to the execution of the deed.
- 50.** In the light of the above findings, the reliance of the respondent on *Ningawwa (supra)* is misplaced. In the said case, it was held that a transaction obtained by misrepresentation as to the character of the document would render the transaction void. In the absence of any foundational basis to hold that any misrepresentation happened in the present case, we find no reason to apply the ratio of the said judgment in the instant case.
- 51.** In the judgment of *Virendra Singh (supra)*, various circumstances were considered by the court, including a comparison of two documents executed on the same day which were held to be of different nature. Also, the transferee in the said case was not related to the transferor and there was no explanation as to why the transferor/testator executed the disputed Will as well as the gift deed transferring his entire agricultural land in favour of the defendant no.1 therein on the same day.

- 52.** The court observed that from the various circumstances of the said case, the Trial Court rightly came to the conclusion that no gift deed was executed with free consent.
- 53.** Any such circumstance, however, is absent in the present case and as such, the ratio laid down therein is not a binding precedent in the case at hand.
- 54.** However, insofar as the argument of the appellant that the evidence of DW2, the donor, ought to have been discarded in view of violation of Order XVIII Rule 3-A of the Code of Civil Procedure is concerned, we are unable to accept such submission.
- 55.** The learned Single Judge of the Orrisa High Court, in *Jagannath Nayak (supra)*, held that the permission of the court under the said provision must be sought for at the time when the party commences leading his evidence and not after violating the provision.
- 56.** We however, with utmost respect, differ from such view on the face of the clear language of Rule 3-A of Order XVIII. The provision stipulates that where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, *unless the Court, for reasons to be recorded, permits him to appear as his witness at a later stage.*
- 57.** Hence, there is no fetter for the court to grant such permission even at a later stage when the party himself seeks to adduce evidence. In the present case, the learned Trial Judge granted such permission to DW2 after DW1 adduced evidence, thereby validating the belated adduction of evidence by the plaintiff Rama Devi as PW2. Hence, we did not find

force in the contention of the appellant that the evidence of PW2 ought to be discarded on such ground.

- 58.** In fine, on the basis of the observations made above, we are of the opinion that the learned Trial Judge acted patently contrary to the law and materials on record in declaring the disputed gift deed to be void and not binding on the plaintiff and granting permanent injunction against the defendants from selling, mortgaging, encumbering, alienating the suit property on the strength of the said document dated May 22, 1985.
- 59.** Accordingly, FA No. 104 of 2017 is allowed on contest without costs, thereby setting aside the impugned judgment and decree dated February 8, 2017 passed by the learned Judge, Second Bench, City Civil Court at Calcutta in Title Suit No. 1738 of 1992 and dismissing the said suit.
- 60.** Consequentially, CAN 3 of 2022 stands disposed of as well.
- 61.** A formal decree be drawn up accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)