



GAHC010191102007

Page No.# 1/14



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RSA/140/2007

ON THE DEATH OF LATE HAREN SARMAH HIS LEGAL HEIRS DIPAK
SARMAH AND 7 ORS
SO LATE HAREN SARMAH,
RO VILLAGE TENGABARI, MOUZA CHAPAI, PO 784529, PS MANGALDOI,
DISTRICT DARRANG, ASSAM

1.1: SRI PANKAJ SARMAH
S/O LATE HAREN SARMAH
R/O VILL. TENGABARI
(WITHIN MANGALDOI MUNICIPALITY) MOUZA CHAPAI
P.O. MANGALDOI 784125
P.S. MANGALDOI
DIST. DARRANG
ASSAM.

1.2: SRI DHRUBAJYOTI SARMAH
S/O LATE HAREN SARMAH
R/O VILL. TENGABARI
(WITHIN MANGALDOI MUNICIPALITY) MOUZA CHAPAI
P.O. MANGALDOI 784125
P.S. MANGALDOI
DIST. DARRANG
ASSAM.

1.3: SMTI RENU DEVI
D/O LATE HAREN SARMAH
R/O VILL. TENGABARI
(WITHIN MANGALDOI MUNICIPALITY) MOUZA CHAPAI
P.O. MANGALDOI 784125
P.S. MANGALDOI
DIST. DARRANG
ASSAM.

1.4: SRI RITA DEVI



D/O LATE HAREN SARMAH
W/O SRI DIMBESWAR DEKA
R/O VILL. TENGABARI
(WITHIN MANGALDOI MUNICIPALITY) MOUZA CHAPAI
P.O. MANGALDOI 784125
P.S. MANGALDOI
DIST. DARRANG
ASSAM.

2: ON THE DEATH OF LATE HIREN SARMAH HIS LEGAL HEIR CHIKON
DEVI
W/O LATE HIREN SARMAH

R/O VILL. TENGABARI
(WITHIN MANGALDOI MUNICIPALITY) MOUZA CHAPAI
P.O. MANGALDOI 784125
P.S. MANGALDOI
DIST. DARRANG
ASSAM.

2.1: SRI DHARANI SARMAH
SO LATE HIREN SARMAH
R/O VILL. TENGABARI
(WITHIN MANGALDOI MUNICIPALITY) MOUZA CHAPAI
P.O. MANGALDOI 784125
P.S. MANGALDOI
DIST. DARRANG
ASSAM.

2.2: SRI KHAGEN SARMAH
SO LATE HIREN SARMAH
R/O VILL. TENGABARI
(WITHIN MANGALDOI MUNICIPALITY) MOUZA CHAPAI
P.O. MANGALDOI 784125
P.S. MANGALDOI
DIST. DARRANG
ASSAM

VERSUS

JOGENDRA CH. SARMA and ORS
S/O LATE RABIDEV SARMA, VILL. TENGABARI WITHIN MANGALDAI
MUNICIPALITY, MOUZA-CHAPAI, P.S. MANGALDAI, DIST. DARRANG,
ASSAM.

Advocate for the Petitioner : MS S DASGUPTA



Advocate for the Respondent : MR C GOSWAMI

B E F O R E
HON'BLE MR. JUSTICE ARUN DEV CHOUDHURY

Advocates for the appellants : Mr. R Sarma

Advocates for the respondents : Mr. C Goswami

Date of hearing & : **21.04.2023**
Judgment

JUDGMENT & ORDER (ORAL)

1. Heard Mr. R Sarma, learned counsel for the appellants. Also heard Mr. C Goswami, learned counsel for the respondents.
2. The present appeal is directed against the judgment and decree dated 30.06.2006 passed by the learned Civil Judge Darrang, Mangaldai decreeing the suit of the plaintiffs/respondents by reversing the decree of dismissal passed by the learned Civil Judge Junior Division No.1 Mangaldai in T.S No.23/1977.
3. This Court under its order dtd. 28.11.2007 formulated the following substantial questions of law:
 - I. Whether a deed of gift can be acted upon without being proved in accordance with Section 68 of the Evidence Act?
 - II. Whether in absence of attestation of gift deed by two

witnesses, the same can be accepted as a valid gift?

III. Whether a gift of immovable property unaccompanied by delivery of possession can confer title on the donee?

4. Before coming to the substantial questions of law framed by this Court under its order dated 28.11.2007, let this Court record in brief the facts leading to the filing of the present second appeal.

5. The case of the plaintiff/respondent:

- I. The plaintiffs/respondents instituted a suit being T.S.No.23/1977 for declaration of right, title and interest of the plaintiff over "Ka" schedule land and "Kha" schedule houses with a prayer for recovery of khas possession of the aforesaid schedule land along with another schedule "Ga".
- II. The basic pleaded case of the plaintiff was that the suit property was gifted by plaintiff's father Rabidev Sarma in favour of the plaintiff on 11.03.1959 by executing a registered gift deed and delivered khas possession of the suit land. The said suit land gifted is described as schedule "ka land" appended to the plaint.
- III. It is the further case of the plaintiff that after getting the possession, the plaintiff constructed "kha schedule house" and was living therein with his wife and children. The defendant Nos. 1 and 2 are the brothers of the plaintiff and immediately after death of the father of the plaintiff, on 02.07.1974 the defendants dispossessed

the plaintiff from the suit land. Accordingly, the plaintiff instituted certain criminal proceeding against the defendants.

- IV. It was the specific pleading of the plaintiffs that no right title and interest is accrued upon the defendant Nos. 1 and 2 over the Ka schedule land and Kha schedule houses. Accordingly, in view of such dispossession, the plaintiffs filed a suit with the aforesaid prayer.

6. The case of the defendants:

- I. The defendants entered appearance, denied averments made and took a specific stand at paragraph 3 of the written statement that the gift deed is not just and proper for the reason that the said gift deed is deceitful and forged. It was also pleaded that the plaintiffs by managing the witnesses of Lt. Rabidev Sarma got the gift deed executed without the possession of the suit property being handed over.
- II. It was the pleaded case of the defendants that all the sons i.e., Lt. Rabidev Sarma (hereinafter to be referred to as the donor) separated themselves by equally dividing the land belonging to the donor in the year 1957. Accordingly all the brothers were living in their portion of land by constructing their houses.
- III. It was their case that the donor used to stay with the defendant No.1, but used to cook for himself. It was also specifically pleaded that although the land was divided and separated, yet the defendant Nos.1 and 2 were living together in one mess till last ten years prior

to the filing of the written statement. It is also pleaded that thus having kept the separate land in their respective possession, the donor died and as per social customs, the defendant No.1 was asked to offer fire on the mouth of the deceased. Yet another plea was taken that the parties are in possession of the respective share since 1957 peacefully and the plaintiffs has no right title for last twenty years for which the suit is time barred.

7. The issues:

The learned trial court below formulated as many as six issues which are as follows:

- 1). Whether there is any cause of action to sue the defendants?
- 2). Whether the plaintiff has right, title and interest over the land in the suit?
- 3). Whether the alleged deed of gift is fraudulent?
- 4). Whether the suit is bad for non-joinder and mis-joinder of necessary parties?
- 5). Whether the defendants are in peaceful possession of the land in suit for more than 12 years with the knowledge of the plaintiff?
- 6). What relief if any the parties are entitled to?

8. The evidence:

The plaintiffs examined as many as three witnesses including one attesting witness of the alleged gift deed and exhibited some documents. The defendants examined six witnesses and exhibited certain documents which will be dealt with at a later stage of the judgment.

9. The finding of the learned trial Court:

- I. While dealing with the issue No.3, the learned trial court came to a conclusion that the essential condition that one witness should have put his signature *animo attestandi* and that he has personal knowledge of the same was not fulfilled as disclosed in the evidence of PW-2. As the PW-2 stated that he does not know where the suit land is, the land where the plaintiffs and defendants had resided. Another statement of the PW-2 is that he does not know as to which is the boundary of the gifted land and as to what piece of land is gifted to the plaintiffs and also deposed that the defendants has not informed him to be a witness to the gift deed. However, the beneficiaries of the gift deed asked him to put his signature on the gift deed and accordingly, it was held that the alleged gift deed was a fraudulent one.
- II. While dealing with the issue No.5 relying on the evidence that PW-2 is ignorant about who is possessing the suit land, concluded that it is an admission that the defendant is possessing the suit land since twenty years. It was also concluded that from the evidence on record it appeared that both the plaintiffs and the defendant live separately and property of Late Rabidev Sarma was partitioned which is admitted by the plaintiffs. It was the finding that the plaintiff has not been able to show any other landed property owned by the defendant except the suit land.
- III. It was yet another finding that the defendant has been able to

prove their hostile title against the plaintiff as the plaintiff knows the possession of the defendant over the suit land. Accordingly, it was a conclusion made that the defendants are in peaceful possession of the land in the suit for more than twelve years and accordingly dismissed the suit.

10. Finding of the learned Appellate Court:

- I. Relying on the evidence of the attesting witness (PW2), who deposed that he was witness to the gift deed and the defendant put his signature in front of him and that he could also identify the signature of the other attesting witness, the learned Court below concluded that execution of the gift deed has properly been proved and the deposition that the attesting witness is not aware about the subject matter of the gift deed is not relevant, inasmuch as, the attesting witness has not only proved his signature, but also proved that the other witnesses and the defendant put their signature and thumb impression in front of him and identified the signatures and thumb impression and exhibited those thumb impression and signatures.
- II. The learned Court below also relied upon the evidence of DW-4, Haren Sarma, who is one of the defendant who during cross examination testified that a civil suit was instituted to set aside the gift deed, i.e., exhibit-1, but the said suit was dismissed due to lack of evidence.
- III. The learned Appellate Court also opined that in terms of Order VI Rule 4, particulars of fraud is required to be given in pleading when

fraud is pleaded. However, there is no specific plea by the defendant in their pleading regarding fraud and was of the view that in absence of such pleading, the trial Court could not have held that the gift deed was a fraudulent one by brushing aside the material evidence adduced by the plaintiffs to prove the execution of exhibit 1 in terms of the provisions of Section 68 of the Evidence Act, 1872 read with Section 123 of the Transfer of Property Act, 1882.

- IV. While dealing with the issue No.5, the learned appellate Court came to a conclusion that without dealing with the ingredients of adverse possession, it wrongly placed the burden of the plaintiffs to prove that plaintiffs was in possession of the suit land within twelve years of the suit by completely ignoring the law of limitation applicable thereto. Accordingly, the learned Appellate Court reversed the judgment of the learned Trial Court and the suit was decreed holding that the gift deed was duly proved.

11. Argument advanced on behalf of the Appellant:

Mr. R Sarma, learned counsel for the appellants argues the following:

- I. The gift deed has not been proved in accordance with the provisions of Section 68 of the Evidence Act . As the execution has been denied by the defendants and therefore, both the attesting witnesses ought to have been brought to the witness box to prove the Gift Deed, in as much as both the witnesses were alive at that point of time.
- II. One of the essentials of a valid gift deed is delivery of possession *inasmuch as* the plaintiffs have miserably failed to prove that

possession was handed over after the execution of the purported gift deed. Therefore, even if the gift deed was duly executed, the same was not valid due to non-handing of the possession. Accordingly, he submits that the substantial questions No.1, 2 and 3 needs to be answered in favour of the appellants.

- III. Mr. R Sarma, learned counsel further argues that the defendants were in possession of the suit land since 1953, the gift deed was executed in the year 1959 and the suit was filed in the year 1977 and therefore, there was delay in filing the suit which has rightly been answered by the learned trial Court, however, the learned Appellate Court reversed the same putting the burden of the defendant, whereas it is the plaintiffs through their case, who had proved that the suit was not barred by the limitation.

12. Argument advanced on behalf of the Respondent:

Per contra, Mr. C. Goswami, learned counsel for the respondents argues the following:

- I. The learned appellate Court was right in holding that the gift deed was duly executed inasmuch as, it is not necessary always that both the attesting witnesses should come to the witness box and prove the execution.
- II. It is a finding of fact by the learned appellate court that the attesting witness has duly identified not only the signature of the donor, the signature of the other witnesses, the signature of the scribe, but also specifically stated that the donor put his signature in presence of him, therefore, nothing more is required to prove the

gift deed in terms of Section 68 of the Evidence Act, 1872.

- III. It is also contended by Mr. C Goswami, learned counsel for the respondents that this Court in exercise of its jurisdiction under Section 100 of the Code of Civil Procedure 1908, may not like to interfere with such findings of fact, more particularly, in a background that such conclusion has been reached on the basis of evidence and the same cannot be said to be perverted. Accordingly he contends that there is no substantial question of law available and accordingly, the present appeal needs to be dismissed.

13. Findings of this Court:

- I. This Court has given its anxious consideration to the arguments advanced by the learned counsel for the parties and perused the material available on record.
- II. The law is by now well settled that when a party pleads fraud, it is to specifically plead regarding such fraud. Mere stating that a fraud has been pleaded is not enough and the allegation of fraud must be specifically averred. The Hon'ble Apex Court in the case of ***Rosammal Issetheen Ammal Fernandez (Dead) by LRs. –Vs- Joosa Marian Fernandez*** reported in ***(2000) 7 SCC 189*** held that in terms of Section 68 of the Indian Evidence Act, 1872, the obligation to produce at-least one attesting witness stands withdrawn, if the execution of any such document, not being a will, which is registered is not specifically denied.
- III. Section 68 of the Indian Evidence Act, 1872, mandates that when a document is required by law to be attested, such document should

not be used as evidence until at-least one attesting witness has been called, for the purpose of proving its execution, if there be an attesting witness alive subject to the process of the Court and the witness is capable of giving evidence. Thus from Section 68 it is clear that one attesting witness is sufficient, if it comes and proves execution of a document, which is required by law to be attested and then the said document can be taken in evidence.

IV. However, a further qualification has been given in the proviso to Section 68 by mandating that even calling of an attesting witness shall not be necessary to prove the execution of such document, which is registered in accordance with the provision of Indian Registration Act 1908, except in case of a will. However, such qualification shall not be applicable in a case when execution of such deed has specifically been denied by the party contesting such execution. Therefore, it can be summarized that until and unless a deed, which is required under law to be attested and is a registered, presence of attesting witness to prove such document shall not be necessary and a presumption of genuineness of such document shall be available. Such presumption shall become rebuttable in a case, when execution is specifically denied.

V. In the case in hand, the only statement regarding the genuineness of the gift deed can be gathered from paragraph 3 of the written statement which is quoted hereinbelow:

“The gift deed is not just and proper as the said gift deed is deceitful and forged. The plaintiff by managing the witnesses of Late Rabidev Sarma and got the same done without handing over possession thereof.”

- VI. In the considered opinion of this Court the aforesaid paragraph, can be treated that the execution of the Gift deed by donor Rabidev Sarma has been specifically denied in the aforesaid paragraph, though allegation of deceit and fraud is alleged.
- VII. The law is well also well settled that mere stating in the pleading that a fraud has been committed, without giving precise particular of such fraud, as is required under order VI Rule 4 of the CPC'1908, a party alleging fraud cannot succeed. However, as discussed hereinabove, the requirement of such specific pleading and particular is not available in the written statement filed by the defendants.
- VIII. The evidence of PW-2, who was one of the attesting witness clearly shows that he was a witness to the execution of the gift deed by the donor. He saw the donor putting his signature and identified and marked the signature of the donor as Ext.1(1)and 1(2), identified and proved the signature of the other attesting witnesses as 1(5) and 1(6) and the signature of the Scribe as Exhibit 1(3) and 1(4). he also specifically identified his signature and stated that he saw the donor executing the gift deed. Such evidence remains unshaken and, therefore, this Court finds no fault on the decision of the learned Appellate Court as discussed hereinabove holding that the gift deed was duly executed and that the lack of knowledge of the attesting witness regarding the detailed description and boundary of the gift deed is not necessary for proof of an execution of the gift deed by an attesting witness.

IX. Coming to the point of adverse possession, this Court also finds that the learned appellate Court has rightly concluded the issue *inasmuch as* there is no pleading whatsoever regarding any adverse possession by the defendants. The learned trial Court without any pleading or of any iota of evidence came to the conclusion that the defendant has been able to prove their hostile title against the plaintiffs. It is not the case of the defendants that they are possessing adversely or their possession is hostile to the plaintiffs, rather it was their case that the land was partitioned between the brothers prior to the death of the father.

14. The conclusion and direction:

- I. In view of the above discussions and reasons, this Court concludes that no substantial question of law is involved in the present second appeal. Accordingly, the present second appeal stands dismissed.
- II. The parties are left to bear their own costs.
- III. Prepare a decree accordingly and send back the LCR.

JUDGE

Comparing Assistant