

**5 SCOB [2015] HCD 33****High Court Division**

CIVIL REVISION NO. 2691 OF 2002

**Renuka Rani Mondol alias Roy**

... Petitioner

Versus

**Biswajit Mondol alias Roy and another**

... Opposite Parties

Mr. Zainul Abedin, with

Mr. M. Mahbubur Rahman, Advocates

..... For the Petitioner

Mr. Md. Anwarul Islam, with

Mrs. Farjana Sharmin, Advocates

..... For Opposite Party no.1

Heard on- 02.09.2015, 03.09.2015, and  
07.09.2015

Judgment dated: 09.09.2015

**Present:****Mr. Justice Borhanuddin****Section 123 of Transfer of Property Act, 1872:**

**Appellate court below allowed the appeal in part holding that the deed was not acted upon since there is no evidence that possession was delivered to the defendant no.1. This finding is not correct. Where the instrument of gift has been registered, delivery of possession is not essential for the validity of a gift by a Hindu. ... (Para 12)**

**Judgment****Borhanuddin, J:**

1. This Rule has been issued calling upon opposite party no. 1 to show cause as to why judgment and decree dated 16.03.2002 passed by the learned Additional District Judge, 1<sup>st</sup> Court, Khulna, in Title Appeal No. 121 of 2000 allowing the appeal in part by way of modifying the judgment and decree dated 13.03.2000 passed by the learned Subordinate Judge, 3<sup>rd</sup> Court, Khulna, in Title Suit No. 17 of 1998 dismissing the suit, should not be set aside and/or such other or further order or orders passed as to this court may seem fit and proper.

2. Facts relevant for disposal of the rule are that opposite party no.1 herein as plaintiff instituted Title Suit No. 17 of 1998 in the 3<sup>rd</sup> Court of learned Subordinate Judge, Khulna, for declaration of Title in respect of  $.47\frac{1}{3}$  acres land out of 1.43 acres as  $\frac{1}{3}$  share by way of inheritance described in schedule "Ka" of the plaint and for further declaration that the deed of gift no.3315 dated 14.12.1997 registered at Batiagata Sub registry office is forged, fraudulent, inoperative, void and not binding upon the plaintiff.

3. Plaintiff's case in short is that suit land belonged to Bhabesh Mondol who married Purnima Rani, daughter of Pulin Bairagee; Out of the wedlock, plaintiff was born who was brought up in the house of his maternal uncle; Since Purnima lost her procreation capacity,

Bhabesh Mondol married Renuka and out of that wedlock two sons namely, Bhudeb and Bidhu were born; In the year 1997, Bhabesh was admitted in Khulna Seba Clinic for treatment; Bhabesh was a heart patient; At critical stage of his ailment, Bhabesh again admitted at Batiaghata Health Complex and remained there till 18.12.1997; Plaintiff was residing at Chittagong for the purpose of his service; His mother was at his maternal uncle's house; Bhudeb, Bidhu and their mother Renuka looked after Bhabesh at the clinic; Taking advantage of the situation, on 14.12.1997 defendant no.1 and her two sons took Bhabesh out of the clinic for 2(two) hours by executing a bond and within this time in collusion with the subregistrar created a forged deed of gift dated 14.12.1997 in respect of the suit land; Said deed of gift was not executed voluntarily by Bhabesh; Bhabesh died on 19.04.1998 without any treatment; After the cremation ceremony, defendant no.1 disclosed about the deed of gift; Then the plaintiff procured certified copy of the deed on 17.05.1998 and constrained to file the suit.

4. Defendant no.1 contested the suit by filing written statement denying material allegations made in the plaint and contending *inter alia* that there is no cause of action, suit is not maintainable, bad for defect of parties and barred by limitation. Further contending that Bhabesh Mondol willingly and voluntarily executed and registered the deed of gift in favour of his wife; She is in possession of the land; Plaintiff is not son of Bhabesh Mondol; All the rituals after expiry of Bhabesh Mondol performed by the defendant and her two sons; Suit is liable to be dismissed.

5. After hearing the parties and assessing evidenced on record, learned Subordinate Judge dismissed the suit on contest against defendant no.1 and *ex parte* against the rest holding that plaintiff did not pray for cancellation of the deed and the suit is bad for defect of parties and also held that suit for declaration on an undemarcated and unspecified land is not maintainable.

6. Being aggrieved, plaintiff as appellant filed Title Appeal No. 121 of 2000 in the Court of learned District Judge, Khulna. On transfer, the appeal was heard and disposed of by the learned Additional District Judge, 1<sup>st</sup> Court, Khulna, who after hearing the parties and reassessing evidence on record allowed the appeal in part upholding portion of the judgment and decree passed by the trial court so far as it relates to declaration of title but decreed that the deed of gift dated 14.12.1997 is forged, inoperative and not binding upon the plaintiff.

7. Having aggrieved by and dissatisfied with the judgment and decree, defendant-respondent as petitioner preferred this revisional application under section 115(1) of the Code of Civil Procedure and obtained the present rule with an order of stay.

8. Mr. Zainul Abedin with Mr. M. Mahbubur Rahman, learned advocates appearing for the petitioner submits that appellate court below committed an error of law resulting in an error in the decision occasioning failure of justice in passing the impugned judgment and decree without advertent findings of the trial court and thus violated provisions of Order XLI rule 31 of the Code of Civil Procedure as such, impugned judgment and decree is liable to be set aside. He also submits that appellate court below committed an illegality in not considering that plaintiff filed the suit praying for declaration that the deed of gift dated 14.12.1997 is forged and fraudulent as such, burden of proof lies upon the plaintiff under Section 103 of the Evidence Act to prove that the registered deed of gift is executed and registered fraudulently. He next submits that since the deed of gift is duly registered it has presumption of genuineness and correctness under section 114(e) of the Evidence Act and the

appellate court below committed an illegality without considering this legal aspect. He again submits that appellate court below allowed the appeal with extraneous finding that the deed of gift was not acted upon without looking into the provisions of Section 123 of the Transfer of Property Act inasmuch as amongst Hindus gift made subsequent to the Act does not require delivery of possession if there is registration. He lastly submits that the impugned judgment and decree passed by the appellate court below is based on misreading and non appreciation of evidence on record and as such liable to be set aside. In support of his submissions, learned advocate referred to the case of Abani Mohan Saha-Vs- Assistant Custodian (S.D.O) Vested Property, Chandpur and others, reported in 39 DLR(AD)323 and the case of Abul Kashem Howlader-Vs- Sultan Ahmed and others, reported in 9 BLC 333.

9. On the other hand Mr. Anwarul Islam Shahin with Ms. Farjana Sharmin, learned advocates for the opposite party submits that since the defendant no.1 claims title in the suit land by dint of deed of gift dated 14.12.1997, duty cast upon her under the provisions of Sections 101 and 103 of the Evidence Act to prove that the deed was acted upon. He also submits that it is apparent from evidence on record that at the time of execution and registration of the deed of gift, the donor was critically ill and admitted in the hospital so, it can be easily presumed that the deed of gift was not executed and registered voluntarily. He next submits that from the circumstances which is proved by the witnesses, it is evident that at the time of execution and registration of the deed of gift, the donor was not physically and mentally sound and the same is also proved from the testimony of PW.5 i.e. doctor of the clinic. He next submits that the very circumstances of the clinic wherein plaintiff and his mother were absent proves that the deed of gift executed under undue influence by defendant no.1 and her two sons to deprive the plaintiff from his due share. In support of his submissions, learned advocate referred to the case of Official Assignee of Bengal -Vs- Bidyasundari Dasi and others, reported in The Calcutta Weekly Notes, Vol-XXIV, P.145.

10. Heard the learned advocates. Perused revisional application, judgment of the courts below along with lower courts record and the decisions cited by the learned advocates.

11. Admittedly plaintiff instituted the suit for declaration of title in respect of "Ka" schedule land and for further declaration that the deed of gift dated 14.12.1997 registered at Bhatiajata sub register office is forged, fraudulent, void, inoperative and not binding upon the plaintiff. Deed of gift dated 14.12.1997 which is under challenge is a registered instrument. It is not a case of the plaintiff that said deed was not executed and registered by Bhabesh Mondol rather plaintiff's case is that the donor did not execute and register the deed voluntarily and willingly but under undue influence of defendant no.1 and her sons.

12. I have gone through the judgments passed by the trial court as well as appellate court below. Plaintiff filed the suit under Section 42 of the Specific Relief Act. By now it is settled that a suit for mere declaration without seeking cancellation of the document is not maintainable. Further that the impugned deed of gift which is duly registered has a presumption of correctness as provided under Section 114 (e) of the Evidence Act as such onus lies upon the plaintiff to prove that the deed is forged and fabricated. On perusal of the record, it is evident that plaintiff failed to prove that the deed of gift is forged and fabricated by adducing credible oral and documentary evidence. From deposition of PW.5, it appears that the donor was permitted by the doctor to go out of the clinic for two hours, when the deed was executed and registered. Appellate court below allowed the appeal in part holding that the deed was not acted upon since there is no evidence that possession was delivered to the defendant no.1. This finding is not correct. Where the instrument of gift has been registered, delivery of possession is not essential for the validity of a gift by a Hindu.

13. Section 123 of the Transfer of Property Act. runs as follows:

*“123. Transfer how effected- 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.*

*[Notwithstanding anything contained in any other law for the time being in force, a heba under Muhammadan law shall be deemed to be a gift of immovable property for the aforesaid purpose.]*

*For the purpose of making a gift of movable property, the transfer may be effected either by registered instrument signed as aforesaid or by delivery.*

*Such delivery may be made in the same way as goods sold may be delivered.”*

14. On plain reading of Section 123, it is clear that delivery of possession is essential to the validity of a gift is abrogated by section 123 of the Act. A gift under the Act can only be effected in a manner provided by Section 123.

15. On perusal of the testimony of DWs it appears that DW.4 is a attesting witness of the deed of Gift and DW.5 is scribe of the deed but the appellate court below on the basis of testimony of DWs.2 and 3 arrived at a finding that DWs.2-4 did not heard about the deed of Gift when Bhabesh was alive. But on perusal of the testimony of DWs.2, 3 and 4, it is apparent that the appellate court below arrived at such a finding on misreading of evidence. In such view of the matter, I am of the opinion that the appellate court below committed an error of law resulting in an error in the decision occasioning failure of justice in passing the impugned judgment and decree.

16. Facts and circumstances of the case cited by the learned advocate for the opposite party is quite distinguishable from the facts and circumstances of the case in hand.

17. In the result, the rule is made absolute without any order as to cost.

18. Judgment and decree dated 16.03.2002 passed by the learned Additional District Judge, 1<sup>st</sup> Court, Khulna, in Title Appeal No. 121 of 2000 is set aside and the judgment and decree dated 13.03.2000 passed by the learned Subordinate Judge, 3<sup>rd</sup> Court, Khulna, in Title Suit No. 17 of 1998 is hereby restored.

19. Order of stay granted at the time of issuance of the rule is vacated.

20. Send down lower courts record along with a copy of this judgment to the court concern at once.