Present:

Mr. Justice Md. Rezaul Hasan
and
Mr. Justice Md. Abdul Mannan.
First Appeal No.371 of 2015.

Md. Bashir Ahmed

…….Plaintiff-Appellant.
-Versus-
Nasima Akter and others
.....Defendant -Respondents.
Mr. Khandaker Aminul Haque, Advocate.
..... For the Appellant.
Mr. Mohammad Abul Kalam Azad, Advocates.
.....For the Respondent No.2.

Heard on 23.10.2024, 29.10.2024, 05.11.2024,
06.01.2025 and Judgment on 07.01.2025.

Md. Abdul Mannan, J.

This appeal is directed against the impugned judgment and decree dated 29.01.2015 (decree signed on 05.02.2015), passed by the Joint District Judge, 1st Court, Gazipur, in Title Suit No. 88 of 2007, dismissing the suit.

2. Facts, relevant for disposal of this appeal, in brief, are that, one Mst. Harunnessa filed Title Suit No.88 of 2007, before the Court of the learned Joint District Judge, 1st Court, Gazipur, seeking cancellation of deed No. 14863, dated 07.07.2004, and deed No.26390, dated 23.11.2005, as mentioned in the schedule to the plaint.

3. The plaintiff's case, in brief, is that, the disputed land, measuring 37.35 decimals of land appertaining to C.S. and S.A. Khatian No.18, corresponding to R.S. Khatian No.85, pertaining to C.S. / S.A. plot No.109, corresponding to R.S. plot No.176 in the

Moujaof Deshipara, Police Station Gazipur Sadar, District-Gazipur, 24.50 decimals of land appertaining to S.A. Khatian No.18 and R.S. Khatian No.85, pertaining to C.S./S.A. plot No.109 corresponding to R.S. plot No.176, in the Mouja of Deshipara, Police Station Gazipur Sadar, District-Gazipur alongwith 18 decimals of land appertaining to S.A. Khatian Nos. 340, 341, 287, corresponding to R.S. Khatian Nos. 56, 559, 206, appertaining to S.A plot No.1573, corresponding to R.S. plot Nos. 2998, 2999, 3010, 3015, S.A. plot No.1540,corresponding to R.S. plot No.2995, in the Mouja of Dokhin Salna, Police Station Gazipur Sadar, District-Gazipur, belonged to the father and husband of the plaintiff's. After the death of her father and her husband she has inherited the entire disputed land and she was blessed by 1(one) son namely, Md. Bashir Ahmed and 2 (two) daughters namely, Nasima Akter (defendant No.1) and Samima Akter (defendant No.2). She had been possessing the suit land peacefully, but on 01.02.2007, she came to know that, the defendant Nos. 1 and 2 had taken executed and registered the disputed deeds, but she never went to the Sub Registrar's Office, nor had gifted the disputed land to the defendant Nos.1 and 2 and she did not at all deliver the possession of the said property to the defendants. The defendants collusively and fraudulently created and registered the impugned deeds and in spite of these two deeds, she was possessing the suit land with the knowledge of the defendants. On 01-02-2007, the defendants claimed the title in the

suit land, on the basis of the said two disputed deeds and had denied her title in the suit land. Hence, the plaintiff filed the instant original Title Suit No.88 of 2007, seeking declaration for cancellation of the impugned 2(two) Hebanama deeds.

4. At the time of hearing, the plaintiff herself deposed as P.W.1 and after her death, her only son Md. Bashir Ahmed, was substituted as plaintiff.

5. The defendant No.1 had filed written statements but she did not contest the suit, rather she has stated in her written statement that, she came to compromise with the plaintiff (her mother).

6. The defendant No.2 had contested in the suit by filing written statement, denying all material allegations narrated in the plaint contending inter alia that, the plaintiff was living under the care nursing of her 2 daughters (defendant Nos. 1 and 2) the plaintiff, being satisfied by their nursing and scare, she had voluntarily gifted the suit property to the defendant Nos.1 and 2, vide the alleged 2 *Hebanama* (deed of gift) and that she voluntarily went to the office of the Sub Registrar and executed and registered the *Hebanama* deeds and had delivered the possession of the suit land to the defendants and that, the defendants were possessing the suit land by erecting house and paying rent. The plaintiff had no right and title in the suit land. She had filed this case being influenced by her son Md. Bashir Ahmed. She prayed for dismissal the suit.

7. The plaintiff has got examined 3 witnesses as P.W.1 to P.W. 3 and has produced certain documents to prove her case, which were marked as Exhibits '1 and 1(Ka)'.

8. The defendant No.2 has also got examined 5 witnesses as D.W.1 to D.W.5 and has produced and proved certain documents, which were marked as Exhibit 'A, A(I), B, B(I) and C'.

9. The learned trial court, after hearing both the parties and having assessed the evidence on record, has dismissed the suit, vide it's judgment and decree dated 29.01.2015 (decree signed on 05.02.2015).

10. Being aggrieved thereby and dissatisfied with the said judgment and decree dated 29.01.2015 (decree signed on 05.02.2015), the plaintiff has preferred this appeal, on the grounds stated in the memo of appeal.

11. Learned Advocate Mr. Khandaker Aminul Haque appeared on behalf of the plaintiff-appellant. He submits that, the plaintiff Harunnessa has never proposed to gift the disputed property in favour of the defendants, nor went to Sub Registrar's Office. Nor she had executed the impugned *Hebanama* deeds. He also submits that, the plaintiff herself has deposed as P.W.1 and has denied the execution and registration of the disputed *Hebanama* deeds. He further submits that the plaintiff were taken to the Joydebpur Bazar and in the name of purchasing medicine took her signature on some papers and had fraudulently used the same to create the *Hebanama* deeds. He next submits that, the P.W.3 was shown as

identifier in the disputed deeds but she has denied the execution and registration of the alleged deeds. He also submits that, the P.W.3, in her deposition and cross-examination, has deposed that, she was not at all present in the Sub Registrar's Office, Gazipur Sadar, Gazipur, at the time of the registration of the deeds. He next submits that, the defendant Nos.1 and 2 are full sisters and the defendant No.1 has deposed as D.W.4. She has testified that the plaintiff did not make any Hebanama deeds in favour of the defendants, but the trial court has failed to consider these clear evidence on record has most illegally erroneously dismissed the suit. He therefore, submits that, the appeal has merit and the same may kindly be allowed.

12. Learned Advocates Mr. Mohammad Abul Kalam Azad appeared on behalf of the defendant-respondent No.2. He submits that, the plaintiff had voluntarily gifted the suit property in favour of the defendants and had delivered the possession of the same. He next submits that the defendants were possessing the suit land by erecting dwelling house. He also submits that, the deed writer Nurul Islam was examined as D.W.2, who had testified that the plaintiff came before him and had executed and got registered the gift deeds. He next submits that, the plaintiff has delivered the possession of the suit land to the defendants after observing the legal formalities of the deeds. He proceeds on that, the trial court, having properly assessed the evidence on record, has rightly passed the judgment and decree and dismissed the suit. He

concludes that, the trial court has committed no error of law or illegality in passing the impugned judgment. He has cited 3 decisions in support of his contention, namely 52 DLR (2000), 491 : Wahida Begum Vs. Tajul Islam,39 DLR (AD) (1987), 223: Abani Mohan Saha Vs. Assistant Custodian and 10 BLC (AD) (2005), 161: Monzur Rahman Khan Vs. Tahera Parvin and others. He therefore submits that this appeal has no merit and the same may be dismissed.

13. We have heard the learned Advocates for the both parties, perused the impugned judgment and decree of the trial court, and have assessed the evidence on record, independently and as last court of facts. It is admitted that, there is no dispute that the plaintiff is the owner of the suit property.

14. However, considering the evidence on record, we find that, the plaintiff has categorically denied the execution of the disputed deeds, in her deposition given as P.W.1. On the other hand, P.W. 3, sister of the plaintiff, shown as identifier of the alleged deeds, has categorically denied her presence in the Sub Registrar Office at the time of registration of the deeds and has asserted that she did not identify the plaintiff as executants. Besides, P.W. 3 had denied her signature, on the disputed deeds, as identifier. The others P.Ws. have also corroborated the plaintiff's case.

15. The D.W.2 Nurul Islam, deed writer, although had claimed that, the disputed deeds were executed by the plaintiff voluntarily, but he told in his cross examination that the plaintiff was not known to him.

16. The contesting defendant could not produce any attesting witnesses to prove the execution of the disputed deeds, the onus having lied on her. Even the husband of the defendant No.2, Masdu-ur-Rahman, was as an attesting witness of the alleged deeds, but he did not turn up to give the deposition to prove the execution. In our considered opinion, the defendant No.2 having stated a positive case, she had a burden to prove her case, but she has failed to prove the case as required by law.

17. On the other hand, there is no evidence on record as to why the attesting witness could not be produced before the court by the defendants.

18. In view of the evidence on record placed before us, we are of the opinion that, the trial court has utterly failed to properly assess the evidence on record and this is a case of misreading and non-reading of the evidence on record by the trial court. The findings are perverse and are liable to be reversed and the judgment and decree is liable to be set aside.

19. We have also considered the decisions submitted by the learned Advocate for the respondent, these are about the presumption of regarding execution of a document. These presumptions of the cited decisions are rebuttable in this particular case. The oral and documentary evidences placed before us clearly reversed the presumption about the execution by direct relevant and admissible evidence. Therefore, the case cited before us are liable to be distinguished.

20. However, we find merit in this appeal and the same should be allowed.

Md. Rezaul Hasan, J.

21. I have had the privilege to hear the judgment pronounced by my learned Brother. However, the reasons for my conclusions should be assigned, briefly, hereinafter.

22. It is to be mentioned here that, section 68 of the Evidence Act, 1872, lays down the procedure to prove the execution of a document which is required by law to be attested. It reads as follows:

> "68. 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 Registration act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied." (emphasis added).

23. Sections 69, 70 and 71 are to be read with Section 68, as if they are the provisos to section 68. These sections, having laid down the procedure to be complied with, to prove the execution of a document required by law to be attested, must be complied with. Otherwise, the court is not legally permitted to use the same as evidence.

24. **We find that, in this particular case, the plaintiff has denied execution of the disputed deeds of gift. But, the execution of the questioned documents were not proved in the manner as prescribed in sections 68 to 71. Nor these disputed documents were**

proved, otherwise, by resorting to the alternative mode of proof as prescribed in sections 73, 45 and 47.

25. In this circumstances, we hold that, the deposition of the D.W. 2, who is not an attesting witness, is 'no evidence' in the eye of law, in view of the provisions of section 68 of the Evidence Act, 1872. Hence, the trial court had no lawful authority to use deposition of the D.W.2, as proof of execution of the questioned documents, in passing the impugned judgment and decree.

26. Therefore, the trial court's findings have been rightly reversed and the impugned judgment and decree have been rightly set aside by my learned brother. Hence, I do agree.

ORDER

In the result, the appeal is allowed.

The impugned judgment and decree dated 29.01.2015 (decree signed on 05.02.2015), passed by the Joint District Judge, 1st Court, Gazipur, in Title Suit No. 88 of 2007, is hereby set aside and the deed No.14863, dated 07.07.2004 and the deed No.26390, dated 23.11.2005 are hereby declared void and not binding upon the plaintiff.

The judgment and decree of the lower Court shall be stand modified.

Let a copy of this judgment and order be sent to the Sub Registrar, Gazipur Sadar, Gazipur, for noting this concerned deeds.

There is no order as to cost.

Md. Rezaul Hasan, J:

I agree.

A.Aziz:B.O.