

CASE NO.:
Appeal (civil) 5028 of 1990

PETITIONER:
KHUSHAL CHAND SWARUP CHAND ZABAK JAIN

RESPONDENT:
SURESH CHANDRA KANHIYALAL KOCHAR AND ANR.

DATE OF JUDGMENT: 04/10/1994

BENCH:
K. RAMASWAMY & S.C. AGRAWAL & N. VENKATACHALA

JUDGMENT:
JUDGMENT

1994 SUPPL. (4) SCR 218

The following Order of the Court was delivered:

The unsuccessful plaintiff is the appellant before us. One Raja Bai had executed a gift deed dated June 20, 1957 in favour of respondent No. 1 Sureshchandra Kanhaiyalal Kochar. She died on 21 May, 1966. About five months prior to her death she executed a registered Will dated 27th December, 1965 in favour of the appellant bequeathing the self-shared property gifted over to the first respondent under the Gift Deed dated June 20, 1957. Initially the appellant filed the suit against the tenants claiming possession thereof but when they pleaded the gifting over in favour of Sureshchandra, the appellant impleaded him as a third respondent who had pleaded in the written statement that Raja Bai had bequeathed the property to him under the gift Deed dated June 20, 1957. Thereafter the appellant has amended the plaint and sought for a declaration that he is the owner of the property. The trial court decreed the suit. In First Appeal No 174 of 1974 and Letters Patent Appeal No. 60 of 1984 the learned Single Judge of the High Court and the Division Bench had held that the gift deed was duly executed by Rajabai in favour of Sureshchandra and, therefore, the appellant does not get any right under the Will. Accordingly they dismissed the suit. Thus, this appeal by special leave.

Shri Bobde, learned senior counsel for the appellant, sought to contend that the gift deed has not been duly proved. He also contended that the donor had not parted with the possession of the property covered by the gift deed. On the other hand evidence on record shows that she remained in possession and enjoyment of the property as the owner. Therefore, the gift was not given effect to. In other words it could be treated to be a Will. Since she had executed the Will on 27th December, 1965 it must be deemed that the earlier Will stands revoked, thereby the appellant is the owner of the property. We find no force in the first contention. The second contention was not raised in the courts below and, therefore, we cannot permit the learned counsel to raise that contention for the first time here without proper pleadings, evidence and consideration by the courts below.

It is seen that Chagan Lal one of the attesting witness, was examined on behalf of the appellant. Section 123 of the Transfer of Property Act, 1882 for short 'the Act' postulates that for the purpose of making a gift of immovable property, (he transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. In Section 3 of the Act 'attestation' has been defined, - in relation to an instrument, it shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or

mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one Of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

Section 68 of the Evidence Act prescribes proof of execution of the document required by law to be attested. It says that 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 by 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 the attesting witness in proof of execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, unless its execution by the person by whom it purports to have been executed is specifically denied.

It is seen from the pleadings that the execution of the document had not been denied. On the other hand the recitals in the Will executed by Rajabai establish that she admitted the execution. However, she stated therein that it has been obtained by fraud and mis-representation. Fraud and mis-representation have been specifically dealt with and rejected by the learned Single Judge of the High Court as well as by the Division Bench. Once the execution of the document has been specifically admitted, the due execution under the Registration Act is presumed to have been done as the gift is admittedly a registered document. Moreover in this case, as seen from paragraph 7 of the judgment of the High Court, one of the attesting witness has been examined on behalf of the appellant who admitted in the cross-examination that he attested the document. Son of another attesting witness and also the son of the scribe of the document have also been examined on behalf of the respondent. That evidence was considered and the High Court found that the document has been duly proved. Under these circumstances it must be concluded that due execution of the gift deed has been proved by the respondent. It is no doubt clear from the evidence that Rajabai retained the possession of the property. Obviously the beneficial enjoyment of the property has been retained by her for her life time. Under these circumstances Rajabai having divested of her title to the property after due execution and registration of the gift deed, she has been divested of her right and interest except her beneficial right to enjoyment of the property during her life time. Therefore, the Will executed in favour of the appellant is a document which does not confer any right in the bequeathed properties on the appellant and is inconsequential. The appeal is, therefore, dismissed with costs.