

HIGH COURT FORM NO (J) 2

HEADING OF JUDGMENT IN ORIGINAL SUIT

District : Sonitpur

IN THE COURT OF MUNSIFF NO 1, TEZPUR , SONITPUR

PRESENT---- Aklima Begum, AJS

Munsiff No1

Sonitpur, Tezpur

Monday, the 2nd day May of 2015

Title Suit No 8 of 2009

Sri Jogen Bonia

.....Plaintiff

Vs

1) Sri Dipu Bonia.....Defendant.

1) Sri Dharani Kanta Bonia.....proforma defendant.

This suit coming on final hearing on 23/4/2015 in presence of

Advocate for the plaintiff Sri P. Saikia and others

Advocate for the defendants F. Hoque and others

And having stood for consideration to this day, the court delivered the following judgment:-

J U D G M E N T

1. The plaintiff has instituted this suit for the declaration, and for eviction.
2. The brief fact leading to institution of this suit as revealed from the plaint is that, plaintiff is the grandson of pro-forma defendant and defendant is the son

of pro-forma defendant. It has been stated that pro-forma defendant has been living with the plaintiff and with love and affection gifted his land measuring 2 kathas 3 lessas out of 1 bigha 1 kathas 9 lessas under dag no 33 P.P no 47 situated at Gerua Gaon Mouza Bihaguri described in Schedule A vide Registered Gift Deed No 1152 of 2004 on 1/7/2004 and delivered possession of the said land to plaintiff who took possession of the said land by accepting the said Gift and the plaintiff had posted pucca post in the boundary of the said land and also mutated his name in respect of the aforesaid land on the basis of Gift Deed. Thus plaintiff became sole owner of and title holder and possessor of the suit land.

- 3.** The plaintiff further stated that schedule B land is a portion of Schedule A land and at the time of aforesaid Gift, one ek-chali small katcha thatched house, belonging to pro-forma defendant, was standing thereon and pro-forma defendant has allowed his son, the defendant, to stay there temporarily. But at the time of gift pro-forma defendant has demolished the said Katcha House and ousted the defendant. But in the month of September 2005, the defendant, by taking advantage of absence of plaintiff, again had illegally entered in to the suit land described in the Schedule B land by removing the boundary posts and erected bamboo fencing. The plaintiff after knowing the fact asked the defendant to remove the bamboo fencing and defendant promised to remove the bamboo fencing but defendant had not removed the said fencing. It has been stated that except Schedule B land other portion of Schedule A land was under possession of plaintiff.
- 4.** It has also been alleged that subsequently defendant had constructed two chali tin roof house in the aforesaid encroached portion of the suit land in 2006. Despite protest from plaintiff the defendant gradually made pucca half wall and chatai wall in upper portion and made the pucca plinth. On 27/3/2007 and on 14/2/2008 the plaintiff asked the defendant to remove the illegal construction. On 14/2/2008 for the first time refused to vacate the Schedule B land and threatened to construct brick wall. It has been stated that defendant had not right title and interest in Schedule A and Schedule B

property and is a mere trespasser. In view of the above the plaintiff sought declaration of right title and interest and for eviction.

5. Initially the pro-forma defendant had appeared in this suit but on subsequent date the pro-forma defendant remained absent for which vide order dated 22/5/09 the suit proceeded ex-parte against the pro-forma defendant.
6. The Defendant has appeared after receiving summon and contested the suit by filing written statement. The defendant in his written statement stated that suit is not maintainable, suit is barred by limitation. It has been stated that plaintiff is not entitled to claim the suit property and defendant denied all the right of plaintiff over the suit property. **The defendant has admitted that plaintiff is able to acquire the suit property by right of gift of Deed from the donor with a mala-fide intention of depriving the legal heir of who are entitled to the property by right of succession and inheritance. The defendant admitted that fact regarding gifting of suit A land by Proforma defendants, acceptance and delivery of possession , mutation of suit A land may be correct but plaintiff has to prove it in the eye of law.**
7. It has been stated that plaintiff was not able to take possession of the suit land as claimed by plaintiff and has misled in the pleading as to fact regarding encroachment of suit land in the year 2006, subsequent construction of pucca half wall and chatai wall in upper portion, making of plinth, fact regarding subsequent asking plaintiff to defendant to remove the fencing . It is also stated that plaintiff has wrongly stated that the defendant told plaintiff that he will vacate the land within one year by removing the house and bamboo fencing but failed to vacate. The plaintiff has stated misleading statement that he has right title and interest over the suit land since the suit land was never been in exclusive possession of the plaintiff on taking deed of Gift.
8. The defendant has stated that in reality since the life time of the his father the defendant constructed a pucca house for his own livelihood and his family

member has been residing in that house without any obstruction from anybody and **on the day of execution of the so called gift deed the defendant has been in physical possession of the suit land.** It is stated that along with the suit land, a plot of land was purchased by defendant adjacent to the suit land and **plaintiff never took possession of the suit land after execution of the registered Gift Deed which was obtained by plaintiff without any knowledge and consent of defendant and since no delivery of possession was made after execution of the deed of Gift and plaintiff obtained no delivery of possession hence no right title and interest has been acquired by the plaintiff without completion of the delivery of possession of the suit land hence the gift deed is null and void in the eye of law and inoperative in the eye of law. Hence prayed for dismissal of the suit.**

9. Upon pleading of the parties my learned predecessor has framed the following issues for consideration...
- 1) **Whether the suit is maintainable ?**
 - 2) **Whether the plaintiff has right title interest and possession over the schedule A land of which schedule B is a part.**
 - 3) **Whether the plaintiff is entitled to get the decree as prayed for?**
10. The plaintiff side has adduced evidence of 3 PWs including himself and has exhibited some documents in support of his case. Defendant side has examined 4 DWs and exhibited some documents.

On perusal of case record plaintiff has exhibited the documents numerically as Ext 1, 2 3..... etc. However the defendant also marked the exhibits as Ext 1,2,3, instead of Ext A,B,C in evidence which may create confusion and inconvenience. Accordingly vide order dated **23/4/2015** this court corrected the exhibits and remarked them as Ext A,B,C etc on consent of both parties

and it is also ordered that the marking of exhibits in evidence and cross examination of DWs will also be treated as Ext A,B,C so on in judgment.

I have heard the arguments advanced by the learned counsel for the plaintiff and perused the material on record. The material on record and submission made on behalf of the plaintiff have received due consideration of this court.

11. Discussion, Decision and Reason thereof

Now let me discuss the material on record to arrive at definite finding as regards to the issues in this suit.

12. Issue no 1 Whether the suit is maintainable ?

The defendant challenged the maintainability of the suit in his written statement and simply stated that the suit is not maintainable in its present forms. But there is no specific averment under what circumstances of facts and law the suit is not maintainable. So, in absence of specific averment the suit in my considerate opinion is maintainable. Maintainability of a civil suit is to be determined on the basis of the pleadings of the parties. The pleadings of the parties do not disclose any procedural defect barring the jurisdiction of this court to try this suit. Therefore this Court is of the considered opinion that this suit is maintainable in its present form.

Accordingly issue No (1) is decided in affirmative in favour of the plaintiff.

13. Issue no 2 :- Whether the plaintiff has right title interest and possession over the schedule A land of which schedule B is a part?

The plaintiff, to claim his right title and interest over the suit land, examined himself as PW 1 and deposed that he has acquired right title and interest over the suit land on the basis of Gift Deed. PW 1 has deposed that proforma defendant who was his maternal grandfather has gifted land measuring 2 kathas 3 lessas out of 1 bigha 1 kathas 9 lessas under dag no 33 P.P no 47 situated at Gerua Gaon Mouza Bihaguri described in Schedule A by executing a gift deed vide Registered Gift Deed No 1152 of 2004 on 1/7/2004.

The plaintiff as PW 1 has exhibited the Gift Deed no 1152/2004 as Ext 1 which shows that land measuring 2 kathas 3 lessas out of 1 bigha 1 kathas 9 lessas under dag no 33 P.P no 47 situated at Gerua Gaon Mouza Bihaguri described in Schedule A has been gifted by proforma defendant , Dharani Kanta Bania to plaintiff vide a registered gift deed no 1152/2004 . PW 1 exhibited the signature of Dharani Kanta Bania i.e donor as Ext 1(1) to Ext 1(7). The PW 1 has exhibited the signature of identifier Hirakjyoti Bania as Ext 1(8).Ext 1(9) is the signature of attesting witness Hirakjyoti Bania and Ext 1(10) the signature of attesting witness Kalpana Devi. Ext 1(11) is the signature of writer Kalpana Devi. The defendant had not disputed the signature of Dharani Bania in written stamen or in cross examination.

In cross examination of PW 1 the defendant failed to impeach the credibility of PW 1 regarding execution of Gift deed by Proforma defendant. The defendant had only given suggestion that Dharani Kanta Bania had never gifted the suit land to Plaintiff which is beyond pleading. The defendant also suggested that proforma defendant had no possession over the suit land hence he has no right to gift the suit land. The fact of execution of gift deed no 1152/2004 remained un-assailed.

The plaintiff has examined PW 2 who in his evidence has deposed that proforma defendant has gifted land measuring 2 kathas 3 lessas out of 1 bigha 1 kathas 9 lessas under dag no 33 P.P no 47 situated at Gerua Gaon Mouza Bihaguri described in Schedule A vide Registered Gift Deed No 1152 of 2004 on 1/7/2004 .The defendant failed to shake the credibility of DW 2 regarding execution of Gift Deed.

14.The plaintiff has examined the deed writer cum attesting witness of Gift Deed namely Smt. Kalpana Devi who in her evidence as PW 3 deposed that she has written the Gift deed no 1152/2004 by which Dharani Kanta Bania had gifted the suit land to the plaintiff, grandson of Dharani Kanta Bania. She deposed that she had written the gift deed and read over the same to the parties after

writing it .She exhibited her signature as Ext A(10) and Ext A(11)(written as Ext 1(10) and Ext 1(11) in evidence.)

In cross examination the PW 3 admitted that she has not brought the Licence as same is handed over for renewal. The defendant has suggested that she has no authority to write the Ext 1, Gift Deed as she has no valid licence. This plea is not sustainable as because a person who writes a deed need not necessarily be a petition writer or deed writer. Any person who has the ability to write can write a deed. Law does not require that only petition writer or deed writer only will have the authority to write a deed. The defendant also suggested that she has obtained signature of Dharani Bania by suppressing material fact. These two suggestion shows that defendant has admitted that PW 3 has written the Ext 1 and Dharani Bania has signed the gift deed. Except giving these suggestion the defendant failed to elicit anything against due execution of Gift deed.

The donor of Gift deed no 152 of 2004 has been made as proforma defendant who has appeared in the suit. But the donor has not filed any written statement against the claim of plaintiff and has not denied the execution of the Gift Deed. Hence the fact of execution of Gift deed no 1152/2004 remained un-assailed.

- 15.** The defendant in written statement has not denied ownership of Dharani Kanta Bania and has not denied the execution of the gift deed. The defendant has not filed counter claim seeking cancellation of the Gift deed by alleging its execution. Throughout the written statement he has only taken the plea that possession was under the defendant hence gift deed is not valid. **It is admitted that on the day of execution of the so called gift deed the defendant has been in physical possession of the suit land and plaintiff never took possession of the suit land after execution of the registered Gift Deed which shows that defendant admitted the execution of gift deed by Dharani Kanta Bania. Only plea is that after execution of gift deed possession was not delivered to the plaintiff.**

However in cross examination of PW 1 defendant has given suggestion that Dharani Kanta Bania has never executed the gift deed in favour of plaintiff. It is suggested that by taking advantage of mental illness of Dharani Kanta Bania plaintiff had got executed the Gift Deed. It is suggested that Dharani Kanta Bania had not have possession over suit land hence had no right to gift the suit land to plaintiff. All these suggestion are beyond pleading hence not admissible. Defendant as DW1 and Dw 2,3,and 4 has deposed that the plaintiff has falsely stated that Dharani kanta Bania had gifted the suit land vide Gift Deed and delivered possession because Dharani Kanta Bania had been suffering from mental disorder from 7 years prior to his death. Hence, he was not of sound mind and the Gift deed, if any, is invalid. DWs deposed that suit land is ancestral land and Dharani Bania had no authority to gift the said land. These pleas are beyond pleading because in written statement defendant has not raised the question of mental imbalance of Dharani Kanta Bania and plea of ancestral land. Hence it is liable to be discarded being beyond pleading. The defendant has not filed counter claim seeking cancellation of gift deed or seeking declaration that the gift deed no 1152/2004 is void and inoperative in law disputing the execution of Gift deed

From the above discussion it has became clear that plaintiff through the evidence of PW 1 2 and 3, Ext. 1 and the pleading of defendant has proved that Dharani Kanta Bania had executed gift deed no 1152/2004 in favour of plaintiff in respect of suit A land.

16. Plaintiff claimed that after execution of gift deed he took possession of the suit land and erected concrete post. The defendant in the month of September 2005 again had illegally entered in to the suit land described in the Schedule B land by removing the boundary posts and erected bamboo fencing. **On the other hand defendant stated that on the day of execution of the so called gift deed the defendant has been in physical possession of the suit land and plaintiff never took**

possession of the suit land after execution of the registered Gift Deed.

In this regard I would like to refer the evidence of the parties. PW 1 in his evidence stated that gifted land was vacant land. At the time of aforesaid Gift one ek-chali small katcha thatched house belonging to pro-forma defendant was standing thereon where in the said pro-forma defendant has allowed his son, the defendant to stay temporarily. **But at the time of gift pro-forma defendant has demolished the said Katcha House by ousting the defendant and delivered the gifted land to plaintiff who** has taken possession of the land gifted by Dharani Kanta Bania and constructed pucca post in the boundary of the suit A land. But by taking absence of plaintiff the defendant in the month of September 2005 again illegally entered in to the suit land described in the Schedule B land by removing the boundary posts and erected bamboo fencing.

Plaintiff examined PW 2 who also deposed that at the time of aforesaid Gift one ek-chali small katcha thatched house belonging to pro-forma defendant was standing thereon where in the said pro-forma defendant has allowed his son , the defendant to stay temporarily. But at the time of gift pro-forma defendant has demolished the said Katcha House by ousting the defendant and delivered the gifted land to plaintiff. PW 2 deposed that plaintiff has taken the possession of the land gifted by Dharani Kanta Bania and constructed pucca post in the boundary of the suit A land and he was present at that time. PW 2 also deposed in 2005 the defendant encroached the suit land and he has seen the defendant removing the pucca post and informed the plaintiff.

However the PW 1 in his cross examination stated that there is an ek chalia house in suit land and prior to gift deed Dharani Bania and defendant used to reside in the same area including the suit land and when Dharani Bania started residing with him defendant resided in that ek chalia house and the defendant is still residing in the house of the suit land.

In cross examination PW 1 admitted that **at the time of gift the suit land was not vacant** which shows that at the time of gift there was still a house in the suit land. The plaintiff in his evidence neither stated anything about presence of his maternal uncle or his family members when he has taken possession and house was demolished or examined his other maternal uncles or witness from his family who are present when the house was demolished and when he took possession to prove that Dharani Kanta Bania had demolished the house and hand over the possession of the suit land to the plaintiff. The plaintiff only stated that he has erected concrete post and taken possession however stated nothing as to whether Gifted land was physically possessed or not by him or his family, whether the said land was cultivated or not by the plaintiffs family during this period. The plaintiff failed to state the manner in which the suit A land was possessed by plaintiff. The PW 1 has not submitted any land revenue receipt in support of his claim of possession. If the plaintiff has possessing the suit land then it is obvious that plaintiff has been paying the land revenue but plaintiff has not submitted any land revenue.

Moreover, plaintiff failed to mention the boundaries of the suit land. The PW 1 stated the eastern boundary as heirs of Kushal Bania and stated that he does not know the other boundary of the suit land. It has been admitted that Dharani Bania used to reside in the suit house with defendant before his death which shows that there is no other house of his grandparents except the Suit land and house. A person in possession of a land is supposed to know the boundary of the suit land and he is supposed to visit the suit land and also supposed to pay the land revenue. In cross examination PW 1 failed to state when he last visited house of his grandparent .The plaintiff failed to state the date on which he had visited the suit land, failed to submits revenue receipt failed to state the date when he visited the suit land. From the above it cannot be said that plaintiff have possessed the suit land. Rather it can be presumed that defendant had been residing in the suit land.

The plaintiff exhibited Mutation Certificate given by Office of Circle Officer Sadar Revenue Circle Tezpur as Ext 2, and Jamabandi Copy as Ext 3 which

shows mutation of name of defendant in suit A land . But mere mutation in the name of plaintiff and entry in the Jamabandi are not sufficient to prove possession of plaintiff. Possession, either physical or constructive, has to be proved by leading cogent evidence which is absent in the present case .

Moreover , the plaintiff in evidence as PW 1 stated that defendant was ousted from the suit land and in the year 2005 defendant encroached B schedule A measuring 12 lessas and erected house and bamboo fencing but failed to state the boundaries and measurement in terms of feet or meter lengthwise and breadth wise of the said 12 lessas of land. The plaintiff has admitted that he serves in Tawang in Arunachal Pradesh Since 2001 and by taking his absence the defendant has encroached the suit land and made ek chalia house and removes concrete post , hence it can be said that at the time of encroachment plaintiff is not present in suit place and he himself has not seen the incidents. The plaintiff has not stated anything as to who were present when the defendant encroached the suit land , made ek chali house or made bamboo fencing by removing concrete post. The plaintiff has not examined his family members or other maternal uncles to prove that defendant had constructed ek chali house and encroached the suit land. PW 1 stated nothing about any person who were present at that time. The plaintiff in cross examination admitted that he does not know if defendant has any other land or residence apart from the house and land over the suit land. The plaintiff failed to show any other places where the defendant with his family had stayed after eviction and before encroachment.

In cross examination the PW2 has also stated that **defendant along with his father has been staying in the suit land since 10 years** This piece of evidence is contrary to the evidence and claim of plaintiff as to demolition of hose at the time of gift. Ext 1 shows that Gift deed was executed in the year 2004 and as per the claim of plaintiff at the time of gift possession was delivered by demolishing the ek chalia house and by ousting the defendant . But PW 2 admitted that since ten years defendant has been residing in the house hence it can be sad since ten years there is house in the suit land and

defendant is residing in that house . Hence, PW 2 failed to prove that land was vacant at the time of gift . The PW2 also failed to mention the place where the defendant had resided after so called eviction by pro-forma defendant.

The PW 2 in evidence also stated that plaintiff has taken possession of vacant land and erected pucca post and he was present at that time. In 2005 the defendant encroached the suit land and he has seen the defendant removing the pucca post and informed the plaintiff. But in cross examination failed to state the boundaries of suit land, failed to state the measurement of the land possessed by defendant. The PW 2 in cross examination stated that he knows nothing except removal of concrete post. Moreover the PW 1 who is a plaintiff, has not stated anything in evidence about the presence of PW2 at the time of taking possession of the suit land, at the time of demolition of the house and at the time of removing of concrete post and also has not stated that PW 2 has informed him about the removal of posts. Hence the evidence that PW 2 was present at the time of taking possession, and at the time of removal of post by defendant is not found worthy of credit.

From the above discussion this court is of the opinion that plaintiff as PW 1 and through the evidence of PW has failed to prove that ek chali house was demolished by proforma defendant and handed over the possession to plaintiff. Hence plaintiff failed to prove his possession over the suit A land. Admittedly the defendant is in possession of the schedule B land but the plaintiff also failed to prove that the defendant has encroached the suit B land in the 2005 and erected ek chali house.

- 17.** On the other hand the defendant as Dw 1 deposed that he is in possession of house in the schedule Land which is described in Schedule B. However Defendant as DW 1 in his evidence deposed that the suit was ancestral property and his father Dharani Kanta Bania has delivered the possession of Schedule B land and since 1994 i.e after his marriage he has been staying in the suit B land with his family. On 19/4/1999 in presence of witness his father

has allowed him to stay in the schedule B land in written accordingly he took possession of schedule B land.

Besides it is stated that he has purchased schedule A land from his brother Dip Bania by executing an Unregistered Deed. The defendant has exhibited the unregistered sale deed executed by Dip Bania in favour of defendant as Ext A (written as ext 1 in evidence of DW 1) and signature of Dip Bania as Ext A(1)(written as Ext 1(2) in evidence and cross examination). The defendant also exhibited the deed of distribution of suit land made in 19/4/1999 as Ext B(written as Ext 2 in evidence) and exhibited the signature of Dharani Kanta as Ext. B(1)(written as Ext 2(1) in evidence), signature of defendant as Ext B(2)(written as Ext 2(2) in evidence) .The defendant has exhibited the land revenue receipt as Ext C to Ext C (5) (in evidence written as Ext 3 to Ext 3(5) and stated that he has received the suit land from the ancestral property. These exhibits are not admissible in evidence as beyond pleading.

The plaintiff has denied the Ext A and Ext B and suggested that Ext A and Ext B is beyond pleading.

- 18.** DW 2 , DW 3 and DW 4 in their evidence in chief have deposed that suit land is the ancestral property of defendant and defendant since 1994 has been residing in the suit land. On 19/4/1999 in presence of witness his father has allowed him to stay in the schedule B land in written accordingly he took possession of schedule B land. Besides he has purchased schedule A land from his brother Dip Bania by executing an Unregistered Deed. DW 2 exhibited his signature on Ext A as Ext A(3) (written as Ext 1(3) in evidence) and identified the signature of Dharani Bania as Ext A(2) (written as Ext 1(2) in evidence) and signature of Dip Bania as Ext A(1) (written as Ext 1(1) in evidence). DW 3 also exhibited his signature on Ext B as Ext B (3) and signature of Dharani Bania as Ext B(1) and signature of defendant as Ex B(2).

However in cross examination Plaintiff failed to shake the credibility of DW 2 3 and 4 in respect of possession of defendant in house in suit land.

From the evidence of defendant it can be said that defendant has been in possession of the house where he is residing with his family as proved by the witness. However on perusal of pleading of defendant it is seen that defendant had never stated anything regarding the fact of suit land being ancestral property, purchase of Suit A land by defendant by unregistered deed, giving of suit land by Dharani Bania vide Ext B, Fact relating mental imbalance of his father etc as deposed in evidence of DW 1,2,3, and 4, in his written statement. Hence the fact deposed in evidence as mentioned above are beyond pleading and liable to be discarded. Moreover the unregistered sale deed is not admissible in evidence to prove transfer of right title. Law requires registered sale deed for transfer of immovable property whose value is Rs 100 or more than Rs 100/-

In this connection I would like to refer the Case law cited by Learned counsel of plaintiff which was reported in **1991(1) Gauhati Law Journal 404, Shri Thuleswar Dev Mahanta and others Vs Shri Parmananda Saikia and others.** In this case Hon'ble Gauhati High Court through Hon'ble Justice S.N Phukan held that **"no amount of evidence can be looked into if the facts are not pleaded by parties in their pleading, court cannot make out a new case beyond the pleading and further no evidence can be looked into by Court from which there is no foundation in the pleading."**

In the resent suit the pleading of defendant is silent in respect of claim that suit property is ancestral property, fact relating to purchase of suit A land by unregistered deed, fact relating mental imbalance of his father etc. In view of the decision rendered in the above cited case the above statement of defendant made in evidence is discarded and cannot be used and looked into. Accordingly it cannot be said that defendant has received the suit B land in written from Dharani Bania and Schedule A and from Dip Bania Vide unregistered Sale Deed which is not admissible in law and acquired any

right and title in suit land. The documents exhibited by defendant are inadmissible in evidence as beyond pleading.

The defendant on the basis of these facts which are beyond pleading cannot claim his right title over the suit A and B land. Moreover the defendant has not sought any declaration seeking right, title and interest and seeking cancellation of gift deed.

Admittedly though defendant is in possession of Schedule B land but as discussed above defendant failed to prove that he has any right title and interest over suit A and B land. As discussed above the plaintiff failed to prove that possession of suit land was handed over to plaintiff.

- 19.** The defendant pleaded that after execution of the deed of Gift and plaintiff obtained no delivery of possession hence no right title and interest has been acquired by the plaintiff without completion of the delivery of possession of the suit land. No other ground of invalidity of Gift deed has been mentioned in the written statement.

The learned counsel for the plaintiff during arguments has submitted that delivery of possession is not essential to validate the gift. It is submitted that in gift under Mohammedan law delivery of possession is must but under Transfer of Property Act delivery of possession is not an essential elements of valid gift of immovable property.

On the other hand learned counsel for the defendant has submitted that delivery of possession is an essential element of a valid gift. Hence, the gift deed is not valid only because possession was not delivered to plaintiff.

In this regard I would like to go through the provision relating to Gift.

However Section 122 of Transfer of Property Act defines Gift as transfer of certain existing movable or immovable property made voluntarily and without consideration , by one person called the

donor, to another called the donee, and accepted by or on behalf of donee.

Section 123 of the said Act also provides that gift of immovable property must be affected by registered instrument signed by or on behalf of donor and attested by at least two witnesses. Under traditional Hindu law no writing was necessary for validity of gift. Hindu Law insisted delivery of possession without which gift could not be completed.

Section 123 does not lay down the precondition of delivery of possession for validity of gift. Under modern Hindu Law Compliance with the provision of the Act irrespective of the fact whether possession has or has not been given, is necessary. Although the Hindu law requires delivery of possession to complete a gift of immovable property, that law has been abrogated by sec. 123 of this Act. This section clearly seems to have the effect of rendering unnecessary the delivery of possession, substituting, as it does, registration for delivery of possession. In Mohammedan law, declaration of gift by the donor, an acceptance of the gift by the donee, and delivery of possession are the essentials of a gift. This rule of Mohammedan law is unaffected by the provisions of sec. 123, Transfer of property Act and, consequently, a registered instrument is not necessary to validate a gift of immovable property.

However Hindu law which required delivery of possession is abrogated by section 123 of Transfer of Property Act.

- 20.** In the present case as discussed above earlier plaintiff failed to show that A schedule property is delivered to plaintiff and plaintiff had been possessing the suit land since execution of the Gift Deed and defendant encroached the suit B land. However admittedly defendant is in possession of Schedule B land at the time of execution of Gift deed as claimed by defendant. However in view of the above provision of law of Transfer of Property Act as discussed above, it can be said that delivery of possession is not an essential requirement of validity of Gift of immovable property. The gift deed no 1152/2004 has not

become inoperative only due to non delivery of the suit land. The gift deed no 1152/2004 is in writing. It is registered, signed by donor and also signed by attesting witness.

- 21.** The gift as deposited by plaintiff is accepted by the plaintiff. The plaintiff as PW 1 has deposed that after execution of Gift Deed the donor had delivered the possession of the suit A land of which Schedule B land is a part to the plaintiff and he had accepted and mutated his name in the land record and paying the revenue. The plaintiff has exhibited the Certificate of Mutation as Ext 2 and certified copy of jamabandi of the schedule land as Ext 3. On perusal of Ext 2, Mutation Certificate given by Office of Circle Officer Sadar Revenue Circle Tezpur, it is found that land measuring 2 katha 3 lessas out of 1 bigha 1 katha 1 lessas covered by patta no 47 Dag no 33 of village Geruagaon under Mouza Bihaguri has been mutated in the name of Sri Jogen Bania S/O Sri Cheniram Bania. Ext 3 Jambandi Copy of the P.P no 47 of Village Geruagaon shows the name of Jogen Bania as Pattadar no 2. Note shows that as per the order dated 21/4/2008 by Circle Officer the name of Jogen Bania has been mutated in land measuring 2 katha 3 lessas with Darani Kanta Bania.

In cross examination of PW 1 the defendant suggested that there is no statement that plaintiff has accepted the gift. The learned counsel for the defendant has submitted that there is no writing in the gift deed regarding acceptance. The learned counsel for the plaintiff has submitted that he plaintiff has accepted the gift and there is no need of writing in gift deed regarding acceptance.

In this regard this I would like to refer the case law cited by learned counsel for the plaintiff which is reported in **(2007) 13 SCC 20 Asokan vs Lakshmikutty and others. In this reported case Hon'ble Apex Court** held that " It is however beyond any doubt or dispute that in order to constitute a valid gift acceptance thereof is essential. The Transfer of Property Act does not prescribe any particular mode of acceptance. It is the circumstances attending to the transaction which may be relevant for

determining the question. There may be various means to prove acceptance of gift. The document may be handed over to done which in given situation may also amount to valid acceptance.”

Considering the above judgment and submission of learned counsel for the plaintiff this Court found force in submission of the plaintiff and this court is of the opinion that there is no need of formal writing of acceptance of gift. The done can accept the gift expressly or impliedly by conduct. In the present case the plaintiff/done has himself stated that he has accepted the gift, he had mutated his name in the suit land. Jamabandi shows him as pattadars. The plaintiff produces the Title Deed i.e Gift Deed. The PW 2 also deposed that he has seen Dharani Kanta Bania handing over the title deed to plaintiff. All these show that donee/plaintiff has accepted the gift.

Hence, Ext 1 Gift Deed is registered , signed by donor, and attesting witness and accepted by the plaintiff hence fulfils the requirement of section 122 and 123 of transfer of Property Act and same is valid and on the basis of Gift deed no 1152/2004 suit land was gifted to plaintiff who acquired right, title and interest in the suit A property of which schedule B land is a part though possession could not be proved by plaintiff. The defendant has been residing in the house constructed in the suit B premise which is part of Schedule A land premise without any right title in Suit property. As the suit land has already been gifted to plaintiff by valid Gift deed and plaintiff acquired right, title interest over the suit land A land hence defendant is to vacate the suit land possessed by him.

Considering the above discussion this issue is decided in affirmative in favour of plaintiff.

- 22. Issue no 3:- Whether the plaintiff is entitled to get the decree as prayed for?** Admittedly, defendant has been residing in the house constructed in the suit premise which is described in suit B land . As the suit land has already been gifted to plaintiff by valid registered Gift deed and plaintiff acquired right, title interest over the suit land hence the defendant

had no right title interest in the schedule B land and liable to be evicted from Schedule B land. Hence the plaintiff is entitled to the decree as prayed for.

This issue no 3 is decided in affirmative.

Order

In conclusion, the suit is decreed on contest with cost. It is declared that plaintiff has right, title and interest over the schedule A land of which Schedule B land is a part. The plaintiff is also entitled to recover the Schedule B land by evicting the defendant with his men and material. The defendant is also permanently restrained from encroaching into the suit Land after their eviction.

Prepare a decree accordingly.

This judgment and order is delivered and operative part of this judgment is pronounced in the open court today, the 2nd day of May 2015 under my hand and seal.

Munsiff No 1,
Sonitpur Tezpur

APPENDIX

(A) Plaintiff's Witness

1. PW-1 Sri Jogen Bania
2. PW 2 Sri Jayanta Bania
3. PW 3 Sri Kalpana Devi

(B)Plaintiff's Exhibits

Ext. 1 Gift deed no 1152/2004 dated 1/7/2004

Ext 1(1),1(2), 1(3) 1(4), 1(5),1(6) and Ext 1(7) are the signature of Dharani kanta Bania.

Ext 1(8) signature of Identifier Hirakjyoty Bania

Ext 1(9) signature of Hirakjyoty Bania as attesting witness.

Ext 1 (10) is signature of Kalpana Devi as attesting witness.

Ext 1(11) signature of Kalpana Devi as writer of Gift deed.Ext 2 is the Mutation Certificate in the name of plaintiff

Ext 3 is the certified copy of Jambandi Copy of the P.P no 47 of Village Geruagaon

(C)Defendants witness

DW 1 Sri Dipu Bania

DW 2 Sri Thuleswar Bora

DW3 Rohinikanta Nath

DW Sri Mohan Chandra Das.

(D) Defendants Exhibit

Ext A unregistered sale deed executed by Dip Bania in favour of defendant (written as Ext 1 in evidence of DW 1)

Ext A(1) signature of Dip Bania (written as Ext 1(2) in evidence.

Ext. A(2) signature of Dharani Kanta Bania {(written as Ext 1(2) in evidence)}

Ext A(3) signature of Thuleswar Bora (written as Ext 1(3) in evidence.)

Ext B is the Certificate of land distribution dated 19/4/1999(written as Ext 2 in evidence)

Ext.B(1) Signature of Dharani Kanta Bania(written as Ext 2(1) in evidence)

Ext B(2) signature of Dipu Bania(written as Ext 2(2) in evidence)

Ext B (3) signature of Rohinikanta Nath(written as Ext 2(3) in evidence)

Ext B(4) signature of Mohan Ch Das (written as Ext 2(4) in evidence)

Ext C to Ext C(5) are the land revenue receipt.(written as Ext 3 to Ext 3(5) in evidence)

Munsiff No 1

Sonitpur Tezpur