

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.223 of 1976

(Against the judgment and decree dated 06.12.1975 passed by the Additional Subordinate Judge, Jehanabad in Partition (Title) Suit No.51 of 1968/10 of 1975).

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Muni Lal Yadav & Ors.

.... Plaintiffs-Appellants

Versus

Ramdeni Yadav & Ors.

.... Defendants-Respondents

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Appearance :

For the Appellant/s : Mr. Anish Chandra Sinha, Advocate
Mr. Krishna Murari Rawt, Advocate

For the Respondent/s : None

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO
ORAL JUDGMENT

Date: 05-01-2015

1. This First Appeal had been filed by the original plaintiff, Smt. Sukeshiya Devi against the judgment and decree dated 06.12.1975 passed by the learned Additional Subordinate Judge, Jehanabad in Partition Suit No.51 of 1968(3rd Subordinate Judge, Gaya)/10 of 1975(Additional Subordinate Judge, Jehanabad) dismissing the plaintiff-appellant's suit. The original plaintiff-appellant died and her legal representatives have been substituted in this First Appeal.

2. The plaintiff filed the aforesaid suit for partition claiming half share in the suit property measuring about 8.58 acres. According to the plaintiff, Lohar Gope was the owner of the suit property. He died in the year 1957 leaving behind his widow,



Deorani Devi, defendant no.3, widow of predeceased son, Sanjharia Devi, defendant no.4 and two daughters i.e. plaintiff, Smt. Sukeshiya Devi and the defendant no.1, Smt. Rajkeshiya Devi. There had been no partition between the parties. The defendant nos.3 and 4 relinquished their shares in favour of the plaintiff and the defendant no.1. The plaintiff demanded partition of half share but the defendants refused to partition on the ground that during the lifetime Lohar Gope has executed a registered gift deed dated 19.02.1952 in favour of the defendant no.2 i.e. son of defendant no.1 and since then the defendant no.2 is continuing in possession of the gifted property measuring 4.2 acres.

3. The defendant nos.1, 2 and 4 have filed contesting written statement. The main defence of the contesting defendants is that the plaintiff is not the daughter of Lohar Gope. She is the sister of Sakhichand Gope, therefore, she has nothing to do with the suit property. The gift deed executed by the owner, Lohar Gope in favour of defendant no.2 is valid gift deed. So far the remaining land in the suit is concerned, their case is that certificate has already been granted by the consolidation authority in the consolidation proceedings and the plaintiff did not file any objection, therefore, this matter cannot be decided by the Civil Court.

4. On the basis of the aforesaid pleadings of the

parties, the learned trial court framed the following issues:

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- I. Is the suit as framed maintainable?
 - II. Has the plaintiffs got cause of action for the suit?
 - III. Is the suit bad for defect of parties?
 - IV. Is the suit barred by limitation, ouster and adverse possession?
 - V. Is the suit barred by estoppel, waiver and acquiescence?
 - VI. Is the suit under valued and court fee paid insufficient?
 - VII. Is the suit barred by the provisions of the Bihar Consolidation of Holding and Prevention of Fragmentation Act?
 - VIII. Is the plaintiff daughter of Lohar Gope?
 - IX. Whether the deed of gift dated 19.02.1952 allegedly executed by Lohar Gope in favour of defendant No.2 was genuine, valid and operative?
 - X. Whether the suit has abated and whether this Court has ceased to have jurisdiction to proceed with this suit?
 - XI. Is the plaintiff entitled to partition and if so, to what extent?
 - XII. To what relief or reliefs, if any, is the plaintiff entitled?

5. After trial, on the basis of the evidences, the trial court recorded a finding that the plaintiff is not the daughter of Lohar Gope. The trial court also recorded a finding that gift deed is validly executed by Lohar Gope in favour of the defendant no.2. Regarding the rest of the land, the court below recorded the finding that the certificates have already been granted in favour of the defendants and moreover, the plaintiff has been held as not the daughter of Lohar

Gope, she is not entitled to any relief. Accordingly, the plaintiff's suit was dismissed.

6. The learned counsel, Mr. Anish Chandra Sinha appearing on behalf of the appellants submitted that the court below wrongly held that the plaintiff is not the daughter of Lohar Gope. According to the learned counsel, all the witnesses examined by the plaintiff have got special means of knowledge but the learned court below without considering those part of the statements of the witnesses regarding their special means of knowledge has discarded their evidences and held that the plaintiff failed to prove that she is the daughter of Lohar Gope. According to the learned counsel, the witnesses i.e. P.W.2 to P.W.7 all are of same village and, therefore, it is expected that they knew the relationship between Lohar Gope and the plaintiff but the court below by assigning untenable reasons discarded the evidences and wrongly held against the plaintiff. The learned counsel further submitted that although, the defendants pleaded in the written statement that she is the sister of Sakhichand Gope, no reliable evidence has been adduced by the defendants in support of this case and, therefore, the finding of the court below on this question is liable to be set aside.

7. The learned counsel further submitted that at the time of execution of the registered gift deed, the mental state of Lohar



Gope was not good because of the sudden premature death of his only son, Horil Gope and, therefore, he was not in a position to know the state of affairs and the contents of the gift deed. The contents of the gift deed was never read over and explained to Lohar Gope and, therefore also, the gift deed is invalid. The learned counsel further submitted that according to the deposition of the defendant no.2, who was examined as D.W.17, his age on calculation comes to five years on the date of execution of gift deed i.e. on 19.02.1952. Therefore, the defendant no.2 was minor on the date of execution of the gift deed but in the deed, he is not represented through any guardian, as such, he never accepted the gift and came in possession of the property, therefore also, the gift deed is liable to be set aside or is liable to be ignored.

8. The learned counsel, Mr. Sinha regarding the rest of the land submitted that merely because certificate has been granted by the consolidation authority in favour of the defendants, the plaintiff's title cannot be extinguished. In other words, according to the learned counsel, the title of the plaintiff is not dependent on filing objection before the consolidation authority and moreover, the plaintiff, in the present case, has prayed for partition of the suit property on refusal by the defendants. On these grounds, the learned counsel submitted that the impugned judgment and decree be set aside

and the plaintiff's suit be decreed.

9. At the time of hearing of this First Appeal, nobody appeared on behalf of the respondents although, the names of the learned counsels are printed in the daily cause list.

10. In view of the submission of the learned counsel for the appellants, the points arise for consideration in this First Appeal are as follows:

- I. Whether the plaintiff, Smt. Sukeshiya Devi is the daughter of Lohar Gope or whether she is the sister of Sakhichand Gope?
- II. Whether the plaintiff is entitled to any share in the suit property including the property covered under the registered gift deed dated 19.02.1952, Exhibit F?

11. The plaintiff filed the suit for partition claiming half share. Her simple case is that she is the daughter of the owner, Lohar Gope. It is the case of the plaintiff that Lohar Gope died in the year 1957 leaving behind four heirs i.e. two daughters, one widow and one widow of predeceased son. Further case is that the widow of Lohar Gope and widow of predeceased son, both relinquished their shares in favour of the plaintiff. On the contrary, the defendant's case is that plaintiff is not daughter of Lohar Gope and there is no question of relinquishment arises.

12. In support of the respective cases, the parties have

adduced evidences oral as well as documentary. The plaintiff examined P.W.1. This witness has stated that Lohar Gope had two daughters. So far this witness is concerned, from perusal of the evidence of this witness, it appears that he is of different village. In his evidence, nowhere he has disclosed his special means of knowledge about the relationship of plaintiff with Lohar Gope.

13. P.W.2, Ram Ishar Singh, P.W.3, Dwarika Singh, P.W.4, Kailash Yadav, P.W.5, Sakhichand Yadav, P.W.6, Kripal Yadav, P.W.7, Chaturbhuj Yadav, all of the same village i.e. the village where Lohar Gope was residing or the suit property is situated, have in one voice stated that they know the villager, Lohar Gope who has two daughters. They also named the daughters. P.W.8 is the plaintiff and the P.W.9 is the son of the plaintiff. Both of them have stated that Lohar Gope had two daughters. It may be mentioned here that P.W.5, Sakhichand Yadav in his evidence has denied that plaintiff is his sister.

14. Hon'ble Supreme Court in the case of **Dolgobinda Paricha v. Nimai Charan Misra and others, A.I.R.1959 Supreme Court 914** has held that "Section 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of Section 50 in the sense that opinion expressed by conduct must be proved only by the person whose



conduct expresses the opinion. Conduct, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is evidence under Section 50 or by some other person acquainted with the facts which express such opinion, and as the testimony must relate to external facts which constitute conduct and is given by persons personally acquainted with such facts, the testimony is in each case direct within the meaning of Section 60. This, in our opinion, is the true inter-relation between Section 50 and Section 60 of the Evidence Act.”

15. In view of the above settled proposition of law laid down by the Hon’ble Supreme Court, the evidences of the witnesses, P.W.2 to P.W.7, who are of same village, is direct evidence of this question. Though, they are not related with Lohar Gope but being the villagers had the special means of knowledge regarding the relationship of Lohar Gope with the plaintiff and, therefore, their evidences are admissible in evidence. From perusal of the judgment of the trial court, it appears that the trial court without considering the legal position has discarded the evidences of these witnesses on merely saying that they have not disclosed the special means of knowledge. In my opinion, therefore, the learned court below has erred in discarding the evidences of witnesses, P.W.2 to P.W.7. Likewise, the court below has discarded the evidence of P.W.8, the

plaintiff herself and P.W.9, the son of the plaintiff on the ground that they are interested persons. It may be mentioned here that on this ground, the evidence of a person cannot be discarded in civil cases. Because so far relationship is concerned, they are the best person to say their relationship. In my opinion, therefore, the learned court below has wrongly discarded their evidences also.

16. In view of the above facts, I find that the plaintiff has been able to prove that she is the daughter of Lohar Gope. The finding of the trial court on this question is, therefore, reversed.

Point No.II

17. The defendant's case is that during the lifetime of Lohar Gope, he executed registered gift deed dated 19.02.1952, Exhibit F in favour of the defendant no.2. The plaintiff, in the plaint, at paragraph 5 and 6, has stated about the execution and registration of this gift deed by Lohar Gope in favour of defendant no.2. However, no relief has been claimed in the plaint with regard to this gift deed. It is admitted fact that the gift deed is registered gift deed which was executed in the year 1952 by the admitted owner, Lohar Gope. Therefore, there is no presumptive invalidity attached to the said registered gift deed. Moreover, the owner, Lohar Gope died in the year 1957 i.e. after five years of the execution of the registered gift deed.

18. Hon'ble Supreme Court in the case of **Md. Noorul Hoda v. Bibi Raifunnisa and others, (1996) 7 Supreme Court Cases 767** has held as follows:

“When the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. Section 31 of the Specific Relief Act, 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or voidable and the court may in its discretion so adjudge it and order it to be delivered or cancelled.”

19. Admittedly, in the present case, no any declaration has been sought for by the plaintiff with relation to this registered document and the simple suit for partition has been filed. The Hon'ble Supreme Court in the case of **Prem Singh vs. Birbal, (2006)5 Supreme Court Cases 353** has held that “there is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption.”

20. As stated above, since the execution of the gift



deed, the owner was alive for five years but he never challenged the said gift deed. The Hon'ble Supreme Court in the case of **Abdul Rahim and others v. Sk. Abdul Zabar and others, A.I.R. 2010 Supreme Court 211** has held that a suit for cancellation of transaction whether on the ground of being void or voidable would be governed by Article 59 of the Limitation Act. The suit, therefore, should have been filed within a period of three years from the date of knowledge of the fact of the transaction. Admittedly, the executant of the deed never challenged the registered deed of gift. The plaintiff also never challenged date of gift and, therefore, after expiry of the limitation period, in a simple suit for partition, this question about the genuineness of the gift deed cannot be examined.

21. This Court in the case of **Sita Sharan Prasad vs. Manorma Devi, 2012(2) BLJ 165**, has held that “a registered document cannot be said to be void ab initio. There cannot be presumptive invalidity attached to such a transaction. Such document remains valid, on the principle that the apparent state of affairs is the real state of affairs, until the facts invalidating the same are established.”

22. In view of the above settled proposition of law, so far the genuineness or invalidity of the registered gift deed, Exhibit F is concerned, the same cannot be examined in this simple suit for



partition particularly when no relief of any declaration with regard to the gift deed has been claimed by the plaintiff. Therefore, the learned court below has rightly held that the gift deed is the valid gift deed. In such circumstances, so far the property covered by the gift deed cannot be the subject matter of partition. So far the remaining property is concerned, the plaintiff is claiming half share in the property. The defence of the defendants is that certificate has been issued by the consolidation authority with regard to the said property. I have already found above that the plaintiff is the daughter of Lohar Gope. Therefore, on the death of Lohar Gope, she is entitled to inherit 1/4th share. Although, the plaintiff pleaded in the plaint that the defendant nos.3 and 4 relinquished their shares in favour of the plaintiff and the defendant no.1, no reliable evidence has been produced. It is settled principles of law that the share can be relinquished only by execution of a registered document. Moreover, in the present case, the defendant no.4 is contesting the case of the plaintiff. Admittedly, on the death of Lohar Gope in the year 1957, his widow, two daughters and the widow of predeceased son being the class I heir inherited equal share in the suit property. No document has been produced by the plaintiff in support of the fact that the defendant nos.3 and 4 ever relinquished their shares in favour of the plaintiff. Moreover, according to the plaintiff herself, there had been



no partition with respect to the suit property. Therefore, there is no question of relinquishment arises. Now, therefore, on the death of Lohar Gope, plaintiff will inherit $1/4^{\text{th}}$ share in the remaining suit property. Admittedly, the widow of Lohar Gope who was defendant no.3 also died during the pendency of the suit, therefore, her share will devolved on her two daughters i.e. plaintiff and defendant no.1 according to Section 15 and 16 of the Hindu Succession Act, 1956 equally. Therefore, the plaintiff's share will be $1/4^{\text{th}} + 1/8^{\text{th}} = 3/8^{\text{th}}$. The plaintiff is, therefore, entitled to this share in the remaining land of the suit i.e. excluding the lands of the gift deed.

23. So far the case of the defendants that certificate has been granted in their favour by the consolidation authority is concerned, in my opinion, it will not disentitle the plaintiff from claiming the share. In other words, the plaintiff's title cannot be extinguished for not filing objection or claiming share before the consolidation authority.

24. Admittedly, in this case, the defendants have not claimed title by adverse possession. There is also no pleading or evidence of ouster. Therefore, possession of one co-sharer is possession of other co-sharer. In such circumstances, even if the plaintiff was residing in her Sasural, it cannot be said that her title in the suit property excluding the land of gift deed extinguished because

she is not in possession of the property. I, therefore, find that the plaintiff has been able to prove unity of title and unity of possession with respect to the remaining portion of the suit property excluding the land of the registered gift deed, Exhibit F.

25. From perusal of the judgment of the trial court, it appears that the learned trial court has not at all considered all these aspects of the matter and has dismissed the plaintiff's suit on the ground that the plaintiff is not the daughter of Lohar Gope. Therefore, the finding of the trial court on this point is thus, reversed.

26. In the result, the First Appeal is allowed in part. The judgment and decree passed by the trial court is modified to the extent indicated above and it is held that the plaintiff is entitled to get 3/8th share in the suit property excluding the property covered under Exhibit F. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

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