

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.310 of 1985

(Against the judgment and decree dated 28.02.1985 passed by Subordinate Judge-III, Gaya in Partition Suit No.30 of 1983)

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Abbas Mian @ Lal Mian & Ors.

.... Defendant nos.1 to 4-Appellants
Versus

Naina Khatoon @ Pappi & Ors.

.... Plaintiffs-Respondents

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Appearance :

For the Appellants : Mr. Binod Kumar Singh, Advocate.

Mr. Rama Singh, Advocate.

Mr. Mrigendra Kumar, Advocate.

Mr. Sushil Kumar, Advocate.

For the Respondents : Mr. Yogendra Mishra, Advocate.

Mr. Ramesh Kumar Choudhary, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 07-04-2015

The contesting defendants have filed this first appeal against the judgment and preliminary decree dated 28.02.1985 passed by learned Subordinate Judge-III, Gaya in Partition Suit No.30 of 1983 whereby the plaintiffs' suit for partition to the extent of 70 paise share in the suit land has been decreed.

2. The plaintiffs filed the aforesaid partition suit claiming partition of 70 paise share alleging that Budhan Kungara had two sons, namely, Dukhi Mian and Bhukhi Mian. Dukhi Mian had a son Mangtu Mian, whereas Bhuki Mian had two sons and one daughter, namely, Nathun Mian, Janglu Mian and Bibi Basiran. It may be

mentioned here that Bibi Basiran has been added subsequently by amendment. This Bibi Basiran was defendant no.5. Nathun Mian died on 29.01.1981 leaving behind widow Bibi Sabiran but she also died on 20.02.1983 leaving behind the plaintiff no.1, Bibi Sakina Khatoon and his daughter Asma khatoon is plaintiff no.2. The contesting defendants-appellants represented the branch of Janglu Mian.

3. The further case of the plaintiffs is that Nathun Mian was working at Kulti in Burdwan district and the plaintiff was living with her husband at Kulti as her husband was also employed there. Mangtu had divided his property. Schedule-A land of the plaint was allotted to Nathun Mian and Janglu Mian. Since the plaintiffs were residing at Kulti, the cultivation work of the land of their share was entrusted to the defendants. However, after death of Nathun Mian, taking advantage of helplessness of the plaintiffs, the defendants filed the mutation application claiming mutation of their names alleging that Nathun Mian died long ago and they are the only heirs. Nathun Mian had executed Baxisnama in their favour. Accordingly, without notice to the plaintiffs, mutation was done. Plaintiff no.1 has purchased 20 paise share of Baxisnama through registered sale deed dated 23.10.1983 and it is false to say that Sabiran died on 20.02.1983. According to the plaintiffs, they have got 70 paise share in the suit property.

4. The contesting defendants-appellants filed written statement mainly contending that prior to death, Nathun Mian and Janglu Mian both were working at Kulti where out of their common earning they acquired 1 Bigha and odd land and constructed a pucca house. After death of Janglu Mian, Nathun Mian gifted his half share to defendant nos.2 and 3 out of love and affection before many respectable persons and got duly executed *yaddast* dated 20.05.1977 and put them in possession. Therefore, the defendant nos.2 and 3 got their names mutated, as such, the plaintiffs have got no concern with the suit property and they are not entitled to any share.

5. On the basis of the aforesaid pleadings of the parties, the learned court below framed the following issues:

- (i) Is the suit as framed maintainable?
- (ii) Whether the plaintiffs have got cause of action for the suit?
- (iii) Whether the court fee paid is insufficient and the plaintiffs are required to pay ad valorem court fee on the market value of the suit properties?
- (iv) Whether Nathun Mian gifted his half share in favour of defendant no.2 and 3 on 20.05.1977 and put them in possession of the suit lands?
- (v) Whether the plaintiffs have got unity of title and possession with the defendants with respect to the suit properties?
- (vi) Whether the plaintiffs are entitled to a decree for partition of their share as claimed or not?
- (vii) To what relief or reliefs, if any, are the plaintiffs entitled?

6. The learned court below disbelieved the case of oral

gift of the defendants by Nathun Mian. The court below also recorded the finding that in view of Section 26A read with section 12 of the Bihar Tenancy Act the oral gift with regard to agricultural land could not have been made at this stage, even there was oral gift, it is void. Accordingly, the plaintiffs' suit was decreed.

7. The learned counsel Mr. Binod Kumar Singh appearing for the appellants submitted that the learned court below has not at all appreciated the oral evidences produced by the appellants in support of oral gift. Almost all the witnesses examined by the defendants-appellants have stated that in their presence oral gift was made by Nathun Mian and then *yaddast* paper was prepared. On these grounds the impugned judgment and decree are liable to be set aside. Secondly the learned counsel submitted that the learned court below without considering the Mohammedan Law whereby the oral gift is valid wrongly held that oral gift could not have been made by Nathun Mian. According to the learned counsel, the custom and usages of Mohammedan shall prevail in the present case. The learned court below has, therefore, wrongly held that the oral gift was void. Section 12 and Section 26A of the Bihar Tenancy Act are not applicable in the present case. On these grounds the learned counsel submitted that the impugned judgment and decree be set aside by allowing the first appeal and the plaintiffs-respondents' suit for

partition be dismissed.

8. On the other hand, the learned counsel Mr. Yogendra Mishra appearing on behalf of the plaintiffs-respondents submitted that although there is pleading in the written statement that in presence of many respectable persons the oral gift was made but there is no supporting evidence. On the date of gift Nathun Mian had his widow and daughter but according to the defendants he gifted his property to the defendants without making any provision for either himself or for his widow and daughter, which clearly creates a doubt about genuineness of the alleged oral gift. Secondly the learned counsel submitted that none of the witnesses examined by the appellants have stated about the oral gift in their presence. Their evidence is only regarding execution of *yaddast*. When there was no oral gift, there is no question of *yaddast* arises. Moreover, in view of Section 26A read with Section 12 of the Bihar Tenancy Act the gift without registered document with regard to agricultural land will be a void transaction as has been held by this Court in the case of **Mt. Bibi Sharifan Vs. Sheikh Salahuddin and others, A.I.R. 1960 Patna 297**. Therefore, the learned court below has rightly held that oral gift is a void transaction. On these grounds the learned counsel submitted that the first appeal is liable to be dismissed with exemplary cost.

9. In view of the above submission of learned counsels

for the parties the point arises for consideration is as to whether Nathun Mina orally gifted his half share in the suit property in favour of contesting defendants-appellants and whether the defendants-appellants derived title through the said oral gift and whether the impugned judgment and decree of the trial court are sustainable in the eye of law?

10. It appears that so far share is concerned, there is no dispute between the parties. There is no dispute between the parties regarding the heir-ship. Admittedly the plaintiffs represent the branch of Nathun Mian whereas the defendants represent the branch of Janglu Mian. It is also admitted fact that the plaintiffs purchased 20 paise share of defendant no.5. The only dispute raised by the defendants-appellants is that out of love and affection Nathun Main orally gifted his half share in the suit property in favour of the defendants. At paragraph 14 of the written statement it is specifically pleaded that “Nathun Mian out of love and affection gifted his half share in the suit property to defendant nos.2 and 3 before Abdul Jabbar, Abdul Aziz Mian, Jaddu Mahton, Rajendra Kumar Singh, Md. Idris and other co-villagers and to memorize the same gave a duly executed *yaddast* dated 20.05.1977 to the defendant nos.2 and 3 and put them in possession of the same. The plaintiffs have denied regarding any such oral gift in the evidence.

11. It may be mentioned here that since the defendants are trying to displace the natural succession of the property on the basis of oral gift, the burden is on them to prove this fact. In support of their case of oral gift the defendants examined D.W.1 Rajendra Singh. He has stated that Nathun Mian had gifted to Abbash and Israfil, who accepted the gift and came in possession. Thereafter paper was executed. It may be mentioned here that according to the pleading in the written statement oral gift was made in presence of this witness. However, nowhere he has stated about the oral gift in his presence. The evidence of D.W.4 is also the same. He has also stated that Nathun Mian gifted to two brothers and gave them possession. Thereafter Baxisnama was written in his presence. D.W.5 and D.W.6 have also stated the same thing. The alleged Baxisnama i.e. so-called *yaddast* has not been marked as exhibit. None of the witnesses have stated about when the oral gift was made and when possession was delivered because according to the evidences, possession was delivered and thereafter paper was executed. None of the witnesses examined have stated that oral gift was made in their presence and thereafter the gift deed was executed. From reading of the evidences it appears that almost all the witnesses have stated the same line that Nathun Mian gifted his half share and gave possession and then paper was executed in their presence.



12. As stated above the admitted fact is that Nathun Mian died in the year 1981 i.e. four years after the alleged gift. Widow and daughter were with Nathun Mian. There is no explanation as to why one will give in gift all his agricultural land without making any provision either for himself or for his wife and daughter. Although it is stated that the gift was made out of love and affection but can it be believed that Nathun Mian had no love and affection with his wife and daughter or that he had got more love and affection in favour of defendant nos.2 and 3 than his wife and daughter? This conduct alleged by the defendants appears to be doubtful.

13. The second aspect of the matter is that if in fact gift was made in their favour in the year 1977 why they did not file mutation petition. Mutation petition was filed only after the death of Nathun Mian.

14. Learned counsel Mr. Binod Kumar Singh for the appellants submitted that there is no dispute that the appellants continued in possession of the land. So far this submission is concerned, it is the case of the plaintiffs also that they were residing at Kulti and they had entrusted the cultivation work in favour of defendants. Now, therefore, if there was no oral gift then merely because the defendants are in possession, valid gift cannot be presumed.

15. On the contrary, it appears that the plaintiffs have also examined 25 witnesses in support of the fact that after death of Nathun Mian, the widow and daughter were in possession of the property. However, who is in possession of the property is not material here because the suit has been filed for partition. The defendants are claiming on the basis of oral gift. The pleading is otherwise as stated above but there is no specific evidence regarding in whose presence and when and where the oral gift was made.

16. In view of my above discussions I find that the defendants have failed to prove the oral gift made by Nathun Mian of his half share in favour of defendant nos.2 and 3.

17. Section 12 of the Bihar Tenancy Act, 1885 reads as follows:

Voluntary transfer of permanent tenure.(1) A transfer of a permanent tenure by sale, gift, exchange or mortgage (other than a transfer by a sale in execution of a decree or by summary sale under any law relating to patni or other tenures) can be made only by a registered instrument.

(2) A registering officer shall not register any instrument purporting or operating to transfer by sale, gift, exchange or usufructuary mortgage a permanent tenure unless there is paid to him in addition to any fee payable under the law for the time being in force for the registration of documents, a process-fee of the prescribed amount and a fee (hereinafter called the landlord's registration fee) together with the costs necessary for the transmission of the landlord's registration fee to the landlord.

18. Section 26A of the Bihar Tenancy Act, 1885 reads as follows:

Transfer and bequest of occupancy-holdings or portions thereof.-(1) Every occupancy-holding or a portion thereof, together with the right of occupancy therein, shall be capable of being transferred and bequeathed in the same manner and to the same extent as other immovable property, and all transfers made by sale, exchange or gift and all bequests shall, subject to the provisions of sub-section (2), be binding on the landlord.

(2) Every transfer of an occupancy-holding or a portion thereof together with the right of occupancy therein, by sale, exchange or gift and every bequest of such holding or portion, together with the right of occupancy therein, shall be made in the same manner and subject to the same conditions as a permanent tenure in respect of registration and the payment of landlord's registration fee.

19. In view of the above provisions of the Bihar Tenancy Act every transfer of occupancy holding or a portion thereof has to be made only by a registered document whether it be sale, exchange or gift made by either a member of any community.

20. These provisions have been interpreted by this Court as far back as in the year 1960 in the case of **Mt. Bibi Sharifan Vs. Sheikh Salahuddin and others, A.I.R. 1960 Patna 297**. It has been held in this decision that a Mohammedan cannot transfer his occupancy holding by oral gift in contravention of the provisions of

Section 26A read with section 12 of the Bihar Tenancy Act. The rule of Mohammedan Law that a Mohammedan can make oral gift does not apply to occupancy holding. Section 26A read with section 12 of the Bihar Tenancy Act override this rule of Mohammedan Law.

21. In view of this position the oral gift will be invalid, illegal and ineffective and will be *nonest* in the eye of law. It will never confer any title. Therefore, the learned court below has rightly held that the so-called oral gift is void transaction. I, therefore, hereby confirm the finding of the trial court on this point.

22. In view of my above discussions I find no merit in this first appeal. It appears that the defendants made a frivolous defence with a view to grab the property of the plaintiffs, who are helpless ladies and they have been able even to drag them up to the High Court. In my opinion, therefore, the appellants are liable to pay cost. The Hon'ble Supreme Court in the case of **Salem Advocate Bar Association, T.N. Vs. Union of India, (2005) 6 Supreme Court Cases 344** has held as follows:

“Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite Section 35(2) CPC. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, wherever costs are

awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for costs to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direction otherwise by recording reasons therefor.”

23. In the result, this first appeal is dismissed with cost of Rs.10,000/- to be paid by the appellants to the plaintiffs-respondents within two months failing which the plaintiffs-respondents will be at liberty to realise the same through the process of the Court.

(Mungeshwar Sahoo, J)

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