

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.28 of 1987

Against the judgment and decree dated 19.09.1986 passed by 2nd Additional Subordinate Judge, Siwan in Title Suit No.241 of 1981/69 of 1986.

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Anita Verma & Ors.

.... Plaintiffs-Appellants

Versus

Saroj Devi & Ors.

.... Defendants-Respondents

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Appearance :

For the Appellants : Mr. Anshay Bahadur Mathur, Advocate.

For the Respondents : Mr. Satendra Narayan Singh, Advocate.

Mrs. Raina Kumari, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 16-10-2015

The plaintiffs have challenged the impugned judgment and decree dated 19.09.1986 passed by learned 2nd Additional Subordinate Judge, Siwan in Title Suit No.241 of 1981/69 of 1986 whereby the plaintiffs-appellants' suit has been dismissed.

2. It appears that the plaintiffs-appellants filed the aforesaid suit for partition of the suit property claiming 4/5th share alleging that the common ancestor of the parties was one Jagdeo Sahay, who had four sons, namely, Gulab Sahay, Raja Prasad, Ramjee Prasad and Thakur Prasad. Out of them, Gulab Sahay, the first son, died before survey leaving behind his wife Rajkali Kuwar. Ramjee Prasad died in the year 1921 without any issue. The remaining two brothers inherited the property of Jagdeo Sahay. Raja Prasad has five

sons. Out of them the first son Bhagwan Prasad and his two daughters are defendants whereas the other four sons are plaintiffs in the case.

3. The further case is that after death of Ramjee Prasad in the year 1921, there was partition and the suit land came in possession of the heirs of Raja Prasad and defendant no.1 Bhagwan Prasad was the karta. The plaintiffs were residing outside in connection with their service, so taking advantage Bhagwan Prasad transferred many properties in favour of defendant 2nd party and lastly Bhagwan Prasad got a fictitious deed of gift executed by Rajkali Kuwar, wife of Gulab Sahay and lay false claim over the suit properties. There was partition through panches who gave award but defendant 1st party did not agree with the terms of the award in the suit for partition.

4. Only defendant no.1 filed contesting written statement alleging that Gulab Sahay was separate from his brothers, so after his death Rajkali Kuwar succeeded to the properties left by Gulab Sahay. She executed the deed of gift in favour of defendant no.1 in the year 1946. Bhagwan Prasad, the defendant no.1, thereafter gifted the properties to his two daughters in the year 1978. After vesting the daughters have been mutated, therefore, there is no unity of title and possession between the parties. The suit was barred under Section 32 of the Arbitration Act.

5. On the basis of the aforesaid pleadings of the parties the

court below framed the following issues:

- (i) Is the suit as framed maintainable?
- (ii) Have the plaintiffs any cause of action for the suit?
- (iii) Is there unity of title and community of possession in between the plaintiffs and defendants over the land in suit and if so are the plaintiffs entitled to 4/5th share in it?
- (iv) To what relief or reliefs, if any, are the plaintiffs entitled?

6. After trial the learned court below came to the conclusion that Gulab Sahay was separate from his brothers and after his death Rajkali Kuwar inherited the properties in suit and transferred the land in favour of Bhagwan Prasad, who in turn, transferred it in favour of his two daughters by deed of gift. Thus, there is no unity of title and community of possession between the plaintiffs and the defendants and accordingly dismissed the plaintiffs' suit.

7. Learned counsel Mr. Anshay Bahadur Mathur for the appellants submitted that the appeal can be disposed of on the question of law only and evidences are not required to be gone into. According to the learned counsel, the husband of Rajkali Kuwar namely Gulab Sahay died prior to survey. Admittedly survey was held in the year 1919, therefore, Gulab Sahay died prior to 1919. There is no dispute about this fact by the defendants. On the death of Gulab Sahay even if it is held that he was separate, the property will go to his widow Rajkali Kuwar no doubt but she will not be entitled to



transfer the property. She will not be the absolute owner. The succession to the property of Gulab Sahay will be governed by old Hindu Law. No doubt, there is no specific pleading either by the plaintiffs or by the defendants but the witnesses have specifically stated in the evidence that Rajkali Kuwar died in the year 1950. This fact is admitted by D.W.2 in his cross-examination who has specifically stated that Rajkali Kuwar died in the year 1950. P.W.1 in paragraph 9 also stated that Rajkali died in the year 1950. In view of the above facts even if there was any gift, will operate till her death only and not thereafter. In old Hindu Law the widow had no right to even sell the property without legal necessity. Here, there is no question of any legal necessity arises because the property has been gifted by Rajkali Kuwar in the year 1946 in favour of defendant no.1. In such circumstances, the gift made by Rajkali Kuwar will be only for her life and not beyond that and after her death the property will revert to the reversioners, and the plaintiffs including the defendant no.1 are the reversioners of Gulab Sahay. The learned counsel further submitted that the court below has not considered this pure question of law and has dismissed the plaintiffs' suit. The learned counsel relied upon various decisions of this Court as well as of the Supreme Court. I will discuss the decisions later on.

8. On the other hand, learned counsel Mr. Satendra

Narayan Singh for the respondents submitted that none of the decisions relied upon by the appellants are applicable in the present case. It is not the case pleaded by the plaintiffs that Rajkali Kuwar died in the year 1950. Therefore, even if there is evidence, the same cannot be looked into. According to the learned counsel, she in fact died after 1959. The learned counsel further submitted that after coming into force of the Hindu Succession Act, 1956 by virtue of Section 14 the widow will become the absolute owner of the property possessed by her and, therefore, she became the owner of the entire property of her husband.

9. The learned counsel in support of his contention relied upon **A.I.R. 1959 SC 577 (Gummalapura Taggina Matada Kotturuswami Vs. Setra Veeravva and others)** and **A.I.R. 1966 SC 216 (Radha Rani Bhargava Vs. Hanuman Prasad Bhargava)** on this point. Further learned counsel submitted that the plaintiffs even after coming to know the fact of gift executed by Rajkali in favour of defendant no.1 and the gift executed by defendant no.1 in favour of his two daughters never prayed for any declaration with respect to the above two gift deeds. Therefore, unless the gift deeds are set aside, the plaintiffs are not entitled to any share in the property of Gulab Sahay which is in possession of two daughters of defendant no.1. According to the learned counsel, even if the plaintiffs are reversioners then also



it is for them to pray for setting aside the gift deed and pray for recovery of possession but in the present case no declaration has been sought for. Therefore, the suit itself was not maintainable which is filed for partition only. According to the learned counsel, the gift deeds are hurdle in the way of plaintiffs' title and unless the plaintiffs avoid the gift deeds, the suit with respect to the property covered by gift deed is not maintainable. So far other properties are concerned, the learned counsel submitted that the defendant no.1 has got no objection for partition of the other properties.

10. In view of the points raised by learned counsel for the parties, the only point arises for consideration in this first appeal is whether the plaintiffs are entitled for a decree for partition in the present case with respect to the property covered by gift deed executed by Rajkali Kuwar in favour of defendant no.1, who in turn gifted the same to his two daughters and whether the impugned judgment and decree are sustainable in the eye of law or not?

11. Admittedly Gulab Sahay died prior to 1919 leaving behind his widow Rajkali Kuwar. No doubt, there is no pleading regarding the year of death of Rajkali but the defendant witness D.W.2 has stated that he knows both the parties. Gulab Sahay was separate from his brothers and after his death Rajkali Kuwar came in possession of the property and in the very first line of his cross-



examination he clearly stated that Rajkali Kuwar died in the year 1950. It may be mentioned here that this is the witness produced by the defendants themselves. There is no contrary evidence or facts or material brought on record by the defendants. P.W.1 also in paragraph 9 of his cross-examination stated that till 1950 wife of Gulab was alive. The defendants themselves have obtained this statement in the cross-examination. Now, therefore, according to the defendants themselves Rajkali Kuwar died in the year 1950. No doubt, it is not the case of the plaintiffs but what has been stated in the cross-examination by P.W.1 is not denied by the defendants and likewise D.W.2, who is defendant witness, also stated the same thing. In such circumstances now it becomes admitted fact that Rajkali Kuwar died in the year 1950 and her husband had died prior to 1919.

12. Now in view of this position, let us examine the right of Rajkali Kuwar over the property of Gulab Sahay.

13. The Hindu law by Mulla Article 43 lays down the order of succession. The Entry Nos.1 to 3 are sons, grandsons, great grandsons and after 14th April, 1937 the widow, predeceased son's widow and predeceased son's predeceased son's widow. Prior to 1937 the widow was taking the estate of her husband as limited interest as has been provided in Entry No.4 of Article 43 aforesaid. On her death the estate goes not to her heirs but to the next heirs of her husband,



who are technically called reversioners. In this present case the plaintiffs as well as the defendant no.1 are the reversioners of the husband of Rajkali. She was entitled only to the income of the property inherited by her. She had no power to dispose of the corpus of the property except in certain cases i.e. she may alienate her life interest in the estate for legal necessity only. After coming into force of the Hindu Women's Right to Property Act, 1937, same right as that of her husband was given to her but then also no right to transfer the property was given. In other words, there was restriction on the right of the widow to transfer the property and that's why it was called limited owner or the widow's estate. After coming into force of Hindu Succession Act, 1956 in view of Section 14 widow became the absolute owner of the property possessed by her. In the present case in view of the above facts since Rajkali Kuwar died in the year 1950, there is no question of absolute ownership of Rajkali Kuwar arises. The possession prior to 1937 was clear to the effect that where a Hindu dies leaving only one widow, she can alienate her life interest in the property inherited by her from her husband but she cannot alienate the corpus of the property except for legal necessity. An alienation of the corpus except for legal necessity does not bind the next heirs of her husband who succeed to his estate after the widow's death. In this connection the illustration given in Article 168 of Hindu



Law by Mulla 20th Edition is very clear. It says that according to all the schools other than the Bombay School, a female inheriting to a male is not a full owner of the property inherited by her. Her power to deal with the property is limited. She cannot alienate it except for legal necessity. Nor does she become a fresh stock of descent. At her death, the property passes not to her heirs, but to the next heirs of the last full owner. Reference also be made to Articles 169, 176, 179 to 181, 181B and 185 of the said Hindu Law. Article 176 referred to many decisions of various High Courts and Supreme Court and thus summarized that a widow or other limited heirs is not a tenant for life, but is owner of the property inherited by her, subject to certain restrictions on alienation, and subject to its devolving upon the next heir of the last full owner upon her death.

14. Hon'ble Supreme Court in the case of **Jaisri Sahu Vs. Rajdewan Dubey and others, A.I.R. 1962 SC 83** as well as in the case of **Gogula Gurumurthy and others Vs. Kurimeti Ayyappa, A.I.R. 1974 SC 1702** has held that the right of widow is of the nature of a right of property, her possession is that of owner, her power in that character are, however, limited, but so long as she is alive no one has any vested interest in the succession. Again in the case of **Kalishanker Das and another Vs. Dhirendra Nath and others, A.I.R. 1954 SC 505** it has been held that a widow under the Hindu



Law takes a special and qualified estate and she has a limited power of disposition of her husband's property. The restrictions on her power of alienation are inseparable from her estate and their existence does not depend on that of heirs capable of taking on her death. If, for want of heirs, the right to the property passes to the government, the government has the same power that an heir would have of protecting its interests by impeaching any unauthorized alienation by the widow. From the above settled principles now it becomes clear that the expression "widow's estate" implies a limited estate. A female takes absolute estate in her *stridhan* but she takes a qualified estate in property inherited by her. When she takes a qualified estate, it is said that she takes a widow's estate.

15. So far decisions relied upon by the learned counsel for the respondents are concerned, all these decisions have been referred to and discussed by the Supreme Court in the case of **Kalawatibai Vs. Soiryabai and others, A.I.R. 1991 SC 1581** and at paragraphs 12 and 13 it has been held as follows:-

“12. Limited owner commonly means a person with restricted rights as opposed to full owner with absolute rights. In relation to property absolute, complete or full ownership comprises various constituents such as the right to possess, actual or constructive, power to enjoy, that is to determine manner of use extending even to destroying, right to alienate, transfer or dispose of etc. Any restriction or limitation on exercise of these rights may result in limited or qualified ownership. For instance restriction on enjoyment of property or its alienation. Such restriction or



limitation may arise by operation of law or by deed or instrument. The limited ownership of female Hindu in Hindu Law arose as a matter of law. A Hindu widow, according to different schools, Banaras, Bengal or Mithila and even in Bombay inherited or succeeded to property whether of male or female as a limited owner and held limited estate only. Nature of such estate was explained by the Privy Council in *Janki Ammal v. Narayanaswami*, (1916) 43 Ind App 207: (AIR 1916 PC 117) to be "her right is of the nature of a right to property, her powers in that character are limited". In *Jaisri v. Raj Diwan Dubey*, (1962) 2 SCR 558: (AIR 1962 SC 83) it was observed by this Court that "when a widow succeeds as heir to her husband the ownership in the property both legal and beneficial vests in her". And the restriction on her power to alienate except for legal necessity is imposed, "not for the benefit of reversioners but is an incident of estate". Thus a Hindu widow Prior to 1956 held the property fully with right to enjoy or even destroy or dispose it of or alienate it but such destruction or alienation should have been impressed with legal necessity or for religious or charitable purposes or for spiritual welfare of the husband. Necessary consequences that flowed from an alienation for legal necessity was that the property vested in the transferee or alienee, and the reversioners were precluded from assailing its validity. In *Kamala Devi v. Bachu Lal Gupta*; 1957 SCR 452 : (AIR 1957 SC 434), this Court after reviewing various authorities extended this principle to female done. A gift made within reasonable limits, in favour of daughter even two years after the marriage but in pursuance of promise made at time of the marriage was up held and the reversioner's claim was repelled on permissible alienation under Hindu Law. But what right or title is acquired by the alienee if transfer is against legal necessity or contrary to law? The authorities appear to be at one that such transfer being not void but voidable could be avoided by reversioners including Govt. taking by escheat (*Collector of Masulipatam v. Cavalry Venkata*. (1861) 8 Moo Ind App 529). But the widow was held bound by the transfer.

In *Natwarlal Punjabhai v. Dadubhai Manubhai*, AIR 1954 SC. 61 the Court held as under. (at p. 68):-

"The Hindu Law certainly does not



countenance the idea of a widow alienating her property without any necessity merely as a mode of enjoyment as was suggested before us by Mr. Ayyangar. If such a transfer is made by a Hindu widow it is not correct to say that the transferee acquires necessarily and in law an interest commensurate with the period Of the natural life of the widow or at any rate with the period of her widowhood. Such transfer is invalid in Hindu Law, but the widow being the grantor herself cannot derogate from the grant and the transfer cannot also be impeached so long as a person does not come into existence who can claim a present right to possession of the property.”

“13. Thus if prior to 1956 any alienation was made by a Hindu widow of widow's estate prohibited by law or being beyond permissible limits, it stripped the widow of her rights and she could not acquire any rights under Section 14. And so far as alienees were concerned it could utmost create temporary and transitory ownership precarious in nature and vulnerable in character open to challenge if any attempt was made to cloud reversioner's interest. Her possession may be good against the world, her right in property may not be impeachable by the widow but her interest qua the reversioner was to continue in possession at the maximum till the lifetime of her donor or transferor. It was ' life interest, loosely, as the duration of interest created under invalid transfer came to an end not on death of donee or transferee but donor or transferor. So far as the male alienees from, limited owners, that is female Hindu prior to 1956 are concerned, it was held by this Court, in Radhey Krishan Singh v. Shiv Shankar Singh, (1973) 2 SCC 472 : (AIR 1973 SC 2405), that, the Alienation could be challenged by the reversioner as there was nothing in the Hindu Succession Act which has taken away such a right. A female alienee did not enjoy, better or different status as the Hindu Law applied universally and uniformly both to male and female alienees. She did not become limited owner or holder of a limited estate as understood in Hindu Law. And the alienation without legal necessity could be assailed by the reversioner. No change was brought about in this regard by the Act. If the alienation was valid i.e., it was for legal necessity or permitted by law then the donee became an owner of it and the right and title in the property vested in her. But if

it was contrary to law, as in this case-the gift being of entire widow's estate, then it did not bind the reversioner who could file a suit after the death of the widow. And the appellant cannot claim to have acquired title to the property, under the gift deed. Nor had she become a limited owner under Hindu Law which could mature into full ownership when the Act came into force. In fact such possession was not backed by any title as against reversioner which could preclude her from bringing the suit for declaration.”

16. Here, admittedly the gift has been made by Rajkali Kuwar of entire widow's estate, therefore, it will not bind the reversioners, who have filed the suit for partition of their share. Therefore, the gift made by her cannot be termed as for legal necessity. At best this gift will be binding on the reversioners during her lifetime only. After her death because the gift was against the law, the reversioners can ignore it and may file suit for recovery of possession which is the position in the present case, at our hand, as the plaintiffs have filed the suit for partition i.e. for recovery of possession of their 4/5th share.

17. So far the submission of learned counsel for the respondents that the plaintiffs-appellants have not sought for any declaration in relation to the gift deeds of the year 1946 and 1978 is concerned, it may be mentioned that in the decision of **Kalawatibai** (supra) the Supreme Court has held that if it was contrary to law, as in the case of gift of entire widow's estate, then it did not bind the

reversioner who could file a suit after the death of the widow for recovery of possession treating the gift as nullity. In **A.I.R. 1966 SC 216 (Radha Rani Bhargava Vs. Hanuman Prasad Bhargava)** the Supreme Court has held that in the case of an alienation by a Hindu widow without legal necessity, the reversioners were not bound to institute a declaratory suit during life-time of the widow. They could wait till her death and then sue the alienee for possession of the alienated property treating the alienation as a nullity. This is again reiterated in the case of **Kalawatibai** (supra).

18. The learned counsel for the respondents next submitted that on the date of commencement of Hindu Succession Act, 1956 the donee, defendant no.1 was continuing in possession of the property gifted to him and, therefore, the benefit under Section 14 of the Act available to the widow of Gulab Sahay is available to the donee, who was continuing in permissive possession. So far this submission is concerned, it may be stated that in the aforesaid decision i.e. **Kalawatibai** (supra) it has been held that the benefit of section 14 of the Act cannot be given to a donee as the right of the widow who was limited owner was extended to the absolute owner. This benefit is not available to any other person.

19. Here, in the present case the widow herself died in the year 1950. Even if it is held that she was alive on the date of

commencement of Hindu Succession Act then also this benefit under Section 14 will not be given to the donee, defendant no.1 according to the aforesaid decision. In any view of the matter whether she died in the year 1950 or after 1956, the donee, defendant no.1 will not be getting any benefit under Section 14 of the Hindu Succession Act, 1956.

20. In view of my above discussion I find that the plaintiffs are entitled to the decree for partition of their share and recovery of possession of the same. The donee, defendant no.1 is not entitled to claim absolute title on the property donated by Rajkali Kuwar and thereafter donated by defendant no.1 to his daughters. The plaintiffs are not bound by these gift deeds. Accordingly, the findings of the court below on this point are hereby reversed. Thus, the point formulated is answered in favour of the plaintiffs-appellants and against the defendants-respondents.

21. In the result, this first appeal is allowed. The impugned judgment and decree are set aside. The plaintiffs' suit for partition to the extent of their $\frac{4}{5}$ th share is hereby decreed. In the facts and circumstances of the case, there shall be no order as to cost.

Harish/-

(Mungeshwar Sahoo, J)

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