IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.152 of 2012

(Against the judgment and decree dated 26.06.2012 passed by Subordinate Judge-I, Siwan in Title Suit No.87 of 2010)

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Ramayan Pandit

.... Plaintiff-Appellant

Versus

Most. Sukha Kunwar & Ors.

.... Defendants-Respondents

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Appearance :

For the Appellant : Mr. Rajendra Narain, Sr. Advocate.
Mr.Umesh Kumar Roy, Advocate.

For Respondent nos.1 to 3 and 6 : Mr.Ranjan Kumar Dubey, Advocate.

For respondent nos.4 and 5 : Mr. Makardhwaj Upadhyay, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

ORAL JUDGMENT

Date: 21-01-2015

The plaintiff has filed this first appeal against the judgment and decree dated 26.06.2012 passed by the learned Subordinate Judge-I, Siwan in Title Suit No.87 of 2010 whereby the court below dismissed the plaintiff-appellant's suit.

2. The plaintiff-appellant filed the aforesaid suit for declaration that the gift deed dated 28.10.1980 executed by Nagina in favour of defendant no.1, Most. Sukha Kunwar is forged, fabricated, void *ab-initio* and do not affect the right and title of the plaintiff and also for partition of his 1/3rd share in Schedule-II and Schedule-III property.

3. The plaintiff claimed the aforesaid relief alleging that

Janki Kohar had two sons, namely, Tota Kohar and Mahesh Kohar. Since the branch of Mahesh Kohar is separate, the descendants and their property are not included in this present suit. Tota Kohar died prior to cadastral survey record of right leaving behind his only son Bipat Kohar. Bipat Kohar also died in 1977 leaving behind his one son Nagina Pandit and a daughter Maidi. Maidi is defendant no.4. Nagina Pandit died in the year 1982 leaving behind Ramayan Pandit (plaintiff) and the widow of Ram Barai (the second son) Sukha Kunwar, who is defendant no.1 and one daughter Sheojharo Devi (defendant no.5). Defendant nos.2 and 3 are two daughters of defendant no.1. The plaintiff further alleged that in partition between Bipat Kohar and Mahesh Kohar the Schedule-II property came in the share of Bipat Kohar, which is ancestral property of the family. After separation Bipat Kohar purchased Schedule-III property in the year 1940 and 1954 in the name of Bipat Kohar and his son Nagina Pandit. After death of Nagina Pandit in the year 1982 the parties are joint and there had been no partition. However, during the course of partition in *panchayat,i* defendant no.1 disclosed that she has got 2 Bigha land in gift executed by Nagina Pandit on 28.10.1980. Then the plaintiff obtained certified copy of the gift deed and came to know that there are many defects in the gift deed and in fact it is forged document. Nagina Pandit had no authority to execute the gift deed regarding joint family property, therefore, the gift deed itself is a void document.

4. The defendant nos.1, 2 and 3 filed written statement contesting the plaintiff's case. Their main defence is that there had already been partition between the parties and there is no unity of title and possession. So far the property mentioned in Schedule-III is concerned, the case of the defendants is that it was the property acquired by Bipat Kohar and Nagina, therefore, Nagina had half share in the property, who executed the gift deed with regard to his half share i.e. 2 Bigha land in favour of defendant no.1 in the year 1980. Therefore, the gift deed is valid and legal.

5. The defendant nos.4 and 5 also filed separate written statement alleging that there had been no partition between the parties, therefore, the property may be partitioned and they also claimed their share in the suit property. According to them also the gift deed in question is void and illegal gift deed.

6. On the basis of the aforesaid pleadings of the parties, the trial court framed various issues including the question of partition alleged by the defendants and also regarding genuineness or otherwise of the gift deed in question.

7. After trial, the trial court recorded a finding that there had already been partition between the parties. The trial court also recorded the finding that the gift deed (Ext.B) is valid and legal

document. Accordingly, the suit filed by the plaintiff has been dismissed by the impugned judgment.

8. The learned senior counsel appearing on behalf of the appellant submitted that the learned court below has not properly appreciated the evidence and wrongly held that that the gift deed is valid gift deed, although it is settled principles of law that a coparcener cannot gift his undivided property as has been held by the Hon’ble Supreme Court in the case of **Thamma Venkata Subbamma Vs. Thamma Rattamma, A.I.R. 1987 Supreme Court 1775**.

9. According to the learned senior counsel, the property was purchased in the year 1940 and 1954 in the name of Bipat Kohar and his son Nagina, therefore, on their death the property became the joint family property. Moreover, there is presumption that the properties were purchased in the name of both persons, who were only the coparceners, therefore, the property was a coparcenary property. Secondly the learned counsel submitted that it is the burden on the defendants to prove previous partition. In Ext.B itself Nagina while gifting the property stated that husband of defendant no.1 died in jointness with the present plaintiff. Therefore, the evidences produced by the plaintiff which are nothing but bald statements only regarding previous partition, could not have been relied upon by the

trial court but the learned trial court himself applied the statement contrary to the statements made in a registered gift deed and recorded a finding that there had been partition. The learned counsel further submitted that there is nothing on record to show as to when the partition took place and in the said so-called partition which property fell in the share of which party. When in Ext.B (the registered gift deed) it is stated that the husband of defendant no.1 died in jointness with his brother (plaintiff) then the presumption will be that till 1980 there was no partition. No case has been made out by the defendants that after 1980 there was any partition between the parties. In such circumstances the findings of the learned trial court on the question of previous partition is liable to be set aside.

10. On the other hand, the learned counsel appearing on behalf of the contesting defendants-respondent nos.1 to 3 and 6 submitted that the main dispute between the parties is with regard to the execution and registration of the gift deed with respect to 2 Bigha of land in favour of defendant no.1 by Nagina. According to the learned counsel, the property gifted by Nagina is the self acquired property of Nagina. No case has been made out by the plaintiff that the property was the joint family property. In fact it was the self acquired property of Bipat Kohar and Nagina. Therefore, after the death of Bipat Kohar, his half share will go to Nagina and the

daughter of Bipat Kohar, i.e. defendant no.4 (Maidi). Since the plaintiff was not the heir of Bipat Kohar and the property was not the ancestral property, the plaintiff had no share in the said property. Therefore, Nagina, who is the rightful owner of the property, has executed a registered gift deed in favour of defendant no.1. In such circumstances, there is no question of application of the decision relied upon by the appellant arises. According to the learned counsel, the plaintiff admitted in the plaint that the property mentioned in Schedule-III is purchased by Bipat Kohar and Nagina. No case has been made out that it was purchased out of the income of the joint family property. Therefore, there is no presumption that the property which they purchased is the joint family property. In such circumstances, it cannot be said that it is joint family property or ancestral property. The plaintiff became the heir only after death of Nagina in the year 1982. So far previous partition is concerned, the learned counsel submitted that the witnesses examined on behalf of the contesting defendants have specifically stated that there had already been partition between the parties and in fact the plaintiff, who has been examined as P.W.1, has also admitted in his evidence that the parties are cultivating the lands separately according to their convenience since long. The learned counsel further submitted that although there is pleading in the plaint that the plaintiff had no knowledge about the execution of the gift deed in the year 1980, the plaintiff failed to prove this fact by adducing cogent evidence. Therefore, since the gift deed is dated 28.10.1980, the suit filed in the year 2010 is barred by law of limitation because of the fact that in the present case the plaintiff has prayed for declaration with respect to the registered gift deed of the year 1980. Article 58/59 of the Limitation Act is applicable, the period of which is only three years. On these grounds, the learned counsel submitted that the appeal be dismissed with cost.

11. In view of the above rival contentions of the parties the following points arise for consideration in the present appeal:-

(i) Whether the registered gift deed dated 28.10.1980 is forged, fabricated, void, ineffective and illegal?

(ii) Whether there is unity of title and possession between the parties or there had already been partition as alleged by defendants and if no partition then what will be the share of the respective parties?

<u>Point No.(i):</u>

12. The registered gift deed dated 28.10.1980 has been produced by the defendants, which has been marked as Ext.B. From perusal of this Ext.B it appears that the same has been executed by Nagina Pandit in favour of defendant no.1, Sukha Kunwar (widow of Late Ram Barai). Ram Barai predeceased his father Nagina Pandit. The donor assigned the reason and apprehended that in future

Ramayan Pandit (the plaintiff) may not give due share to the widow, therefore, he gifted the property mentioned in the registered gift deed. From perusal of the pleadings of the parties and the evidences, it becomes clear that the properties, which are in the name of Bipat Kohar and Nagina Pandit purchased by them in the year 1940 and 1954, have only been gifted. The purchased property is mentioned in detail in Schedule-III of the plaint. Out of this Schedule-III land only 2 Bigha of land had been gifted by Nagina and this gifted land has been detailed in Schedule-IV of the plaint. It is the specific case of the plaintiff that this property was purchased by Bipat Kohar and Nagina measuring 4 Bigha, 5 Katha 3 Dhoor by paragraph 8 of the plaint. In Schedule-III also the plaintiff clearly mentioned that the property is the purchased property of Bipat Kohar and Nagina. From perusal of the plaint, it appears that except this statement that Schedule-III property has been purchased by Bipat Kohar and Nagina, there is no other statement regarding as to out of which fund the same has been purchased. However, in the plaint the plaintiff pleaded that it is the joint family property. The learned senior counsel at the time of hearing of the appeal vehemently argued that since the property was purchased by two male members of the joint family and they had no other source of income, it will be presumed that the property was purchased out of joint family fund or that out of the income from the joint family property. In such circumstances according to the learned counsel for the appellant it is for the defendants to show that in fact it was the self acquired property of Bipat Kohar and Nagina, because they had no separate source of income except the cultivation. There is presumption that the properties were purchased out of the income from the agricultural joint family land.

13. So far this submission of the learned counsel for the appellant is concerned, as stated above, there is no pleading regarding joint family fund or joint family nucleus or the case that the property was purchased out of the income from the joint family land. It is settled principles of law that when in a suit for partition, a party claims that any particular item of the property is joint family property, the burden of proving that it is so, rests on the party asserting it. To render the property joint, the plaintiff must prove that the family was possessed of some property with the income of which the property could have been acquired. It can only be brought to the cognizance of a Court in the same way as any other fact, namely, by evidence. In the present case, it is the plaintiff's case itself that it was purchased by Bipat Kohar and Nagina. Since it is the plaintiff's case that it was purchased by Bipat Kohar and Nagina, the presumption is that it is their self acquired property. There cannot be any presumption that it was the joint family acquisition. The submission of the learned

counsel regarding presumption is concerned, in my opinion, it is contrary to the pleading pleaded in the plaint. Therefore, so far Schedule-III property is concerned, it was the property of Bipat Kohar and Nagina, who had half and half share. On the death of Bipat Kohar in the year 1977, which is admitted fact, his half share in the property will go to Nagina and Maidi equally. The total area of Schedule-III land is 4 Bigha 5 Katha 3 Dhoor. Out of that, Bipat Kohar had half share which will be divided between Nagina and Maidi Pandit only half and half as on the death of Bipat Kohar, Ramayan Pandit was not the heir of Bipat Kohar.

14. The only ground raised by the appellant regarding voidability of the registered gift deed is concerned, is that the coparcener could not have gifted the joint family land. So far this submission is concerned, as stated above, this property i.e. Schedule-III property was the acquisition of Bipat Kohar and Nagina, the same cannot be considered to be either ancestral property or the joint family property. The decision relied upon by the learned senior counsel, i.e. **A.I.R. 1987 Supreme Court 1775** (**Thamma Venkata Subbamma Vs. Thamma Rattamma**) is concerned, it speaks about the right of a coparcener but in the present case, at our hand, Nagina Pandit gifted his self acquired property, therefore, the decision has got no application in the present case. Except this ground, no other ground

has been raised. In such circumstances, it cannot be said that the registered gift deed of the year 1980 is a void document. So far voidability is concerned, there is no pleading regarding the mental status of the donor or whether he was capable of executing the deed or not. Therefore, on the ground raised by the appellant the registered gift deed cannot be avoided. There is no pleading or evidence as to how this gift deed is forged deed. From perusal of the evidence of P.W.1, it appears that he admitted the fact that it was executed by his father. Nowhere case has been made out that in fact it was a forged document. The specific case of the plaintiff is that Nagina had no authority to gift the joint family property.

15. 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. In the present case, as discussed above, there is no such evidence produced by the plaintiff-appellant to show that the gift deed is in any way either illegal or ineffective or is a forged document. In view of my above discussion, I find that the gift deed (Ext.B) dated 28.10.1980 is valid, legal and has been executed by the rightful owner in favour of the donee (defendant no.1). The finding of

the court below on this question is, therefore, confirmed. From the evidence of plaintiff I find that he has specifically stated that he came to know about the deed in 2010, therefore, the suit is not barred by law of limitation.

Point No.(ii):

16. According to the plaintiff, there has been no partition with respect to the suit property. On the contrary, the case of the defendants-respondents is that there had already been partition between the parties. It is settled principles of law that Hindu family is always presumed to be joint unless the contrary is proved. In the present case, the plaintiff, who has been examined as P.W.1, categorically stated that the properties are joint and there had been no partition with respect to the suit property between the parties. On the contrary the defendants although have stated that there had been partition, no reliable evidence has been produced to show that there had been partition between the parties with respect to the suit property. It is specific case of the plaintiff that the branch of Mahesh Kohar was separate prior to the survey and, therefore, their properties are not included in the present suit. The descendants of Mahesh Kohar are also not added as party defendant. It is admitted case that only the property of Bipat Kohar, which he got in partition from Mahesh Kohar and the properties acquired by Bipat Kohar and Nagina Pandit

in the year 1940 and 1954 are the subject matter of the present suit. The defendants' witnesses including the defendant no.1, who has been examined as D.W.1, have stated that there had been partition. The manner of partition or the month or year of partition have not been specified either in the pleading or in the evidence. Therefore, only on the basis of bald statement of the witnesses the presumption of jointness cannot be rebutted.

17. Moreover, in the present case as stated above, Ext.B (the registered gift deed) which is relied upon by defendants themselves clearly proves that till the year 1980, i.e. the date of execution and registration of the gift deed, there was no partition between the parties. Nagina Pandit in this registered gift deed clearly stated that Ram Barai Pandit died in jointness with Ramayan Pandit, i.e. the plaintiff. Ram Barai Pandit is the husband of defendant no.1. Now, therefore, so far this statement made by Nagina Pandit is concerned, it is the case of the defendants. When there was no partition till this document is executed then after the year 1980 when partition took place has not been specified by the defendants. It is settled principles of law that if a thing or a state of things is shown to exist, an inference of its continuity within a reasonably proximate time both forwards and backwards may sometimes be drawn. In this case, when the fact that the family was joint till 1980 is evident from

the registered document, the said fact will continue unless the contrary is proved by the other side. As stated above, in the present case, there is no such evidence or pleading by the defendants. Therefore, I find that there had been no partition between the parties.

18. However, since I have already found that gift deed is valid and genuine gift deed, the property covered under this gift deed is not available for partition. In other words, the plaintiff and any other defendants are not entitled to any share in this gifted property other than the donee.

19. Now let us consider the share of the respective parties with respect to the properties, which are subject matter except the property covered by gift deed (Ext.B). There are two types of properties. Schedule-II property is the ancestral property. So far this property is concerned, it is coparcenary property. Therefore, Bipat Kohar, Nagina Pandit, Maidi, Ramayan Pandit (plaintiff), Sukha Kunwar (defendant no.1) and Sheojharo Devi are the coparceners. All will get 1/6 share according to notional partition. Here for determination of the share of the parties the Court has to find out the share of Bipat Kohar by notional partition. On the death of Bipat Kohar, his 1/6 share will devolve on Nagina and Maidi only, therefore, the share of Nagina will be 1/6 + 1/12 and share of Maidi will be 1/6 + 1/12 in Schedule-II property. On the death of Nagina in

the year 1982, his share will devolve on Ramayan Pandit, Sukha Kunwar and Sheojharo Devi equally. Therefore, the share of Ramayan Pandit, i.e. plaintiff will be 1/6 + 1/3rd share of Nagina Pandit and likewise same share will be of Sukha Kunwar and Sheojharo Devi.

20. So far Schedule-III property is concerned, it measures 4 Bigha 5 Katha 3 Dhoor. Out of this land the gifted property will be deducted, i.e. 4 Bigha 5 Katha 3 Dhoor – 2 Bigha = 2 Bigha 5 Katha 3 Dhoor. On the death of Bipat Kohar in the year 1977, his half share out of 4 Bigha 5 Katha 3 Dhoor will be divided equally between Nagina Pandit and Maidi Pandit. Since Nagina Pandit already gifted 2 Bigha land, his remaining share will go to Ramayan Pandit, Sukha Kunwar and Sheojharo Devi on his death in the year 1982. Therefore, Schedule-III property will be divided in this way, as stated above.

21. Since I have already held that there had been no partition, the plaintiff is entitled to the share as stated above only in Schedule-II and Schedule-III properties. The finding of the learned court below on this question is, therefore, reversed accordingly.

22. It appears that one interlocutory application being I.A. No.6794 of 2014 was filed by respondent no.1 praying for permission to sell out the land mentioned in paragraph 9 of the petition. After hearing the parties by terms of order dated 08.12.2014 it was directed that the interlocutory application shall be heard at the time of hearing

of the appeal and keeping in mind the urgency, the date of hearing of the appeal was fixed. Since I have finally heard the appeal and the judgment is being delivered deciding the rights of the parties with respect to the suit properties holding that the gifted property is not available for partition, no separate order on this interlocutory application is required to be passed, as the application has been filed for permission to sell out Schedule-IV property. Accordingly, the interlocutory application is also disposed of in terms of the judgment itself.

23. In the result, this first appeal is allowed in part. The judgment and decree of the trial court is modified to the extent that the plaintiff is entitled to his share in Schedule-II and Schedule-III property as indicated above excluding the gifted property mentioned in detail in Schedule-IV of the plaint. The plaintiff's suit for partition is, thus, decreed in part as indicated above. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

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