

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.55 of 1969

(Against the judgment and decree dated 21.01.1969 passed by 3rd
Additional Subordinate Judge, Chapra in Partition Suit No. 90 of
1963/42 of 1966.)

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Chandreshwar Nonia & Ors.

.... Appellant/s

Versus

Mosmat Sundari & Ors

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Dhruv Narayan, Senior Advocate
For the Respondent/s : Mr. Yogendra Prasad Sinha, Advocate

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**CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO**

C.A.V. JUDGMENT

Date: 01st March, 2016

This first appeal has been filed by the defendants-appellants against the judgment and decree dated 21.01.1969 passed by the learned 3rd Additional Sub-Ordinate Judge, Chapra in Partition Suit No. 90 of 1963/42 of 1966, whereby the learned court below decreed the plaintiffs' suit for partition granting 1/3rd share in the suit property.

2. It may be mentioned here that earlier, this first appeal was heard and finally disposed of on 19.01.1980. The respondents thereafter filed Letters Patent Appeal. The L.P.A. Court set aside the

judgment of the Single Judge on the ground that Order 41 Rule 31 of the Code of Civil Procedure has not been complied with and then remanded the matter for a fresh decision. Thereafter, I heard the appeal.

3. The plaintiffs-respondents filed the aforesaid partition suit praying for decree of their share to the extent of $1/3^{\text{rd}}$ in the suit property. The plaintiffs claimed the said relief of $1/3^{\text{rd}}$ share on the ground that one Gobardhan Nonia had three sons, namely, Kumar Nonia, Bhoj Noonia and Rajman Nonia. The defendants represent the branch of Kumar Nonia and Bhoj Nonia, whereas the plaintiffs are widow and daughters of Rajman Nonia. According to the plaintiffs' case, there was only separation between three brothers but, no partition by metes and bounds ever took place. After the death of Rajman Nonia in the year 1920, his widow, plaintiff No. 1 inherited the share of Rajman Nonia in the suit property. Thereafter, she on 09.08.1952, gifted the entire share to her three daughters, who are plaintiffs, by registered gift deeds. Since there was no partition, they filed partition suit.

4. The defendants filed contesting written statement. Their main defence is that Rajman Nonia had authorized his widow, plaintiff No.1 to adopt a son and plaintiff No. 1 adopted defendant No. 2 as her sons, therefore, he succeeded the entire share of Rajman

Nonia and plaintiff No. 1 had no right to gift the property to her daughters. The unity of title and unity of possession was denied. The defendants also denied the competency to execute the gift deed by plaintiff No. 1 in favour of her daughters.

5. On the basis of aforesaid pleadings of the parties, the learned trial court framed the following issues;

“Issues;

No.1. Have the plaintiffs any cause of action for the suit?

No.2. Is the suit as framed maintainable ?

No.3. Is defendant No.2 the adopted son of Rajman Nonia, as alleged by defendant No.2?

No.4 Whether plaintiff No.1 was competent to execute a deed of Bakshisnama dated 09.08.1952? If so, whether the same is genuine, valid and effective document?

No.5 Are plaintiffs entitled to a decree for partition to the extent of 1/3rd share and separate possession in respect of the lands mentioned at the bottom of the plaint?

No.6 To what relief, if any, 07985338 are plaintiffs entitled?”

6. The trial court recorded finding that the widow had no authority to adopt defendant No. 2 as such, the defendant No. 2 failed to prove that he is adopted son of Rajman Nonia and plaintiff No. 1. The court below then recorded finding that the gift deeds executed by plaintiff No. 1 in favour of her daughters are valid and genuine and cannot be allowed to be challenged and, accordingly, decreed the plaintiffs' suit.

7. The learned Senior counsel, Mr. Dhruv Narayan,



appearing for the appellants submitted that it is admitted case of the parties that Rajman Nonia died in the year 1920, which is clearly recorded by the trial court in the judgment while deciding Issue No. 4 at paragraph 14, therefore, if there was partition as alleged by the plaintiffs, then the present partition suit is not maintainable. However, it is pleaded by the plaintiffs that there was only separation, which means that there was no partition. If there was no partition then it was coparcenary property and on the death of husband of plaintiff No.1, namely, Rajman Nonia in the year 1920, the property will devolve by the principles of survivorship to the remaining coparceners. The widow was only entitled for maintenance. So far this question is concerned, it is pure question of law. The court below has not considered this aspect of the matter. If she had no interest in the property as she was not the heir according to Hindu law on the date of death of her husband, she was not the title holder of the property, as such, she could not have gifted the 1/3rd share of Rajman Nonia to her daughters in the year 1952. She was not competent to execute the gift deeds. In such circumstances, the court below has wrongly decreed the plaintiffs' suit for partition.

8. On the other hand, learned counsel, Mr. Yogendra Prasad Sinha, submitted that after coming into force of the Hindu Succession Act, 1956, the plaintiff No.1 became the absolute owner of the share



of her husband and, therefore, the court below has rightly granted the decree for partition. She may not be the heir on the date of death of her husband in the year 1920, but she was in possession of the property of her husband then she became absolute owner under the provision of Section 14 of the Hindu Succession Act, 1956. She was in possession of the property, therefore, she gifted the property to her daughters and even if, it is held that on the date of execution of the registered deeds in the year, 1952, she had no right but then also she is entitled to 1/3rd share after coming into force of the Hindu Succession Act, 1956.

9. In view of the above rival contentions of the parties, the only point arises for consideration in this first appeal is as to whether plaintiff No. 1 became absolute owner of 1/3rd share of her husband, Rajman Nonia after coming into force of the Hindu Succession Act, 1956 and whether she had been able to prove unity of title and possession.

10. As stated above, plaintiff No. 1 is the widow of Rajman Nonia. According to plaintiff No.1 herself, there was only separation in *Mess* but there was no partition of the joint family property by metes and bounds. It is admitted by the learned counsels for the parties before this Court that Rajman Nonia died in the year 1920. The question is whether on death of Rajman Nonia in the year 1920, the

share of Rajman Nonia will devolve on his widow or not. It is not denied by the parties that in the year 1920, widow was not entitled to inherit the share of husband in the coparcenary property. She was entitled to maintenance only.

11. Prior to 1937, the only *sapindas*, who were succeeding the interest were son, grand son and great grand son. After 14th April, 1937, the widow, pre-deceased sons and pre deceased son's widow were recognized to inherit the share. After 14th April, 1937, a widow takes the same share as that of sons. It may be mentioned here that till then also the daughters were not recognized as an heir. In the year 1937, the Hindu Women's Rights to Property Act (XXIII) of 1937, which was amended by Act No. XI of 1938, was introduced important change in the law of succession. In this Act, the widow was given right to inherit the share of husband in coparcenary property as a son. Reference may be made to Section 3 of the Hindu Women's Right to Property Act.

12. Prior to this Act of 1937, no right was conferred to the widow. Section 4 of the 1937 Act provides that nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

13. In view of this provision, the widow i.e. plaintiff No.1 will not get any benefit because of enactment of this Act in the year



1937 as her husband Rajman Nonia had already died in the year 1920, therefore, this act is not applicable. Plaintiff No. 1 did not even take limited interest what is commonly known as widow estate in the estate of her husband. The Hindu Succession Act was, subsequently, enacted in the year 1956. Section 14 of Hindu Succession Act, 1956 provides that any property possessed by a female hindu, whether acquired before or after the commencement of the act, shall be held by her as full owner thereof and not as a limited owner. In the present case, it is not the case of plaintiff No.1 that the suit properties are acquired by her before or after the commencement of the Act of the year 1956. Her only case is that she inherited the property.

14. The Hon'ble Supreme Court in the case of *Kalawatibai vs Soiryabai And Others* reported in *AIR 1991 SC 1581* held that a female hindu possessed of the property on the date of the act i.e. Hindu Succession Act came into force can become absolute owner only if she was a limited owner. In view of this settled principle of law, she could not be the absolute owner of the share of her husband because no benefit is available to her under the Act of 1937. In other words, she was not a limited owner. When she was not the limited owner and the act of the year 1937 is not applicable in the case, there is no question of become absolute owner under Section 14 of the Hindu Succession Act arises.

15. In view of the above fact and settled law on the death of her husband in the year 1920, the property of Rajman Nonia devolved on the heirs of her husband according to survivorship. This vesting of the property will not be divested because of enactment of Hindu Succession Act, 1956 or she acquired any right, title even under the act of 1937 nor act of 1956. Therefore, when she was not a title holder nor even a limited owner, she could not have transferred 1/3rd share by gift in favour of her two daughters. The learned court below has not at all considered these aspects of the matter.

16. So far the adoption is concerned, even if, the defendant failed to prove adoption but on that ground the plaintiffs' suit cannot be decreed particularly when the plaintiffs are claiming share in the suit property which they are not entitled to in view of the above discussion. The case of the plaintiffs will fall or stand on their pleadings and cannot take advantage of the weakness of the defendants. Since I have already held that plaintiff No. 1 was neither an heir in the year 1920 nor she got any benefit under 1937 Act nor she became limited owner nor she became absolute owner after 1956, she had no right, title or interest or possession to transfer by registered gift deeds to her daughters. The learned court below has, therefore, without considering these settled principles of law has decreed the plaintiffs' suit for partition. It may be mentioned here that even if,

these questions were not raised in the trial court but then it is a pure question of law, which can be raised at any stage as it is settled principle of law that there is no estoppel against the statute.

17. In view of the above discussion, I find that the plaintiffs failed to prove that there is unity of title and unity of possession and they are entitled to 1/3rd share in the property. The finding of the trial court on this point is, therefore, hereby, reversed.

18. In the result, this first appeal is allowed and the impugned judgment and decree is set aside. The plaintiffs's suit for partition is, hereby, dismissed.

(Mungeshwar Sahoo, J.)

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