

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Letters Patent Appeal No.103 of 1992**

**IN**

**First Appeal No.303 of 73**

- =====
1. Ramji Sah son of Jai Ram Sah,
  2. Bans Narain Sah, son of Ramji Sah
  3. Vinaya Kumar, son of Ramji Sah
- All residents of village- Divian, Police Station Kargahar, Post Office- Divian,  
Pargana- Sasaram, District- Rohtas.

.... .... Plaintiffs- Appellant/s

Versus

1. Ghamandi Sah, son of Jai Ram Sah
  2. Vidyasagar Sah, son of Ghamandi Sah
  3. Ramayan Sah, son of Ghamadi Sah
  4. Narayan Sah, son of Ghamadi Sah
  5. Shyam Narain Sah, son of Ghamadi Sah
  6. Hridaya Narain Sah, son of Ghamadi Sah
  7. Satya Narayan Sah, son of Ghamadi Sah
  8. Dulahin Bindhyachali Devi, wife of Ghamadi Sah
  9. (i) Tej Pratap Sah, son of Ramji Sah and Samundra Devi  
(ii) Prabhavati Devi, wife of Subash Chandra Prasad  
Village- Kota, P.S.- Dihita, District- Bhabhua (Kaimur)  
(iii) Dharmavati Devi, wife of SohamLal Gupta  
Village- Jonpur, P.S.- Rajpur, District- Buxar  
(iv) Umrawati Devi, wife of Raja Ram Sah, village- Rajpur, P.S.- Rajpur,  
District- Buxar.
  10. Bhrigun Singh Kushwaha, son of name not known
  11. Smt. Pandharia Devi, wife of Bajedan Sah, resident of Village- Muraaan, P.S.-  
Mohania, District- Rohtas.
  12. Most. Ghutia Devi, widow of late Ram Kishun Sah, resident of Mohalla-  
Jamania Station Bazar, at & P.S.- Jamania, District- Gajipur (Uttar Pradesh).
  13. Smt. Sanmukhiya Devi, wife of Jamuna Sah, resident of Mohalla- Jamania  
Station Bazar, at & P.S.- Jamania, District- Gajipur (Uttar Pradesh).
- Respondent nos. 1 to 10 are residents of village- Divian, Police Station  
Kargahar, Post Office- Divian, Pargana- Sasaram, District- Rohtas

.... .... Respondent/s

=====

**Appearance :**

For the Appellant/s : Mr. Binod Kumar Singh  
Mr. Arvind Kumar Sinha  
Mr. Achhaibari Singh  
Ms. Vagisha Pragya Vacacnavi, Advocates

For the Respondent/s :

=====

**CORAM: HONOURABLE THE CHIEF JUSTICE**

**and**

**HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY**

**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)**

**Date: 14-11-2017**



The present Letters Patent arises out of the judgment of learned Single Judge dated 30.10.1992 in First Appeal No. 303 of 1973.

2. First Appeal No. 303 of 1973 was filed by the plaintiff against the judgment and decree dated 31.03.1973 passed in Title Suit No. 96/2 of 1967/73. The suit was for partition. In the partition suit, the defendants claimed that by way of private arrangement, they were separate in mess, whereas the plaintiffs claimed that the defendant no.1 was the Karta and they were joint six months before the filing of the suit, but there was difference between the plaintiffs-respondents and as such they demanded partition of the joint family property, but the defendant no.1 being the Karta decline to accede the request of the plaintiff and as such the suit was filed. On the basis of the pleading, the trial court formulated a number of issues, out of which issue nos. (iv), (v), (vi) and (vii) are relevant.

(iv) Whether Pargan had a son named Hardeo and whether Roop Jharo was the widow of Hardeo Sah?

(v) Whether the deed of gift alleged to have been executed by Roop Jharo in favour of defendant no.9 Bindhyachali Devi is a genuine and valid document?

(vi) Is there unity of title and possession between the



parties in respect of the suit properties?

(vii) Are the plaintiffs entitled to a decree for partition in this suit, and if so, to what extent?

3. The First Appellate Court considered the case of the appellants in the light of the issues decided by the trial court. Before the first appellate court, the appellants have basically raised two issues: (i) That the story of previous partition was setup by the defendants in order to make out a case that the Roop Jharo was entitled to alienate the property. (ii) The gift deed executed by Roop Jharo was not legal and valid for two reasons: (a) the gift deed was executed by fictitious and non-existent person, as the appellants have disputed the existence of Hardeo, son of Pargan and as such disputed the existence of Roop Jharo, wife of Hardeo and (b) in alternative the appellants argued that in absence of partition, the Roop Jharo was not entitled to execute the deed of gift.

4. The First Appellate Court referring to Section 30 of the Hindu Succession Act held out that Roop Jharo was entitled to transfer by way of gift. The relevant consideration of the First Appellate Court on the point of competence of Roop Jharo to alienate the undivided property by executing deed of gift is discussed in para 24 of the judgment. The first Appellate Court held out the execution



of gift deed by Roop Jharo is valid.

5. This appeal was heard on different dates and in order to accommodate the counsel representing the respondents, we have granted indulgence after indulgence and finally on 03.10.2017, we made it clear that as a matter of last indulgence, as prayed for by learned counsel for the respondents, we adjourn the matter for 10.10.2017. The matter was listed on 10.10.2017, but again the respondents had adopted delaying tactics and did not appear to assist the Court in the Letters Patent Appeal pending in the court since 1992. Under the compelling circumstances, we directed for stay of all execution proceedings arising out of judgment in question vide order dated 10.10.2017. The appeal thereafter listed on 06.11.2017, yet on 06.11.2017, the respondents failed to appear and on 06.11.2017 while directing the case to be listing on 14.11.2017, we made it clear that in case respondents do not appear, the matter shall be heard and decided without granting any further adjournment. Yet on 14.11.2017, no one appears on behalf of the respondents in this appeal.

6. In this appeal Ms. Vagisha Pragya Vacaknavi has submitted that the 1<sup>st</sup> Appellate Court has misconstrued the provisions of Section 30 of the Hindu Succession Act (hereinafter referred to as 'the Act'). She submitted that Section 30 of the Act permits testamentary succession and gift does not come within the meaning of



testamentary succession. She refers to the judgment of Apex Court in the case of Pavitri Devi and Another Vs. Darbari Singh and others, reported in (1993) 4 SCC 392. The Apex Court judgment in the case of Pavitri Devi (supra) is clinching on the point that the gift deed does not partake the character of testamentary succession. Para 2 to 11 of the judgment are quoted for ready reference:

2. Though the respondents have been served before and after the grant of special leave, none has appeared either in person or through counsel. Shri Ranjit Kumar, learned Counsel for the appellants placing reliance on Section 30 of the Hindu Succession Act, 1956 for short 'the Act', contented that Brahmadeo Singh had power to dispose of his undivided share in the joint family property by testamentary disposition including by way of gift to his daughter. The interest held by him in the coparcenary property could be bequeathed by the gift deed. Thereby the appellant became successor in interest of Brahmadeo Singh, her father, by devolution under Order 22 Rule 10 of CPC, 1906. Undoubtedly, Order 22 Rule 10 is applicable to an assignee or a person acquiring, during pendency of the suit, the interest in the suit property by devolution. So she would be entitled to be brought on record as her father's legal representative to continue the appeal.



Equally as a daughter, being Class I heir, she could be brought on record under Order 22 Rule 3 C.P.C. The question is whether the gift over of the interest in the coparcenary property by Brahmadeo Singh is valid in law. Section 30(1) of the Act provides that 'any Hindu may dispose of, by will or other testamentary disposition, any property which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus'. The explanation, thereto provides that the interest of a male Hindu in a Mitakshara coparcenary property ... shall notwithstanding anything contained in this Act, or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section. Section 6 of the Act provides that when a male Hindu dies, after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary. If the deceased had left behind him a surviving female relative specified in Class I of the Schedule, the interest of the deceased in the Mitakshara coparcenary property shall



devolve by testamentary or intestate succession, as the case may be, under the Act and not by survivorship.

3. Webster in 'Comprehensive' Dictionary in international edition at page 1298, stated the meaning of the word 'testamentary' thus: (i) derived from, bequeathed by, or set forth in a will; (ii) appointed or provided by, or done in accordance with, a will; (iii) pertaining to a will, or to the administration or settlement of a will, testamental. In the Law Lexicon by P. Ramanatha Aiyar, reprint edition 1987 at P. 1271 testamentary instrument was defined to mean a "testamentary instrument" is one which declares the present will of the maker as to the disposal of his property after death, without attempting to declare or create any rights therein prior to such event. Black's Law Dictionary [6th Ed. 1991] defines "testamentary disposition" at page 1475 thus - "the passing of property to another upon the death of the owner. A disposition of property by way of a gift, Will or deed which is not to take effect unless the grantor dies or until that event." Section 123 of the Transfer of Property Act provides disposition by a gift which takes effect even during the lifetime of the donor and effective as soon as it is registered and normally given possession of the property therein. Section 30 of the Act is



merely declaratory of the law not only as it stood before the Act, but as it now stands modified by the provisions of the Act. It declares that any Hindu may dispose of by a will or other testamentary disposition his property or interest in coparcenary which is capable of being so disposed of by him in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force applicable to the Hindus. Its explanation is really material. The testamentary disposition, therefore, would mean disposition of the property which would take effect after the death, instead of co-instentine on the execution of the document. A testamentary disposition is generally effected by a will or by a codicil which means an instrument made in relation to a will extending, altering or adding to its disposition and is to be deemed to form part of the will. Will as defined in Section 2(h) of the Indian Succession Act, 1925 means legal declaration of the intention of the testator with respect to his property which he desired to carry into effect after his demise. It limits alienation intra vivos. While the gift being a disposition in presenting, it becomes effective on due execution and registration and generally delivery of the possession. Section 30 makes it clear that testamentary



disposition under the Act would be dealt with in accordance with the Indian Succession Act. Section 55 and Schedule 3 of the said Act prescribe procedure effecting succession amongst Hindus by testamentary succession by will or codicil. Section 30 employs non-obstinate clause and excludes from the operation of pre-existing or any other law applicable to coparcenary property governed by Mitakshara law and introduced fiction in its explanation and empowers the Hindu male or female to dispose of his or her interest by a will or any other testamentary disposition known to law-which would be effective after the demise. It would, therefore, be difficult to envisage that disposition by gift partakes the character of testamentary succession under Section 30 of the Act.

4. It would be clear when we glean through the pre-existing law. In *Jalaja Shedthi v. Lakshmi Shedthi*, reported in 1973 (1) SCR 707, relied on by Mr. Ranjit Kumar this Court held thus:

“On the demand for partition there is a division in status, and though partition by metes and bounds may not have taken place, that family can thereafter never be considered as an undivided family, nor can the interest of a coparcener be



considered to be an undivided interest. It is a well established principle in the Hindu Law that a member of a joint Hindu Family has a right to intimate his definite and unambiguous intention to the other members of the joint family that he will separate himself from the family and enjoy his share in severalty. Such an unequivocal intention communicated to the others will amount to a division in status and on such division he will have a right to get a de facto division of his specific share of the joint family property, in which till then all of them had an undivided coparcenary interest, and in which none of them could claim that he had any right to any specific part thereof. Once the decision to divide has been unequivocally expressed and clearly intimated to his co-sharers, whether or not the other co-sharers agree, an immediate severance of the joint status is effected to which he is admittedly entitled, becomes specified.”

5. Having made demand for partition and laid the suit in that behalf claiming a specific share in the Mitakshara Coparcenary, Brahmadeo Singh stood divided it status from other members of the coparcenary, though partition by metes and bounds had not been



taken place, on the date of his death; he was a dividing member of the joint family. By operation of Section 30 he was entitled to dispose of his undivided share and the interest in the coparcenary by testamentary disposition.

6. In Phoolchand v. Gopal Lal (AIR 1967 SC 1470), this Court held that after filing the suit there was a division in status among the members of the joint family, even though they had been separated earlier. In that case there was a decree passed. Sohan Lal had bequeathed his share by a will in favour of Gopal Lal. This Court held that Sohan Lal being the owner of his share in the undivided coparcenary, was competent to bequeath by will of his undivided share he got out of the joint family property. This bequest was between coparceners.

7. It is settled law that the Karta or the Manager of the Hindu Joint Family has a right to alienate undivided interest in the Hindu joint family property for valid consideration for family necessity. Karta or coparcener has right to alienate his undivided share in coparcenary property and the purchaser acquires only the equitable right to allotment of his predecessor's share at a partition. The purchaser is entitled to the



allotment of the specific property sold and was put in possession, as far as possible, subject to equities. In *Baba v. Thimma*: ILR (1884) 7 Mad. 357: the Full Bench held that an undivided Hindu father has no right ; to bequeath coparcenary property.

8. In *Soorajeemoney Dossee v. Deenobundo Mullick*: 6 Moore's Indian Appeals 123:, under Dayabaga law the Judicial Committee held that whatever may have formerly been considered the state of that law as to testamentary power of the Hindus over their property, the power has long been recognised and must be considered as completely established. In *Tagore v. Tagore* (1872) Indian Appeals (Suppl.) 47, the Judicial Committee set the limits thus: the law of will among the Hindus is analogous to law of gifts and even if wills are not universally to be recognised in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred. A bequest by a will made by a Hindu father of his joint family property for the maintenance of his wife was held to be invalid *Subbaramani v. Ramanamma* (1920) I.L.R. 43 Madras 824.

9. At p. 685 in paragraph 406 of Mayne's



Hindu Law, 13th Edition revised by Justice A. Kuppaswami former Chief Justice of Andhra Pradesh High Court, it is stated thus: "It is now equally well settled in all the states that a gift or device by a coparcener in a Mitakshara family of his undivided interest is wholly invalid. The exceptional cases recognised by the Mitakshara law where it is open to the father or managing member of the family to make a gift of ancestral movable or immovable property have been noticed. in paragraph 377, 393 and 394. A coparcener cannot make a gift of his undivided interest in the movable family property either to a stranger or a relative except for the purpose warranted by special texts.

10. In N.R. Raghvachariar's Hindu Law, edited by late Prof. S. Venkataraman, who himself was an authority on Hindu Law, stated at page 236 that a coparcener cannot transfer. his undivided interest without consideration. Such transfer is totally void. At page 237 it was stated that a gift of his interest by a coparcener being void altogether, there is no estoppel or other kinds of personal bar precluding the donor from asserting his rights to recover the transferred property. A gift by a major coparcener in favour of the minor coparcener was stated to be valid as an exception to the general



principle. A Transaction of gift of a joint family property would be void in toto and would not bind even the donor.

11. In Mayne's Hindu Law, in paragraph 379 at p. 661 it is stated that the father's power to make gift through affection within reasonable limits of ancestral movable property has been duly recognised. In Ramalinga v. Narayana (1992) 49 Indian Appeal 168 at 173 the Judicial Committee held that the father has undoubtedly the power under the Hindu Law of making, within reasonable. limits gift of movable property of Rs. 8,000/- to a daughter, but the gift through affection of joint family property as invalid. Right of the coparceners vests by survivorship at the moment of the testator's death, and there is accordingly nothing upon which the will can operate, as held in Lakshman Dada Naick v. Ramachandra (1881) 7 Indian appeals 181 (P.C.). A gift made with the consent of the coparceners was held to be valid in Appanpatra v. Srinivasa (1917) I.L.R. 40 Madras 1122.

7. In view of the judgment of the Apex Court in case of Pavitri Devi (supra), we are of the considered view that the gift deed does not come within the purview of testamentary succession. Section 30 of the Act permits only testamentary succession without



partition. The trial court as well as the first Appellate Court have consistently held out that the case of previous partition by the defendant is not sustainable. In view of the aforesaid admitted factual position that there was no previous partition, the only issue warranting adjudication in the instant appeal whether the widow was entitled to execute the deed of gift and alienate the undivided share of the joint family property? On consideration of the judgment aforesaid, in Pavitri Devi case we have no hesitation in holding that the gift by the Roop Jharo without partition in the joint family was invalid, as Section 30 of the Act does not include gift, as it only permits testamentary succession and gift does not come within the purview of testamentary succession. We find and hold that the first Appellate Court erred in construing the gift as testamentary succession. Gift is inter vivos transfer, whereas the testamentary instrument operates after death of testator and as such the First Appellate Court erred in law in holding the gift as valid under Section 30 of the Act.

8. Accordingly, we set aside the judgment of the First Appellate Court as well as the trial court, so far as the alienation of the undivided joint property by Roop Jharo is concerned. Since there was no partition between the parties, we have no difficulty in declaring that the deed of gift in favour of defendant no.9 Bindhyachali Devi is void and inoperative and as such the court below is directed to prepare



decree accordingly in the schedule property (schedule ब, स एवं घ)  
of the plaint to the extent of 1/3 share each including the Mill.

**(Rajendra Menon, CJ)**

**(Anil Kumar Upadhyay, J)**

Uday/-

|                   |            |
|-------------------|------------|
| AFR/NAFR          | NAFR       |
| CAV DATE          | NA         |
| Uploading Date    | 05.12.2017 |
| Transmission Date | NA         |

