

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.17 of 1991

(Appeal against the judgment and decree passed in Title Suit No. 143 of 1987/28 of 1989 dated 19.12.1989 by learned Munsif, Bikramganj as well as against the judgment and decree of affirmation passed on 17.09.1990 by the learned lower appellate court (A.D.J.-III Rohtas) in Title Appeal No. 07 of 1990).

Late Radha Sah through L.Rs.

.... Appellant/s

Versus

Most. Girja Devi through L.R.

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Rajiv Kumar Verma, Adv.
Mr. Karuna Nath Sahay, Adv.
Mr. Raj Kumar Tiwary, Adv.
Mr. R.N. Tiwary, Adv.

For the Respondent/s : Mr. Rama Kant Tiwary, Adv.
Mr. Rajesh Kr. Pandey, Adv.
Mr. P.K. Mallick, Adv.

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
CAV JUDGMENT

Date: 15-03-2018

Original plaintiff Late Girja Devi and her daughter Rukmini Devi brought title Suit No.143 of 1987 against the appellants for declaration that the registered deed of gift executed by Chamru Sah in favour of appellant Radha Sah on 03.06.1977 and registered deed of gift dated 19.07.1977 executed by Smt. Tulni Devi first wife of Chamru Sah in favour of the defendants-appellants in respect of Schedule-C property are quite illegal, invalid and not binding upon the plaintiffs.



2. The case and claim of the plaintiffs as disclosed in the plaint is that one Halkhori Sah had two sons Chamru Sah and Radha Sah. (It is worth to mention here that Radha Sah, his wife Lalita Devi and his minor son Hari Sewak Sah are defendants of the suit and original appellants herein).

3. Further case is that Chamru Sah was first married with Tulni Devi and after losing hope of any issue from Tulni Devi, Chamru Sah again married with plaintiff Girja Devi and from the wedlock of Girja Devi he got a daughter Rukmini Devi who was plaintiff No.2 to the suit. The case of the plaintiffs is that Schedule-A property is the joint family property of the plaintiffs and the defendants and from the joint family fund, Schedule-B property was acquired through different registered sale deeds by Chamru Sah and Tulni Devi. Schedule-B property was never treated as separate property of anyone and was always treated as joint family property. The defendant-Radha Sah was Karta of the family as Chamru Sah was of weak intellect. Taking advantage of his dominance on the joint family, Radha Sah practised fraud upon Chamru Sah and brought into existence a registered deed of gift dated 03.06.1977 in respect of the joint family properties in his name.



Subsequently, another registered deed of gift was manufactured which was dated 19.07.1977 said to be executed by Tulni Devi in favour of appellant Lalia in respect of the land which was standing in the name of Tulni Devi as per the registered sale deed. The main thrust is that coparcenary property was alienated by gifts against the mandate of law. Hence, both the gift deeds are sham and void transactions.

4. The appellants filed written statement refuting and disputing the case and claim of the plaintiffs-respondents on different grounds inter alia on the ground that plaintiff Girja Devi was not wife of Chamru Sah nor plaintiff No.2 Rukmini is daughter of Chamru Sah rather plaintiff No.1 is wife of one Mathura Sah and plaintiff No.2 is daughter of Mathura Sah from plaintiff No.1. The defendants-appellants denied that the defendant No.1 was ever Karta of the family. Schedule-A and Schedule-B property were never joint family properties. The plaintiffs were never coparceners. The deed of gifts under challenge are valid and genuine documents, they were acted upon and the allegation of creation is false and concocted one and finally prayed that the plaintiff deserves no relief in the suit.

5. The learned Trial Court chalked out different



issues for consideration including issue No.6 as to whether the plaintiffs have got any concern with the family of Late Chamru Sah. The learned Trial Court noticed that the plaintiffs' witnesses have supported the case that the plaintiffs are wife and daughter of Chamru Sah whereas the defendants' witnesses denied the aforesaid fact. However, Ext.-1 and Ext.-4, the Voter Lists and School Leaving Certificate of plaintiff No.2 revealed that plaintiffs were wife and daughter of Chamru Sah. The documentary evidence coupled with the oral evidence weighed in favour of the plaintiffs' case and the learned Trial Court held that the plaintiff No.1 is second wife and plaintiff No.2 is daughter of Chamru Sah. The finding was affirmed by the learned lower Appellate Court.

6. The learned Trial Court decided two issues jointly as Issue Nos.7 and 8; whether the deed of gift dated 03.06.1977 and dated 19.07.1977 executed in favour of defendant No.1 and 2 are illegal and invalid. Whether they were procured by practising fraud on Chamru Sah and Tulni Devi and as such are fit to be declared as void and invalid documents.

7. The learned Trial Court observed that there is presumption of jointness and the burden was on the



defendants to prove separation. The gift of joint property without consent of coparcener is prejudicial and unwarranted. The gift deed executed by Tulni Devi vide Annexure-3/A is not attested by two attesting witnesses as required under Section 123 of the Transfer of Property Act. The deeds of gift were obtained by practicing fraud. Hence, they are not binding upon the plaintiffs.

8. The learned Lower Appellate Court affirmed the aforesaid finding of the learned Trial Court. Hence, this appeal.

9. The substantial question of law which was formulated at the time of admission of this appeal is

“whether the suit with regard to the gift executed by Tulni Devi could be challenged by the plaintiffs as from the pleadings, it does not appear that the plaintiffs, in any way, could inherit the property held by Tulni Devi”.

10. At the time of hearing, learned counsel for the appellant raised following substantial questions of law **“whether the finding of the courts below that entire gifted property are coparcenary property is erroneous and perverse”. “Whether the courts below have wrongly**



come to the conclusion without material to substantiate that fraud was practiced during transactions of both the gift deeds”.

11. Submission of the learned counsel for the appellant is that the property which was gifted by Tulni Devi was her self-acquired property and as such, her absolute property in view of the specific provisions of Section 14 of the Hindu Succession Act which reads as follows:

S.14. “ Property of a female Hindu to be her absolute property.”-(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.-In this sub-section, ‘property’ includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or



exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

12. According to learned counsel, it was burden of the plaintiffs to prove that the property standing in the name of individual members was joint family property because there is no presumption under the law that the property standing in the name of a cosharer is a joint family property. Reference was made to case of **Raghunath Tiwary & Ors Vs. Ramakant Tiwary & Ors**, reported in **AIR 1991 Patna 145**. Learned counsel for the appellant further submits that both Chamru Sah and Radha Sah were purchasing property in their individual name through



different sale deeds which would be evident from Ext-A/2 and Exts-A, A/1, A/3, A/4 to A/10. Therefore, gift of property purchased by a cosharer in his own name from personal income cannot be said to be a coparcenary property. Contrary has not been proved by the plaintiffs by cogent evidence. Moreover, there is no absolute bar prohibiting a coparcener from making gift of undivided interest in the coparcenary property to another coparcener or to a stranger with the prior consent of all other coparceners. Learned counsel has relied upon the judgment of the Hon'ble Supreme Court in ***Thamma Venkata Subbama Vs. Thamma Rattamma***, reported in ***AIR 1987 SC 1775***.

13. Submission of the learned counsel for the appellant is that in the present case even if it is assumed that the property gifted was a coparcenary property. There is no illegality in the execution of the deed of gift by Chamru Sah in favour of another coparcenary Radha Sah. Only negligible lacuna is that consent of Hari Sewak Sah the minor son of Radha Sah was not taken. Learned counsel for the appellant submits that no interest of Hari Sewak Sah has been prejudiced by gift because no interest of Hari Sewak Sah has been transferred through deed of gift by coparcener Chamru Sah for the reason that Hari Sewak Sah would inherit per



strips and not per capita. Whatever property would be allotted in the partition between Chamru Sah and Radha Sah, Hari Sewak Sah would get from the share of Radha Sah only.

14. Learned counsel for the respondents submits that there is concurrent finding of fact by the courts below. Hence, the law is well settled that the second appellate court would be slow in interfering with such findings for trivial lapses committed by the courts below. Contention is that the final conclusion of the courts below is just and proper based on evidence on the record. Hence, the same requires no interference.

15. On careful consideration of the pleadings and evidence of the parties, I am of the considered view that both the courts below have erred in holding that the property gifted by Tulni was a joint family property rather the same was self-acquired property of Tulni Devi purchased through registered sale deed. Moreover, the property standing in the name of a female cannot be blended in the joint family as per the Hindu Law of Mitaskhra joint family property. There is no evidence at all on the record to substantiate, the bald pleading of plaintiffs, that any fraud was practiced while gift deed was executed. The law is well settled that party, pleading fraud must prove it. The plaintiffs-respondents have



miserably failed to prove a case of fraud and both the courts below have committed error of record while coming to the conclusion that the fraud was committed in obtaining the gift deed aforesaid. Therefore, it is held that the property gifted by Tulni Devi to defendant Lalia Devi was her self-acquired property and she was competent to transfer the same through deed of gift. However the original deed of gift vide Ext.B/1 and its certified copy vide Ext.3/A would reveal, that the gift deed is not attested by two witnesses which is requirement of Section 123 of Transfer of Property Act. The same reads as follows:

123. Transfer how effected.- *For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.*

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.



16. The gift deed would reveal that only Chamru Sah, the husband of Tulni Devi is witness on the deed. The deed writer Gopalji Rai has simply written that he reduced the gift into writing and read over and explained the same to the executant. In the circumstances, the deed of gift executed is apparently not according to law. Hence, the same is a void document. In the circumstances, the findings of the learned court below stand set aside to the aforesaid extent and affirmed to the extent that the deed of gift executed by Tulni Devi in favour of appellant Lalia Devi is not a document consistent with law in absence of attestation by two witnesses and non-production of any of the attested witnesses to support the due execution of the deed of gift.

17. Since, the property of Tulni Devi was self-acquired property. After death of Tulni Devi who admittedly died in the year 1980, the property left by her would be succeeded by her husband only in absence of any son or daughter as per Section 15 of the Hindu Succession Act, 1956 and after death of husband Chamru Sah in the year 1984, the property would go upon his heirs which includes the plaintiffs who are class-I heirs. Therefore, the plaintiffs are competent to challenge the gift of Tulni Devi for the reason that the plaintiffs could inherit the property held by



Tulni Devi after death of husband of Tulni Devi or even in the event of predeceased husband, as heirs of husband in view of the specific provisions of Section 15 of Hindu Succession Act. Accordingly, the 1st substantial question of law stands answered.

18. Question No.2- From the record, it is evident that Chamru Sah and his brother Radha Sah both were acquiring property separately vide Ext-A Series, which are sale deed executed by different persons in the name of Chamru Sah in the year 1969 and in other years prior to filing of the suit. Ext-A/2 are two sale deeds, executed by Deoki Mistri and Jagdish Dushadh in favour of Radha Sah. There is no bar that a member of the joint family cannot acquire self-property nor there is presumption that the property standing in the name of a cosharer is a joint family property. Moreover, the record reveals that the two co-sharers were acquiring property in their respective names through different gift deeds. Thus, Chamru Sah was competent enough to transfer by gift his self-acquired property. Therefore, the findings of the courts below in the matter of deed of gift in respect of self-acquired property of Chamru Sah vide Schedule-'B' properties to the plaint stands quashed as error of law and record.



19. Assuming that Chamru Sah has transferred through gift the coparcenary property, it is evident that the gift was executed in favour of another coparcener and consent of the minor son of the coparcener in whose favour, the deed of gift was executed was not taken. Even then the gift is not valid because it has not prejudiced the interest of the minor coparcener as joint share was transferred in favour of his father; the minor would get share in the property of his father and not in the property of the person transferring through deed of gift. In ***Thamma Venkata Subbama*** (Supra), the submission advanced before the Hon'ble Supreme Court was that only reason why undivided coparcenary interest cannot be gifted is that an individual member of the joint Hindu family has no definite share in the coparcenary property. By alienation of his undivided interest in the coparcenary property, a coparcener cannot deprive the other coparceners of their right to the property. The object of this strict rule against alienation by way of gift is to maintain the jointness of ownership and possession of the coparcenary property. It is true that there is no specific textual authority prohibiting alienation by gift and the law in this regard has developed gradually, but that is for the purpose of preventing a joint Hindu family from being disintegrated. The Hon'ble Supreme



Court in para-17 of the judgment held as follows:

17. “ It is, however, a settled law that a coparcener can make a gift of his undivided interest in the coparcenary property to another coparcener or to a stranger with the prior consent of all other coparceners. Such a gift would be quite legal and valid”.

20. The facts of the present case would make it clear that the coparcenary in the present case consisted of three persons only, Chamru Sah the donor, Radha Sah the donee and Ram Sewak Sah, the minor son of Radha Sah. Since interest of Ram Sewak Sah in the coparcenary property is confined, into the share of Radha Sah and not in share of Chamru Sah. Hence, he is not going to suffer by the gift. The minor coparcener was under guardianship of his father Radha Sah. Hence, there was no question of disintegration of the joint family property. Furthermore, the coparcener whose consent for gift was not there, is already party to the suit but he has not challenged the gift even after attaining majority. Therefore, the finding of the court below that the gift deed executed by Chamru Sah vide Ext-3 is void for the reason of non-consent of only remaining coparcener Ram Sewak Sah



suffers from error of record and law.

21. I do not find any merit in the second ground of challenge of the gift deed executed by Chamru Sah on the ground that it was obtained by fraud .Though it has been pleaded that Chamru Sah never visited the registry office nor he was aware of the transaction done by him. However, there is no evidence to substantiate the same. Rather the plaintiff (P.W.,Girja Devi) is specific in para-11 of her deposition that she does not know as to what fraud has been committed by Radha Sah in execution of the deed of gift. The law is well settled that the party pleading fraud must strictly prove the specific ingredient of any fraud said to be committed. There is presumption, of correctness and performance in due course, of official act. Once the gift deed got registered, the burden is heavier to get it belied for the reason that it has not been executed by the real executant. Moreover, the deed of gift is duly executed and attested by two witnesses. The attesting witnesses are Kailash and Anjani Kumar Srivastava. Mr. Srivastava (D.W.8) has deposed that he had signed the deed of gift as witness and witness Kailash as well as Chamru Sah, donor had signed in his presence on the gift deed. He further deposed that the witness Kailash is already dead. Thus, due execution of Ext-3 is well proved. There is pleading and



evidence that the donee accepted the gift and in token thereof came in possession and got his name mutated in the Govt. records.

22. To sum up, it is held that: (A) property which Tulni Devi had gifted was her self-acquired property. Hence, she was competent to gift the same. No case of fraud practiced on Tulni Devi is proved in this case by the plaintiff-respondents. However, the deed of gift executed by Tulni Devi is not according to law required by Section 123 of the Transfer of Property Act as it is not attested by two witnesses. (B) The deed of gifts executed by Chamru Sah in favour of his brother original appellant Radha Sah was a valid document to the extent it relates to his self-acquired property as described in Schedule-B of the plaint. Even the gift of coparcenary property cannot be faulted as it has not prejudiced the interest of any coparcener as discussed above. The gift deed of Chamru Sah was duly executed and registered after attestation by two attesting witnesses. The plaintiff-respondent has failed to prove a case of fraud in getting the deed executed. Hence, valid title passed to the appellant through the aforesaid deed of gift.

23. In the result, the judgment and decree of both the courts below to the extent it declared the gift deed



dated 03.06.1977 vide Ext-B executed by Chamru Sah in favour of his brother Radha Sah null and void as well as incompetent is set aside and the suit stands dismissed to the aforesaid extent. The findings of the courts below in the matter of Ext-3/A i.e. gift by Tulni Devi stands affirmed only for the reason that it is not attested by two attesting witnesses, as mandatorily required Section 123 of Transfer of Property Act. As such, it was not executed according to law.

24. Accordingly, this appeal stands partly allowed and partly dismissed. The party shall bear their own costs in the facts and circumstances of this case.

(Birendra Kumar, J)

Nitesh/-

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