

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.283 of 2008**

1. Smt. Bhagwantin Bai D/o. Shri Jagtu Ram, W/o. Shri Chamru Ram Sahu, aged about 35 years, occupation – Cultivation, R/o. Bharda, Post Office – Tarri, Tah. Gurur, Distt. Durg (CG)
2. Smt. Rewati Bai, D/o. Shri Jagtu Ram, W/o. Shri Churaman Lal Sahu, aged about 32 years, occupation – Cultivation, R/o. Vill. Charwahi, Tah. Balod, Distt. Durg (CG)
3. Smt. Tirath Bai D/o. Shri Jagtu Ram, W/o. Shyam Sahu, aged about 30 years, occupation – Cultivation, R/o. Vill. Van Vagoth, Post Office – Kukrail, Tah. & Distt. Dhamtari (CG)

---- Appellants/Plaintiffs**Versus**

1. Nirup Ram S/o. Jagtu Ram Sahu, aged about 50 years, occupation Cultivation
2. Imla Bai, Wd/o. Late Jagtu Ram Sahu, aged about 60 years, occupation Cultivation,
Both R/o. Vill. Basin, Post Office, Basin, Tah. Gurur, Distt. Durg (CG)
3. State of Chhattisgarh through Collector, Distt. Durg (CG)

---- Respondents/Defendants

For Appellants/Plaintiffs: Mr. Ashish Surana, Advocate
 For Res.No.1/Def.No.1 : Mr. Vimlesh Bajpai, Advocate
 For Res.No.2/Def.No.2 : Mr. Ram Kumar Tiwari, Advocate
 For Respondent No.3/State: Ms Shivali Dubey, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal**Judgment on Board****27.01.2020**

1. The substantial questions of law involved, formulated and to be answered in this second appeal preferred by the plaintiffs are as under:-

"1. Whether in the absence of a prayer for setting aside the alienation of the lands in

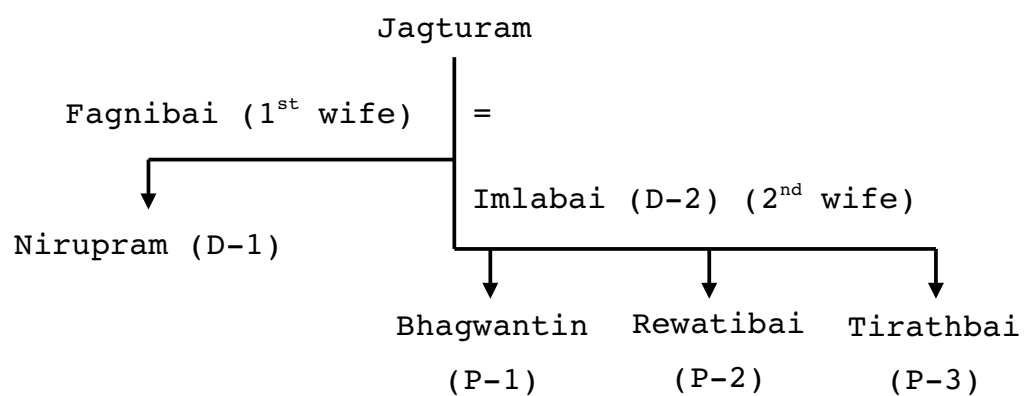
area 3.38 hectares by Jagtu in favour of Imla Bai on 02-04-1974 and the gift deed in relation to land in area 1.23 hectares executed by Imla Bai in favour of the plaintiffs on 28-07-1976, counter claim of the respondents could not be granted ?

2. Whether the counter claim by the respondents is barred by limitation ?

3. Whether the appellants/plaintiffs were entitled for declaration of title and permanent injunction in relation to land in area 4.56 hectares situated in Village Vasin, Revenue Circle Gurur ?"

[For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court].

2. The following genealogical tree would demonstrate the relationship among the parties:-



3. Jagturalam was original holder of the suit land. He had two wives namely Fagnibai (first wife) and Imlabai (second wife), defendant No.1 is his son out of his wedlock with first wife Fagnibai, whereas defendant No.2 is his second wife and the plaintiffs are

daughters of Jagtaram out of his wedlock with second wife defendant No.2-Imla Bai. Jagtaram by registered sale deed dated 2.4.1974 (Ex.P-1) transferred the suit land area 3.387 hectares in favour of defendant No.2-Imla Bai and in turn, defendant No.2 by gift deed dated 27.3.1993 (Ex.P-5) gifted the suit property bearing Khasra No.97, 100 and 154, admeasuring area 1.23 hectares in favour of the plaintiffs and thereafter the plaintiffs filed a suit for declaration of title and permanent injunction stating inter-alia that the suit land is owned and possessed by them as the suit land area 3.387 hectares was alienated by Jagtaram in favour of defendant No.2-Imlabai on 2.4.1974 (Ex.P-1) and gift deed in relation to area 1.23 hectares was executed by defendant No.2-Imlabai in favour of the plaintiffs on 27.3.1993, as such, they are entitled for declaration of title and permanent injunction.

- 4.** Defendant No.1 filed his written statement and denied the averments made in the plaint stating inter-alia that he is only son of Jagtaram out of his wedlock with first wife Fagnibai and the suit property is ancestral property in the hands of Jagtaram, therefore, it being a coparcenary property could not have been transferred by Jagtaram in favour of defendant No.2-Imlabai (second wife) and sale made by

Jagturam in favour of defendant NO.2-Imlabai is not binding on him. He has also filed counter-claim seeking declaration that the suit property being coparcenary property and he is entitled for 2/5th share in the suit property.

5. The trial Court upon evaluation and after appreciation of oral and documentary evidence available on record, by its judgment and decree dated 6.7.2005, partly decreed the suit with respect to Khasra Nos.89 and 90 and held that with respect to Khasra Nos.94, 99/1, 97, 100, 154, 255, 394 and 409 defendant No.1 is entitled to 2/5th share in the suit property and allowed the counter-claim filed by defendant No.1. On appeal being preferred by the plaintiffs, the first appellate Court affirmed the judgment and decree of the trial Court and held that the suit property being coparcenary property, Jagturam had no right to alienate the same in favour of defendant No.2-Imlabai. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellants/plaintiffs, in which substantial questions of law have been formulated by this Court, which have been set-out in the opening paragraph of this judgment.

6. Mr. Ashish Surana, learned counsel for the appellants/plaintiffs, would submit that in

counter-claim filed by defendant NO.1, he did not question the alienation made by Jagtaram of the suit property in favour of defendant No.2-Imlabai on 2.4.1974 (Ex.P-1) and similarly gift deed in relation to the land in area 1.23 hectares executed by Imlabai in favour of the plaintiffs on 27.3.93 (Ex.P-5) was not questioned, therefore, counter-claim filed by defendant No.1 could not have been decreed and both the Courts below ought to have held the counter-claim to be barred by limitation and the plaintiffs are entitled for decree of declaration of title and permanent injunction in their favour.

7. On the other hand, Mr. Vimlesh Bajpai, learned counsel for respondent No.1/defendant No.1, would support the impugned judgment and decree.

8. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

Answer to substantial questions of law NO.1 and 3:-

9. As noticed in opening paragraph of this judgment, the plaintiffs are daughters of Jagtaram out of his wedlock with second wife Imlabai, whereas defendant No.1 is son of Jagtaram out of his wedlock with first wife Fagnibai. The plaintiffs' claimed that the suit property is self-acquired property of Jagtaram which

he transferred by registered sale deed dated 2.4.1974 (Ex.P-1) in favour of defendant No.2-Imla Bai and in turn, defendant No.2 by gift deed dated 27.3.1993 (Ex.P-5) gifted the property bearing Khasra No.97, 100 and 154, admeasuring area 1.23 hectares in favour of the plaintiffs. The trial Court after appreciating oral and documentary evidence available on record came to the conclusion that the suit property is ancestral property in the hands of Jagtaram and it was coparcenary property qua defendant No.1-Nirupram and held that alienation made by Jagtaram in favour of Imlabai is not binding on him and allowed the counter-claim filed by defendant NO.1 giving 2/5th share in the suit property holding that sale deed (Ex.P-1) was made without legal necessity and without valid consideration and it has been executed in order to deprive defendant No.1 of his birth right which he is entitled. On appeal being preferred by the plaintiffs, the first appellate Court affirmed the finding recorded by the trial Court. Finding recorded by the trial Court duly upheld by the first appellate Court holding the suit land to be ancestral property in which defendant No.1 has birth right being coparcener in the suit property and as such, the suit property is coparcenary property is finding of fact based on evidence available on record and against the said

finding, the plaintiffs have neither proposed any substantial question of law nor it has been formulated. Therefore, that finding holding the suit property to be coparcenary property of Jagtaram in his hands in which defendant No.1 has birth right has become final and not liable to be reopened in this second appeal in absence of challenge to that finding.

10. The fact remains that the suit property was coparcenary property as it is well settled that all property inherited by a male Hindu from his father, father's father or father's father, father's father, is ancestral property. The essential feature of ancestral property according to Mitakshara law is that the sons, grandsons and great-grandsons of the person who inherits it, acquire an interest, and the rights attached to such property at the moment of their birth. A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, sons sons, and sons son and sons sons sons, but as regards other relations, he holds it, and is entitled to hold it as his absolute property.

11. With regard to nature of the property, Mulla's Hindu Law, 22nd Edition, page 327 states as under:-

"All property inherited by a Hindu from his father, father's father, father's father's father is ancestral property. The essential feature of ancestral property according to Mitakshara law is that the son's, grandson's and great-grandson's of the person who inherits it, acquire an interest, and the rights attached to such property at the moment of their birth.

A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, son's son and son's son's son, but as regards other relations, he holds it, and is entitled to hold it as his absolute property."

12. It is settled law that the power of a Karta to sell coparcenary property is subject to certain restrictions viz. the sale should be for legal necessity or for the benefit of the estate. The onus for establishing the existence of legal necessity is on the alinee.

13. In the matter of Smt.Rani and another v. Smt.Santa Bala Debnath and others¹ the Supreme Court held as under:-

¹ 1970(3) SCC 722

"10. Legal necessity to support the sale must however be established by the alienees. Sarala owned the land in dispute as a limited oner. She was competent to dispose of the whole estate in the property for legal necessity or benefit to the estate. In adjudging whether the sale conveys the whole estate, the actual pressure on the estate, the danger to be averted, and the benefit to be conferred upon the estate in the particular insistence must be considered. Legal necessity does not mean actual compulsion: it means pressure upon the estate which in law may be regarded as serious and sufficient. The onus of proving legal necessity may be discharged by the alinee by proof of actual necessity or by proof that he made proper and bona fide enquiries about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity."

14. The principle of law laid down in Smt. Rani (supra) has been recently followed by the Supreme Court in the matter of Arshnoor Singh v. Harpal Kaur and others².

15. Reverting to the facts of the present case in light of above-stated legal position, it is quite vivid that Jagtaram being the head/karta of the family could alienate the suit property in favour of Imlabai by registered sale deed dated 2.4.1974 (Ex.P-1) only for legal necessity or for the benefit of the estate and it was the burden of alinee to establish the legal necessity. No evidence has been adduced by defendant

No.2-Imlabai to establish that such an alienation was made for legal necessity, which she was required to let in to avoid the decree as claimed by defendant NO.1 in counter-claim, as such, it could be established on record that Jagtaram alienated the suit property in favour of Imlabai for legal necessity.

16. Now, coming to the question of law, whether gift of undivided share made by defendant No.2-Imlabai in favour of the plaintiffs vide Ex.P-5 can be said to be valid in the eye of law, this question is well settled and the accepted principle is that coparcener has no power to gift his undivided share and gift by such coparcener is void.

17. In the matter of Thamma Venkata Subbamma (dead) by LR v. Thamma Rattamma and others³, the Supreme Court has held that a coparcener under the Mitakshara law has no power to gift his undivided share unless he is sole surviving coparcener and gift by such coparcener is void ab initio. Paragraphs 12, 13, 14 and 17 of the report state as follows: -

"12. There is a long catena of decisions holding that a gift by a coparcener of his undivided interest in the coparcenary property is void. It is not necessary to refer to all these decisions. Instead, we may refer to the following statement of law in Mayne's Hindu Law, eleventh ed., [Article 382](#) :

3(1987) 3 SCC 294

It is now equally well settled in all the Provinces that a gift or devise by a coparcener in a Mitakshara family of his undivided interest is wholly invalid ... A coparcener cannot make a gift of his undivided interest in the family property, movable or immovable, either to a stranger or to a relative except for purposes warranted by special texts.

13. We may also refer to a passage from Mulla's Hindu Law, fifteenth edn., [Article 258](#), which is as follows :

Gift of undivided interest.—(1) According to the Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of the other coparceners.

14. It is submitted by Mr. P.P. Rao, learned Counsel appearing on behalf of the respondents, that no reason has been given in any of the above decisions why a coparcener is not entitled to alienate his undivided interest in the coparcenary property by way of gift. The reason is, however, obvious. It has been already stated that an individual member of the joint Hindu family has no definite share in the coparcenary property. By an 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 an 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.

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."

18. The principle of law settled in Thamma Venkata Subbamma (supra) has been followed with approval by the Supreme Court in the matter of Pavitri Devi and another v. Darbari Singh and others⁴ further following its earlier decision in the matter of Mukund Singh v. Wazir Singh⁵ in which it was held that a gift of coparcener's property by a member is void and it was further held that a disposition *intra vivos* by gift of coparcenary property except either with the consent of other coparceners or between coparceners or in exceptional circumstances is void.

19. The aforesaid decision of the Supreme Court i.e. Thamma Venkata Subbamma (supra) has again been followed in the matter of Baljinder Singh v. Rattan Singh⁶ with approval and it was clearly held that transfer by coparcener of his undivided interest in coparcenary property by a gift, subject to certain exceptions, is void or voidable.

20. Reverting to the facts of the present case in light of the principles laid down in the aforesaid judgments holding that coparcener has no power to gift

4(1993) 4 SCC 392

5(1972) 4 SCC 178

6(2008) 16 SCC 785

his undivided share and the same is void ab initio, therefore, the plaintiffs' mother Imlabai had no right to gift the suit property in favour of the plaintiffs after getting it from Jagtaram by registered sale deed as the suit property would remain coparcenary property and Jagtaram could not have changed the nature of property, therefore, coparcenary property cannot be subject-matter of gift and rightly held so by the trial Court.

Answer to substantial question of law No.2:-

21. Finding recorded by the trial Court that counter-claim filed by defendant No.1 claiming 2/5th share in the suit property and partition was within the period of limitation is finding of fact based on evidence available on record. It is neither perverse nor contrary to record. I do not find any illegality or perversity in the said finding. The substantial questions of law are answered accordingly.
22. Accordingly, the second appeal being devoid of merit is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).
23. Decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-