

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.102 of 2009**

1. Jagannath S/o Chain by caste Kewat, aged about 49 years, resident of Maldi, Tahsil Bilaigarh, District Raipur (CG)
2. Badki Kani D/o Parau, aged about 73 years, By caste Kewat, resident of Khajurani, Tahsil Jaijaipur, District Janjgir Champa (CG)
3. Majhali Kani D/o Parau, aged about 69 years, by caste Kewat, resident of Khajurani, Tahsil Jaijaipur, District Janjgir Champa (CG)

---- Appellants/Defendants**Versus**

1. Radheshyam S/o Harigopal, by caste Kewat, aged about 39 years, resident of Chaurha Devri, Tahsil Champa, District Janjgir Champa (CG)

---- Plaintiff

2. Nanki Kani @ Mantori, D/o Parau, by caste Kewat, aged about 63 years, resident of Chaurha Devri, Tahsil Champa, District Jangjir Champa (CG)
3. State of Chhattisgarh, through Collector, Janjgir Champa (CG)

---- Respondents

For Appellants/Defendants:

Mrs.Renu Kochar, Advocate

For Respondent No.1/Plaintiff:

Mr.S.B.Pandey, Advocate

For Respondent No.3/State:

Dr.Veena Nair, Dy.A.G.

Hon'ble Shri Justice Sanjay K. Agrawal**Judgment on Board****19/08/2020**

1. Final hearing of this second appeal has been taken-up through video conferencing.
2. The substantial questions of law involved, formulated

and to be answered in this second appeal preferred by the appellants/defendants are as under:-

"1. Whether the first appellate Court was justified in holding that defendants No.1 to 4 had executed a gift deed with regard to the suit property in favour of the plaintiff, by recording a finding which is perverse and contrary to the record ?

2. Whether the first appellate Court was justified in holding that plaintiff is in possession of the suit property and thereby, granting decree for permanent injunction in his favour ?"

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

3. The dispute relates to the property left by Parau and his wife Sumrit Bai. They had four daughters namely Samundra Kunwar (defendant No.1 is her son), Badki Kani (defendant No.2), Majhali Kani (defendant No.3) and Chotkikani @ Nanki Kani (defendant No.4) and plaintiff-Radheshyam is son of Chotkikani @ Nankikani. Plaintiff-Radheshyam filed a suit for permanent injunction and in alternative, restoration of possession pleading inter-alia that the suit property was originally held by Parau and he was in possession of the suit property during his life time. Parau & his wife Sumrit both have died and the plaintiff and the defendants became title-holders of the suit property. It was further pleaded

that he is son of Majhalikani and defendants No.2 to 4 have surrendered their share in the suit land at the time of marriage vide Exs.P-3 to P-5 and since 1990, the plaintiff is in cultivating possession of the suit land and he has perfected his title by way of adverse possession. Since the defendants got their names mutated in revenue records, necessity has arisen to file a suit for permanent injunction and in alternative, recovery for possession of the suit land.

4. Resisting the suit, defendants No.1 to 3 filed their joint written statement stating inter-alia that they have never surrendered their share by way of gift deeds (Exs.P-3 to P-5) in favour of the plaintiff and they are in possession of the suit property jointly and as such, the suit deserves to be dismissed.

5. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 7.4.2007, dismissed the suit holding that alleged gift deeds (Exs.P-3 to P-5) are inadmissible in evidence for want of registration, therefore, no title has been conveyed in favour of the plaintiff and the plaintiff is not in exclusive possession of the suit land, therefore, he is not entitled for permanent injunction. On appeal being preferred by the plaintiff, the first appellate Court

allowed the appeal and held that though gift deeds (Exs.P-3 to P-5) are inadmissible in evidence but it can be looked into for collateral purpose and the plaintiff is owner of part of the suit land, therefore till the partition is effected, the plaintiff cannot be dispossessed from the suit land without following the due procedure of law and accordingly, granted decree for permanent injunction in favour of the plaintiff restraining the defendants from interfering with his possession. Being aggrieved and dissatisfied with the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellants/defendants, in which substantial questions of law have been formulated, which have been set-out in the opening paragraph of this judgment for sake of completeness.

6. Mrs.Renu Kochar, learned counsel for the appellants/defendants, would submit that the first appellate Court after having held that gift deeds (Exs.P-3 to P-5) are inadmissible in evidence could not have granted decree for permanent injunction in favour of the plaintiff restraining other co-owners i.e. defendants NO.1 to 3 from using the suit land in the light of decision rendered by the Supreme Court in the matter of Mohammad Baqar and others v. Naim-un-Nisa

Bibi and others¹, as such, the judgment and decree of the first appellate Court deserves to be set aside.

7. On the other hand, Mr. S. B. Pandey, learned counsel for the respondent No. 1/plaintiff, would support the impugned judgment and decree of the first appellate Court and submit that till the suit for partition is filed, the plaintiff cannot be evicted from the suit land without following the due procedure of law.

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

Answer to substantial question of law No. 1:-

9. Gift deeds (Exs. P-3 to P-5) by which the defendants have allegedly gifted the property to the plaintiff is unregistered gift deeds and by virtue of the provisions contained in Section 123 of the Transfer of Property Act, 1882 gift deeds are required to be registered. In view of the matter, both the Courts below have rightly held that Exs. P-3 to P-5 are inadmissible in evidence for want of registration and thereby no title was conveyed to the plaintiff. Accordingly, finding recorded by both the Courts below is hereby affirmed.

Answer to substantial question of law No. 2:-

1 AIR 1856 SC 548

10. Admittedly and undisputedly the plaintiff and defendant No.1 to 3 are co-owners of the suit land and by decree of permanent injunction the first appellate Court has restrained other co-owners (defendants No.1 to 3) herein from using the suit property after having held that gift deeds (Exs.P-3 to P-5) are inadmissible in evidence.

11. The Supreme Court in the matter of Mohammad Baqar (supra) has held that possession of one co-sharer is possession of all co-sharers, it can not be adverse to them, unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster, following thereon for the statutory period.

12. The Calcutta High Court in the matter of Sachindra Nath Sarkar and others v. Binapani Basu and others² clearly laid down the legal position holding that the co-owner is not entitled to an injunction restraining another co-owner. It was observed as under:-

"18. Consistent with the decisions of this Court, the position in law is as follows:-

(a) the co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property, absolutely and simply because he is a co-owner.

(b) before an injunction can be issued, the plaintiff has to establish that he would

² AIR 1976 Cal 277

sustain, by the act he complains of some injury which materially would affect his position or his enjoyment or accustomed user of the joint property would be inconvenienced or interfered with.

(c) the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience."

13. Similarly, in the matter of Sant Ram Nagina Ram v.

Daya Ram Nagina Ram and others³ the Division Bench of the Punjab and Haryana High Court after elaborately discussing the issue held as under:-

"78. The weight of the authorities and the principles which have been discussed above, give rise to the following propositions -

(1) A co-Owner has an interest in the whole property and also in every parcel of it.

(2) Possession of the joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other, as, when a co-owner openly asserts his own title and denies that of the other.

3 AIR 1961 Punjab 528

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners, it is not open to any one to disturb the arrangement without the consent of others except by filing a suit for partition.

(8) The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for partition or for actual joint possession, but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.

(9) Where a portion of the joint property is, by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent user by a co-owner; if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered."

14. Justice P.S. Narayana on his Law of Injunctions at page 406 (9th edition) relying on Woodrooffe on Law of Injunctions laid down the Rules governing the granting of injunctions in cases between co-owners, which states as under:-

"9. Rules governing the granting of injunctions in cases between co-owners:- (1) The Courts will, in all cases be cautious of interference with the possession and enjoyment of joint property.

(2) If one co-share uses the joint property to the greater profits of himself but without damage to the co-sharers, there is no cause of action.

(3) In as much as such co-sharer is entitled to a portion of every part of the joint property the Court will not, as a general rule, enforce merely strict rights and will not interpose where the use is slightly in excess of the right.

(4) where there is an infringement of a character which is sufficiently substantial to entitle to some relief, the Courts will, in the determination of the question whether an injunction should be granted, have to consider whether the injury is adequately remediable by damages and partition. If that be the case an injunction will be refused.

(5) In the particular case of alleged injury through cultivation in the ordinary course by a co-sharer in actual occupation and sole use of the property, damages and not an injunction will ordinarily be granted even though the cultivation has the effect of excluding a co-share, unless such exclusion is in denial of that co-sharer's title in which case injunction will be granted, such a rule being necessitated by the climate, soil and other peculiar circumstances of this country in which the lands are ordinarily cultivated in common.

(6) In all other cases, an injunction may be granted where act complained of involves the exclusion of the co-sharer or some other material and substantial injury not remediable by partition or damages such as the material and injurious alteration of the nature and condition of the property to which the parties are jointly entitled⁴."

**15. Recently, in the matter of T. Ramalingeswara Rao
(Dead) Through Legal Representatives and another v. N.**

⁴ See Woodroffe on Law of Injunctions. AIR 1980 Ker. 94

Madhava Rao and others⁵ the Supreme Court relying upon **Mohammad Baqar** (supra) has clearly held that possession of one of co-sharers cannot be adverse to that of the others and co-sharer is not entitled to injunction against other co-sharers and held as under:-

"16. In our view, even assuming that the plaintiffs claimed to be in possession of the suit property (which the two Courts below did not find in their favour) for claiming injunction, yet they were not entitled to claim injunction against the other co-sharers over the suit property. It is a settled principle of law that the possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period. [See **Mohammad Baqar** (supra)."

16. Reverting to the facts of the present case in the light of propositions of law laid down by the Supreme Court and the High Courts in the above-stated judgments (supra), it is quite vivid that the suit property is the joint property of the plaintiff and the defendants jointly succeeded by all of them after death of Parau, but the plaintiff did not seek any relief of partition of joint property by metes and bounds. In view of that, the plaintiff ought to have filed the suit for partition, but he claimed that he has succeeded the entire property by way of gift deeds (Exs.P-3 to P-5),

5 (2019) 4 SCC 608

which has been found to be inadmissible by two Courts below and affirmed by this Court, therefore, the first appellate Court could have held that possession of one co-owner is deemed to be the possession of other co-owners, therefore, could not have restrained the defendants from using the joint property by decree of permanent injunction.

17. Accordingly, the judgment and decree of the first appellate Court partly decreeing the suit holding that the plaintiff is entitled for decree for permanent injunction restraining the defendants is hereby set aside. The suit would stand dismissed. However, the plaintiff is at liberty to file a suit for partition in accordance with law.

18. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).

19. A decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-