

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 402 of 2003**

1. Chaitram S/o Soru @ Siru (died) through Lrs. :-
 - a. Mileshwar S/o Late Chaitram, Aged about 30 years, R/o Village Sonbarsa, Tahsil Kusmi, Distt. Balrampur-Ramanujganj, Chhattisgarh.
2. Budhan S/o Soru @ Siru, Caste Kanwar, Aged about 35 years.
3. Sudhan S/o Soru @ Siru (died) through Lrs. :-
 - a. Bifana S/o Late Sudhan, Aged about 40 years.
 - b. Sukhai S/o Late Sudhan, Aged about 35 years.Both R/o Village Sonbarsa, Tahsil Kusmi, Distt. Balrampur-Ramanujganj, Chhattisgarh.
4. Ghunsay S/o Viru, Caste Kanwar, Aged about 30 years.

All R/o Village Sonbarsa, Tahsil Kusmi, Distt. Surguja, Chhattisgarh.

---Appellants/Plaintiffs

Versus

1. Viptal S/o Sifan Nagesiya, Aged about 50 years.
2. Sitaram S/o Sifan, Caste Nagesiya, Aged about 48 years.

Both are R/o Village Sonbarsa, Tahsil Kusmi, Distt. Surguja, Chhattisgarh.
3. Narsu S/o Jagram, Caste Kanwar, Aged about 55 years, Occupation Agriculture, R/o Village

Nawadih, Tahsil Kusmi, Distt. Surguja,
Chhattisgarh.

4. The State of M.P. (Now C.G.) through Collector,
Surguja.

--- Respondents/Defendants

For Appellants :- Mr. A.K. Prasad, Advocate

For Respondents No. 1 to 3:- Mr. Rahul Mishra, Advocate

For Respondent No. 4/State:- Mr. Ravi Bhagat, Dy. G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

07/06/2021

1. This second appeal preferred by the appellants/plaintiffs was admitted for hearing on 13/08/2004 by formulating the following two substantial questions of law :-

“(i) Whether the sale in question vide exhibit D/10 vitiates being contrary to the provisions of Section 165(6) of the M.P. Land Revenue Code, 1959 ?

(ii) Whether the finding of the First Appellate Court in relation to the acquisition of property by Gumta in lieu of the said partition is perverse ?”

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

2. Late Shri Dharku Kanwar had four sons namely Gumta Kanwar, Soru @ Siru Kanwar, Biru Kanwar and Dharamjeet Kanwar, out of whom, Gumta Kanwar and Dharamjeet Kanwar died issueless. Plaintiffs No. 1 to 3 are the sons of Soru @ Siru Kanwar whereas plaintiff No. 4 is the son of Biru Kanwar. The suit property situated at Village Sonbarsa, Tahsil Kusmi admeasuring 35.93 acres in total as shown in Schedule 'A' appended with the plaint was settled in 'Raiyati Bandobast' in favour of Gumta Kanwar, Soru @ Siru Kanwar and Dharamjeet Kanwar jointly.

3. It is the case of the plaintiffs that Gumta Kanwar died in July, 1986 and after his death, defendants interfered with the possession of the plaintiffs on the suit land and on enquiry, it was found that Gumta Kanwar had executed a gift deed dated 22/05/1972 (Ex. D/8) in favour of one Balmohan with regard to the suit property shown in Schedule 'B' appended with the plaint admeasuring 2.834 hectares and subsequently, Balmohan sold the said suit property to defendants No. 1 and 2 vide sale deed dated 25/04/1985 (Ex. D/10) on the strength of the gift deed (Ex. D/8). Similarly, Gumta Kanwar had

also alienated the suit property shown in Schedule 'C' appended with the plaint admeasuring 2.015 hectares in favour of defendant No. 3 vide sale deed dated 18/06/1979 (Ex. D/9).

4. Plaintiffs filed a suit for declaration and recovery of possession stating inter alia that the gift deed (Ex. D/8) executed by Gumta Kanwar in favour of Balmohan as well as the alienation made by Gumta Kanwar in favour of defendant No. 3 (Ex. D/9) are null and void since partition has not taken place between Gumta Kanwar, Soru @ Siru Kanwar and Dharamjeet Kanwar, therefore, Gumta Kanwar had no right or title to alienate or gift the suit property in favour of defendants No. 1 to 3 and as such, defendants No. 1 to 3 have no right or title over the suit property and accordingly, decree for declaration as well as recovery of possession be passed in favour of the plaintiffs.

5. Resisting the suit, defendants filed their written statement controverting the plaint allegations stating inter alia that the suit property has already been partitioned between

Gumta Kanwar, Soru @ Siru Kanwar and Dharamjeet Kanwar and they were living separately and were in cultivating possession of their separate shares, that too, much before the alienation of the suit property made by Gumta Kanwar, as such, the suit property is not joint family property and therefore, the gift deed (Ex. D/8) executed by Gumta Kanwar in favour of Balmohan and the subsequent sale made by Balmohan in favour of defendants No. 1 and 2 vide Exhibit D/10 as well as the alienation made by Gumta Kanwar in favour of defendant No. 3 vide Exhibit D/9 is absolutely in accordance with law and the suit is liable to be dismissed.

6. Learned trial Court, after appreciating the oral and documentary evidence on record, decreed the suit in favour of the plaintiffs by its judgment and decree dated 23/01/1998 which was in turn reversed by the first appellate Court by its impugned judgment and decree dated 20/03/2003 holding that plaintiffs are not entitled for decree for declaration and recovery of possession as sought by them. Feeling aggrieved by the impugned judgment and decree passed by the first appellate Court, plaintiffs have

preferred the instant second appeal under Section 100 of CPC in which two substantial questions of law have been formulated and set out in the opening paragraph of this judgment.

7. Mr. A.K. Prasad, learned counsel appearing for the appellants/plaintiffs, would submit that the first appellate Court is absolutely unjustified in reversing the judgment and decree of the trial Court by recording a finding which is contrary and perverse to the record as the parties belong to 'ab-original tribe' (Kanwar by caste) and therefore, Gumta Kanwar could not have executed the gift deed dated 27/05/1972 (Ex. D/8) in favour of Balmohan and further could not have made the alienation of the suit property in favour of defendant No. 3 by sale deed dated (Ex. D/9). Even otherwise, the finding recorded by the first appellate Court that partition has already been taken place between the parties is unsustainable and bad in law, as such, the impugned judgment and decree passed by the first appellate Court deserves to be set aside.

8. Mr. Rahul Mishra, learned counsel appearing for respondents/defendants No. 1 to 3, would support the impugned judgment and decree passed by the first appellate Court and would submit that plaintiffs did not specifically challenge the gift deed dated 22/05/1972 (Ex. D/8) executed by Gumta Kanwar in favour of Balmohan as well as the sale deed dated 18/06/1979 (Ex. D/9) executed by him in favour of defendant No. 3 and further, the plaintiffs also did not implead the legal heirs of Balmohan as a party/defendant in the suit and did not even seek declaration that alienation made by Balmohan in favour of defendants No. 1 and 2 vide sale deed dated 25/04/1985 (Ex. D/10) is unsustainable. He would also submit that the total property which was settled in favour of Gumta Kanwar, Soru @ Siru Kanwar and Dharamjeet Kanwar admeasured 35.93 acres in total as shown in Schedule 'A' annexed with the plaint and assuming that partition has not already taken place between them, then too, Gumta Kanwar has only gifted and alienated less than $1/3^{\text{rd}}$ share of the said suit property, therefore, learned first appellate Court is absolutely justified in reversing the judgment

and decree passed by the trial Court and the instant appeal deserves to be dismissed.

9. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and went through the records with utmost circumspection.
10. The suit property shown in Schedule 'A' appended with the plaint admeasuring 35.93 acres in total was settled in the names of Gumta Kanwar, Soru @ Siru Kanwar and Dharamjeet Kanwar jointly in 'Raiyati Bandobast'. Gumta Kanwar firstly on 22/05/1972 executed a gift deed (Ex. D/8) in favour of one Balmohan with regard to the suit property shown in Schedule 'B' appended with the plaint admeasuring 2.834 hectares, which was subsequently sold by Balmohan to defendants No. 1 and 2 by sale deed dated 25/04/1985 (Ex. D/10) and thereafter, on 18/06/1979, Gumta Kanwar executed a sale deed (Ex. D/9) in favour of defendant No. 3 with regard to the suit property shown in Schedule 'C' appended with the plaint admeasuring 2.015 hectares. The instant suit was filed for declaration and recovery of possession

on 27/01/1988 i.e. after the death of Gumta Kanwar in July, 1986.

11. Admittedly and undisputedly, plaintiffs did not specifically seek for cancellation of sale deed dated 18/06/1979 (Ex. D/9) executed by Gumta Kanwar in favour of defendant No. 3 and similarly, they also did not specifically seek for cancellation of gift deed dated 22/05/1972 (Ex. D/8) executed by Gumta Kanwar in favour of Balmohan and neither did they seek the relief of cancellation of subsequent sale deed dated 25/04/1985 (Ex. D/10) executed by Balmohan in favour of defendants No. 1 and 2. The general relief of declaration that any kind of transaction made by Gumta Kanwar in favour of the defendants is not binding has been claimed by the plaintiffs, which the trial Court has accepted and decreed the suit, but the first appellate Court has not accepted and reversed the judgment and decree passed by the trial Court.

12. Learned first appellate Court accepted the plea of partition raised on behalf of the defendants and came to the conclusion that the suit

property shown in Schedule 'A' appended with the plaint has already been partitioned between Gumta Kanwar, Soru @ Siru Kanwar and Dharamjeet Kanwar and they were living separately and were in separate cultivating possession of each of their share in the suit property. The said finding recorded by the first appellate Court qua partition is also affirmed by the fact that Gumta Kanwar has firstly executed gift deed dated 22/05/1972 (Ex. D/8) in favour of Balmohan and Balmohan, on the strength of the said gift deed, alienated the suit property in favour of defendants No. 1 and 2 by sale deed dated 25/04/1985 (Ex. D/10). Similarly, Gumta Kanwar has also executed sale deed dated 18/06/1979 (Ex. D/9) in favour of defendant No. 3, but both of these transactions made by Gumta Kanwar i.e. gift deed (Ex. D/8) and sale deed (Ex. D/9) have not been questioned by the plaintiffs during the lifetime of Gumta Kanwar and admittedly, he died in July, 1986 and thereafter, the instant suit was filed on 27/01/1988. Plaintiffs are the sons of Soru @ Siru Kanwar and Dharamjeet Kanwar i.e. brothers of Gumta Kanwar and it is totally unacceptable that they were not aware either

about the transfer by way of gift made by Gumta Kanwar in favour of Balmohan vide Exhibit D/8 with regard to the suit property shown in Schedule 'B' appended with the plaint or the alienation of the suit property shown in Schedule 'C' appended with the plaint made by Gumta Kanwar in favour of defendant No. 3 vide Exhibit D/9 and that they only came to know about the said transactions after the death of Gumta Kanwar.

13. Similarly, the gift deed dated 22/05/1972 (Ex. D/8) executed by Gumta Kanwar in favour of Balmohan has sought to be challenged, but the legal heirs of Balmohan have not been impleaded as party/defendant in the instant suit. Even otherwise, plaintiffs did not specifically question the sale deed executed by Balmohan in favour of defendants No. 1 and 2 and even the copies of the gift deed as well as sale deeds (Exhibit D/8 to D/10) were brought on record at the instance of the defendants. As such, the fact of partition is duly established and learned first appellate Court has not committed any illegality by recording the said finding.

14. In view of the fact that there was already a partition as held by the first appellate Court and affirmed by this Court in preceding paragraph, this Court is of the considered view that the transfer made by Gumta Kanwar is not hit by Section 165(6) of the Land Revenue Code. Accordingly, substantial question of law No. 1 is answered against the plaintiffs.

15. There is one more reason for not interfering with the judgment and decree of the first appellate Court. The suit property shown in Schedule 'A' appended with the plaint admeasuring 35.93 acres in total was inherited jointly by Gumta Kanwar, Soru @ Siru Kanwar and Dharamjeet Kanwar and admittedly, each one of them is entitled to $1/3^{\text{rd}}$ share in the said suit property. Gumta Kanwar has transferred the suit property shown in Schedule 'B' and 'C' appended with the plaint by way of gift and sale i.e. 4.849 hectares out of the total 35.93 acres of the suit property which is less than his share of $1/3^{\text{rd}}$ share. As such, the gift deed executed by Gumta Kanwar in favour of Balmohan vide Exhibit D/8 as well as the alienation made by him in favour of defendant No. 3 vide Exhibit

D/9 are absolutely in accordance with law and they cannot be questioned by the plaintiffs.

16. As a fallout and consequence of the aforesaid discussion, both the substantial questions of law are answered in favour of the respondents/defendants and against the appellants/plaintiffs. The impugned judgment and decree passed by the first appellate Court reversing the judgment and decree of the trial Court does not suffer from any perversity or illegality and is hereby affirmed.

17. The second appeal, being devoid of merits, deserves to be and is accordingly dismissed. No cost(s).

18. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet