

IN THE HIGH COURT OF ORISSA AT CUTTACK

SA No.246 of 1994

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 25.07.1994 and 08.08.1994 respectively passed by the learned District Judge, Kalahandi-Nuapada at Bhawanipatna in Title Appeal No.14 of 1989 confirming the judgment and decree passed by the learned Subordinate Judge, Bhawanipatna in Title Suit No.61 of 1982.

Kamalini Dei (Since Dead) ***Appellants***
through her LRs & Others

-versus-

Kunti Dei (Since Dead) through ***Respondents***
her LRs

Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):

For Appellants - Mr.Ganesh Prasad Samal,
S.K. Mohapatra, D.Das,
S.K. Mohanty & D. Das
(Advocates)

For Respondents - Mr.A.K. Mishra, S. Mishra &
A. Mishra
(Advocates for R.1(a))

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 09.05.2022 : Date of Judgment:20.06.2022

The original Appellant, namely, Kamalini Dei, by filing this Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code'), had assailed the judgment and decree dated 25.07.1994 and

08.08.1994 respectively passed by the learned District Judge, Kalahandi-Nuapada at Bhawanipatna in Title Appeal No.14 of 1989.

By the same, the Appeal filed by said Kamalini under section 96 of the Code in challenging the judgment and decree passed by the learned Subordinate Judge, Bhawanipatna in Title Suit No.61 of 1982 has been dismissed and thereby the decision of the Trial Court has been upheld. The Trial Court, in the suit filed by Kunti Dei, has passed the preliminary decree holding her entitlement to half share over the suit properties.

It may be stated at this stage that the original Appellant Kamalini having died during pendency of this Appeal, her legal representatives have come on record and they are now pursuing this Appeal. The original Respondent since has expired, her legal representatives are before this Court as Respondent No.1(a) to 1(c).

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Suit.

3. The Plaintiff's case is that one Durbadal is the owner of the properties described in Schedule-A and B of the plaint and it stood so recorded in his name. He died in the year 1961 leaving behind his wife Laxmi and two daughters, namely, Sangyabati and Kamalini. Sangyabati pre-deceased her mother Laxmi, leaving behind her daughter Kunti, the original Plaintiff. It is stated that after the death of Durbadala, the lands were recorded in the name of Laxmi as its owner. So, it is said that the Plaintiff, being her daughter, is entitled to half share whereas the other half stands as the entitlement of Kamalini (original Defendant). It is alleged that Kamalini had fraudulently obtained a deed of gift from

her mother, Laxmi in respect of the entire properties in the year 1966, which was later on cancelled by Laxmi in the year 1969. Thereafter, the suit land was managed to be mutated in the name of the Defendant. In an Appeal being moved before the Sub-Divisional Officer, Bhawanipatna, the mutation order passed by the Tahasildar, has been set aside and thereafter, it being assailed by Kamalini before the Member of Board of Revenue, Orissa, the order of cancellation of mutation has been upheld in Revenue Case No.1226/71. It is her case that Laxmi and Kamalini were in enimical terms for which, a proceeding under section 145 Cr.P.C. was initiated. In that proceeding, the parties entered into a compromise. It is next stated that in the year 1976, by virtue of the mutual partition, the Plaintiff cultivated Schedule-A land as of her share and lands under Schedule-B remained under cultivating possession of Kamalini. It is stated that Laxmi was all along in possession of the suit land till the partition in the year 1976. On 30.07.1982, the Defendants tried to forcibly cultivate Schedule-A land. Therefore, the suit has come to be filed after the request of the Plaintiff for partition was turned down.

4. The Defendant contested the Plaintiff's claim by filing written statement. It is her case that Laxmi, being the sole owner of the property, has gifted the same in her favour by registered sale deed dated 04.06.1966 and since then, she is in possession of the property being its absolute owner. It is stated that by virtue of the provisions of section 14 of the H.S. Act, Laxmi became the absolute owner of the suit properties and she was competent to dispose of the same. Accordingly, she has gifted the suit properties in favour of the Defendant, which has been duly accepted by the Defendant. Accordingly, it is said that he Plaintiff has no right, title or interest over the suit properties. The factum of prior

partition, as pleaded by the Plaintiff, is denied. It is her case that Durbadala died around the year 1948-49 and on his death, Laxmi became the owner till her death in the year 1980. It is further stated that despite initiation of ceiling proceeding under the provisions of Orissa Land Reforms Act, 1960 against Laxmi, the possession of the Defendant was not disturbed. Accordingly, she has stated that deed of gift is a valid one and Laxmi never possessed the suit land or any part thereof.

5. Faced with the rival pleadings, the Trial Court has framed five issues. Answering issue no.1 as to the year of death of Durbadala, on examination of the evidence and their evaluation, the Trial Court has held that Durbhadal died in the 1961. Next on issue nos.2 & 3 concerning the fate of deed of gift, the Trial Court's has answered it against the Defendant. With such findings, the Trial Court has decreed the suit preliminarily entitling the Plaintiff to half share over the suit properties.

The Appeal being filed by the aggrieved Defendant, the same has yielded no fruitful result.

6. The present Appeal has been admitted on 05.01.1995 for answering the following substantial questions of law:-

“(a) Whether the Courts below committed error in not holding that the gift in favour of the Appellant was duly proved when the execution of the same was admitted by the Plaintiff? and

(b) Whether the courts below committed error in not accepting the certified copy of the registered gift deed as secondary evidence in spite of the materials on record that the original thereof had been lost?

7. Mr.G.P. Samal, learned counsel for the Appellants submitted that with the evidence on record, the Courts below ought to have held that the gift deed executed by Laxmi in favour of the Defendant is valid and that the properties so gifted has come to the hands of Kamalini to the exclusion of other legal heir of Laxmi. He submitted that the Trial Court has erroneously refused to accept the deed of gift in evidence and then having said that said gift has not been proved has committed grave mistake in rejecting the claim of the Defendant based on that gift made by Laxmi. He submitted that the First Appellate Court ought to have accepted the certified copy of the deed of gift as secondary evidence and should have admitted the same in evidence and on the basis of evidence on record, held it to have been duly proved so as to take its effect and as are available in the eye of law. He submitted that the gift being accepted, the claim of the Plaintiff ought to have been dismissed.

8. Mr.A.K. Mishra, learned counsel for the Respondents submitted that the findings of the Court below that Durbadal died in the year 1961 is based on just and proper appreciation of evidence and thus is not liable to be dismissed. He submitted that the same being the finding, Laxmi and her two daughters together inherited the properties and on the death of Laxmi, her share is to be distributed amongst the two daughters equally. He contended that admittedly Laxmi had only 1/3rd share over the properties left by her husband Durbadala and there was no partition in metes and bounds, so the deed of gift executed by her in respect of the property owned by all the three, i.e, herself and her two daughters is void and inoperative and she too had no such authority or competency. He also submitted that since the Defendant has not proved the gift by leading any evidence, as required under the law and it too being not capable of being as such accepted has to be discarded. He submitted that

the Defendant having somehow managed to obtain that deed of gift by misrepresentation had wisely kept mum and having never accepted it as known to law has projected her claim for the first time when the Plaintiff wanted her share. He also submitted that the First Appellate Court has rightly rejected the cock and bull story project by the Defendant providing explanation as to why the original gift deed is not being filed and the certified copy of the same is tendered as secondary evidence.

9. Keeping in view the submissions made, I have carefully gone through judgments passed by the Courts below.

10. The concurrent finding of fact recorded by the Courts below, on appreciation of the evidence on record, is that Durbadal died in the year 1961. So, on the death of Durbadala, by virtue of operation of the provisions of H.S. Act; Class-I heirs, his widow Laxmi and two daughters inherited the properties and on the death of Sangyabati, her daughter Kunti (Plaintiff), i.e., daughter of predeceased daughter came to inherit her interest therein in equal share.

It is stated that Laxmi died in the year 1980. The deed of gift projected by the Defendant is said to have come into being on 04.06.1966 and is a registered one. Admitted position stands that when the Defendant prayed for mutation of the land, it was objected to and the objection being overruled, there was Appeal, which stood allowed. That order of the Appellate Forum being challenged before the Member, Board of Revenue by the Defendant, the move has been repelled. In a proceeding under section 145 Cr.P.C. initiated by the Defendant, Laxmi and the Defendant agreed therein for joint possession. Thus, it appears that even if there was a deed of gift so executed by Laxmi that has never been acted upon and it faced the challenge right from the time it was known and the corroborative fact is that Laxmi is stated to have

executed a deed of cancellation of that deed of gift by another registered instrument to that effect. Although, that deed of cancellation does not itself nullify the legal value of the deed of gift, yet it can be taken into consideration for the purpose that Donor, Laxmi on an earlier point of time, had expressed surprise about its coming into being. The original deed of gift has neither been proved nor the certified copy of the same has been admitted in evidence. The First Appellate Court has discussed the case projected by the Defendant in this regard in great detail and has rejected the same by giving very good reasons. It may be stated here that the story projected by the Defendant seeking leave to adduce evidence secondary evidence is really as if the one which is narrated by grandmas to their grandsons/granddaughters and no saneman. It has also agreed that the reasons given by the Trial Court that the secondary evidence tendered in this regard is not admissible and in my view has been further declined by the First Appellate Court to be so admitted as additional evidence. On going through the evidence on record, this Court finds that the Courts below have not committed any mistake in not accepting the claim of the Defendant based upon that purported gift said to have been made by Laxmi in her favour in respect of entire properties. Moreover, when admittedly Laxmi had only 1/3rd share over the properties, the gift of whole of the property even if it is said that she had so executed the deed cannot sustain when it is not with the consent of other surviving interest holder. Accepting for a moment that Laxmi had executed the said deed of gift; there is absolutely no evidence that the same was acted upon or accepted in any manner.

In addition to all these above, Laxmi if taken to have executed the gift deed; then from that time onwards, she has not only been landless but homeless and coming under the mercy of the done as there remains

no explanation as to for what reason she is excluding her granddaughter (predeceased daughter's daughter) and she has thus executed that deed of gift which may bring her to the street under the sky in case her relationship with the Defendant for any reason turns sour. The transaction as it appears from the facts and circumstances, which even stand admitted as also there emerging from evidence is an unconscionable one and the Defendant's claim based on that even up-to the extent of share of Laxmi is not at all tenable and with the materials on record as also the evidence when those fail to satisfy the test laid down for admission of secondary admission, rightly the Courts below have refused to admit the certified copy of the deed of gift in evidence.

All the aforesaid provide the answers to the substantial questions of law against the case/claim projected by the Defendant basing upon the so-called gift. Therefore, the judgments and decrees passed by the Courts below receive the seal of approval.

11. In the result, the Appeal stands dismissed. There shall, however, be no order as to cost.

**(D. Dash),
Judge.**

Basu