Pavitri Devi And Anr. vs Darbari Singh And Ors. on 7 September, 1993

Equivalent citations: 1993(3)ALT25(SC), I(1994)BC126(SC), JT1993(5)SC197, 1994(I)OLR(SC)39, 1993(3)SCALE671, (1993)4SCC392, [1993]SUPP2SCR162, 1993 AIR SCW 3266, 1993 (4) SCC 392, (1997) 2 MARRILJ 199, (1994) 1 BANKCAS 126, (1993) 3 ANDH LT 25, (1997) 4 LANDLR 304, (1993) 3 RRR 513, (1994) 3 BANKLJ 358, (1993) 2 APLJ 77, (1993) 3 CURCC 93, (1993) 2 HINDULR 265, (1994) 1 ORISSA LR 39, (1993) 3 SCJ 418, 1993 UJ(SC) 2 766, 1994 ALL CJ 1 142, (1993) 5 JT 197 (SC)

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Bench: Kuldip Singh, K. Ramaswamy

JUDGMENT

K. Ramaswamy, J.

1. One Brahmadeo Singh son of Tuso Singh filed partition Title Suit No. 13 of 1963 against his brothers and their heirs claiming 1/6th share in the coparcenary properties mentioned in schedules attached to the plaint. The trial court dismissed the suit. While the F.A. No. 582/68 was pending in the High Court of Patna, he died on June 8, 1981. The appellant, Pavitri Devi, filed an application for substitution of her and her son as legal representatives. Her claim has been founded on two grounds, namely as the daughter of Brahmadeo Singh as well as the registered gift deed Ex.2 dated August 5, 1980 executed by her father giving his entire share in the joint family property and put them in possession of 9.96 acres of land. When the factum of the date of death and her entitlement as an heir were put in issue by the contesting respondents before the appellate court, the trial court was directed to record the evidence and to submit its report thereon. The trial court on recording voluminous evidence found that Brahmadeo Singh died on May 6, 1981 and not on June 8, 1981, and consequently the appeal stood abated. The trial court also found that the appellant is not his daughter. The High Court held that "from the evidence it is clear that Brahmadeo Singh died on June 8, 1981" and the application for substitution was within limitation. However, it held that the appellant is not his heir and the gift deed executed by Brahmadeo Singh was doubtful. Accordingly the appeal was dismissed by decree and judgment dated Feb. 11, 1984. Thus this appeal by special leave.

2. Though the respondents have been served before and after the grant of special leave, none has appeared either in person or through counsel. Shri Ranjit Kumar, learned Counsel for the appellants placing reliance on Section 30 of the Hindu Succession Act, 1956 for short 'the Act', contented that Brahmadeo Singh had power to dispose of his undivided share in the joint family property by testamentary disposition including by way of gift to his daughter. The interest held by him in the coparcenary property could be bequeathed by the gift deed. Thereby the appellant became successor in interest of Brahmadeo Singh, her father, by devolution under Order 22 Rule 10 of CPC, 1906. Undoubtedly, Order 22 Rule 10 is applicable to an assignee or a person acquiring, during pendency of the suit, the interest in the suit property by devolution. So she would be entitled to be brought on record as her father's legal representative to continue the appeal. Equally as a daughter, being Class I heir, she could be brought on record under Order 22 Rule 3 C.P.C. The question is whether the gift over of the interest in the coparcenary property by Brahmadeo Singh is valid in law. Section 30(1) of the Act provides that 'any Hindu may dispose of, by will or other testamentary disposition, any property which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus'. The explanation, thereto provides that the interest of a male Hindu in a Mitakshara coparcenary property. shall notwithstanding anything contained in this Act, or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section. Section 6 of the Act provides that when a male Hindu dies, after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary. If the deceased had left behind him a surviving female relative specified in Class I of the Schedule, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under the Act and not by survivorship.

3. Webster in Comprehensive' Dictionary in international edition at page 1298, stated the meaning of the word 'testamentary' thus: (i) derived from, bequeathed by, or set forth in a will; (ii) appointed or provided by, or done in accordance with, a will; (iii) pertaining to a will, or to the administration or settlement of a will, testamental. In the Law Lexicon by P. Ramanatha Aiyar, reprint edition 1987 at P. 1271 testamentary instrument was defined to mean a "testamentary instrument" is one which declares the present will of the maker as to the disposal of his property after death, without attempting to declare or create any rights therein prior to such event. Black's Law Dictionary [6th Ed. 1991] defines "testamentary disposition" at page 1475 thus - "the passing of property to another upon the death of the owner. A disposition of property by way of a gift, Will or deed which is not to take effect unless the grantor dies or until that event." Section 123 of the Transfer of Property Act provides disposition by a gift which takes effect even during the lifetime of the donor and effective as soon as it is registered and normally given possession of the property therein. Section 30 of the Act is merely declaratory of the law not only as it stood before the Act, but as it now stands modified by the provisions of the Act. It declares that any Hindu may dispose of by a will or other testamentary disposition his property or interest in coparcenary which is capable of being so disposed of by him in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force applicable to the Hindus. Its explanation is really material. The testamentary disposition, therefore, would mean disposition of the property which would take effect after the death, instead of co-instentine on the execution of the document. A testamentary disposition is

generally effected by a will or by a codicil which means an instrument made in relation to a will extending, altering or adding to its disposition arid is to be deemed to form part of the will. Will as defined in Section 2(h) of the Indian Succession Act, 1925 means legal declaration of the intention of the testator with respect to his property which he desired to carry into effect after his demise. It limits alienation intra vivos. While the gift being a disposition in presenting, it becomes effective on due execution and registration and generally delivery of the possession. Section 30 makes it clear that testamentary disposition under the Act would be dealt with in accordance with the Indian Succession Act. Section 55 and Schedule 3 of the said Act prescribe procedure effecting succession amongst Hindus by testamentary succession by will or codicil. Section 30 employs non-obstinate clause and excludes from the operation of pre-existing or any other law applicable to coparcenary property governed by Mitakshara law and introduced fiction in its explanation and empowers the Hindu male or female to dispose of his or her interest by a will or any other testamentary disposition known to law-which would be effective after the demise. It would, therefore, be difficult to envisage that disposition by gift partakes the character of testamentary succession under Section 30 of the Act.

4. It would be clear when we glean through the pre-existing law. In Jalaja Shedthi v. Lakshmi Shedthi 1973 (1) SCR 707, relied on by Mr. Ranjit Kumar this Court held thus:

> On the demand for partition there is a division in status, and though partition by metes and bounds may not have taken place, that family can thereafter never be considered as an undivided family, nor can the interest of a coparcener be considered to be an undivided interest. It is a well established principle in the Hindu Law that a member of a joint Hindu Family has a right to intimate his definite and unambiguous intention to the other members of the joint family that he will separate himself from the family and enjoy his share in severalty. Such an unequivocal intention communicated to the others will amount to a division in status and on such division he will have a right to get a de facto division of his specific share of the joint family property, in which till then all of them had an undivided coparcenary interest, and in which none of them could claim that he had any right to any specific part thereof. Once the decision to divide has been unequivocally expressed and clearly intimated to his co-sharers, whether or not the other co-sharers agree, an immediate severance of the joint status is effected to which he is admittedly entitled, becomes specified.

5. Having made demand for partition and laid the suit in that behalf claiming a specific share in the Mitakshara Coparcenary, Brahmadeo Singh stood divided it status from other members of the coparcenary, though partition by metes and bounds had not been taken place, on the date of his death; he was a dividing member of the joint family. By operation of Section 30 he was entitled to dispose of his undivided share and the interest in the coparcenary by testamentary disposition.

6. In Phoolchand v. Gopal Lal , this Court held that after filing the suit there was a division in status among the members of the joint family, even though they had been separated earlier. In that case there was a decree passed. Sohan Lal had bequeathed his share by a will in favour of Gopal Lal. This Court held that Sohan Lal being the owner of his share in the undivided coparcenary, was competent

to bequeath by will of his undivided share he got out of the joint family property. This bequest was between coparceners.

7. It is settled law that the Karta or the Manager of the Hindu Joint Family has a right to alienate undivided interest in the Hindu joint family property for valid consideration for family necessity. Karta or coparcener has right to alienate his undivided share in coparcenary property and the purchaser acquires only the equitable right to allotment of his predecessor's share at a partition?. The purchaser is entitled to the allotment of the specific property sold and was put in possession, as far as possible, subject to equities. In Baba v. Thimma (1884) 7 Mad. 357 the Full Bench held that an undivided Hindu father has no right ; to bequeath coparcenary property.

8. In Soorajeemoney Dossee v. Deenobundo Mullick (1957) 6 Moore's Indian Appeals 523 at 553, under Dayabaga law the Judicial Committee held that whatever may have formerly been considered the state of that law as to testamentary power of the Hindus over their property, the power has long been recognised and must be considered as completely established. In Tagore v. Tagore (1872) Indian Appeals (Suppl.) 47, the Judicial Committee set the limits thus: the law of will among the Hindus is analogous to law of gifts and even if wills are not universally to be recognised in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred. A bequest by a will made by a Hindu father of his joint family property for the maintenance of his wife was held to be invalid Subbaramani v. Ramanamma (1920) I.L.R. 43 Madras 420.

9. At p. 685 in paragraph 406 of Mayne's Hindu Law, 13th Edition revised by Justice A. Kuppuswami former Chief Justice of Andhra Pradesh High Court, it is stated thus: "It is now equally well settled in all the states that a gift or device by a coparcener in a Mitakshara family of his undivided interest is wholly invalid. The exceptional cases recognised by the Mitakshara law where it is open to the father or managing member of the family to make a gift of ancestral movable or immovable property have been noticed. in paragraph 377, 393 and 394. A coparcener cannot make a gift of his undivided interest in the movable family property either to a stranger or a relative except for the purpose warranted by special texts.

10. In N.R. Raghvachariar's Hindu Law, edited by late Prof. S. Venkataraman, who himself was an authority on Hindu Law, stated at page 236 that a coparcener cannot transfer. his undivided interest without consideration. Such transfer is totally void. At page 237 it was stated that a gift of his interest by a coparcener being void altogether, there is no estoppel or other kinds of personal bar precluding the donor from asserting his rights to recover the transferred property. A gift by a major coparcener in favour of the minor coparcener was stated to be valid as an exception to the general principle. A Transaction of gift of a joint family property would be void in toto and would not bind even the donor.

11. In Mayne's Hindu Law, in paragraph 379 at p. 661 it is stated that the father's power to make gift through affection within reasonable limits of ancestral movable property has been duly recognised. In Ramalinga v. Narayana (1992) 49 Indian Appeal 168 at 173 the Judicial Committee held that the father has undoubtedly the power under the Hindu Law of making, within reasonable. limits gift of

movable property of Rs. 8,000/- to a daughter, but the gift through affection of joint family property as invalid. Right of the coparceners vests by survivorship at the moment of the testator's death, and there is accordingly nothing upon which the will can operate, as held in Lakshman Dada Naick v. Ramachandra (1881) 7 Indian appeals 181 (P.C.). A gift made with the consent of the coparceners was held to be valid in Appanpatra v. Srinivasa (1917) I.L.R. 40 Madras 1122.

12. In Dwarampudi Nagaratnamba v. Kunuku Ramayya and Anr. this Court held that under the Madras School of Mitakshera law by which. V was governed, he had no power to make gift of his undivided interest in the coparcenary property to his concubine. But a gift by one coparcener of his undivided share to another coparcener, to the exclusion of the others is not invalid Venkata Subbammana v. Rathnamma AIR 1987 SC 1757. This Court in Mukund Singh v. Wazir Singh held that a gift of coparcener's property by a member is void. In other words it is settled law 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. Since the gift being not for consideration is void in toto and operates eo instentine during the life time of the donor, it is not a testamentary succession under Section 30 of the Act. Section 30 of the Act, therefore, brought about change in law of testamentary disposition of Hindu Coparcener of his interest in coparcenary properly governed by Mitakshara school of Hindu Law worked out in accordance with Section 55 read with Schedule III of Indian Succession Act or any other law in force to the above extent. The appellant, donee acquire no interest by devolution under the gift to represent the interest of the deceased plaintiff under Order 22 Rule 10 of C.P.C. Therefore, though for different reasons, we uphold the finding of the High Court in this behalf that the appellant is not a successor in interest by devolution by operation of Order 22 Rule 10. Accordingly we reject the claim of the appellant on that premise.

13. However, she is right in her contention that she is a successor in interest under Order 22 Rule 3 of C.P.C. as is seen by operation of the proviso to Section 6(1) of the Act and explanation I of which read's thus:

> Explanation 1.- For the purpose of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be this share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.
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> A reading of Section 6 thereof clearly provides that when female Hindu dies, after the commencement of the Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest by operation of the proviso devolves on his surviving members of the relatives specified in Glass of the Schedule. The interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under the Act an d not by surviorship. In other words interposition of a female class I heir in the family of the deceased coparcener interjects the operation of succession to coparcenary property by survivorship and opens up the intestate or testamentary succession under the Act among the heirs in the order specified in the Schedule. For the purpose of this section

> the interest of a Hindu coparcener shall, be deemed to be a share in the property that would have been allotted to him if a partition of the property had taken place immediately before, h is death, irrespective of whether his was entitled to claim partitioner not. It is, therefore, statutorily assumed that the partition had, in fact, taken place between the deceased and the other coparceners immediately' before his death by fiction of law. The inevitable corollary being that Pavitri Devi, female Class I heir as per schedule will get her share in the interest which the deceased had in the coparcenary property at the time of his death at a notional partition.

14. The immediate question is whether the first appellant is the daughter of Brahmadeo Singh. The High Court rejected her claim predominantly on two grounds; firstly that there was a discrepancy in the description o f the name of her husband and that at the tonsuring ceremony (Mundan) she was described to be the daughter of one Uma Shanker Singh. As regard the first ground is concerned, we find that it is wholly irrelevant and cuts no ice into her case. With regard to tonsurin, ceremony, said to be based on an entry found in a private record said to have been maintained before 30 years by the father of a witness. A private document produced from the custody of a private party though of 30 years old cannot have the same weight as a public document, nor be relied on to make a child bastard. One finds that such a precarious document cannot be used to deny the paternity of the child. Voluminous oral evidence of 11 witnesses was adduced to prove paternity of the appellant that her father is Brahmadeo Singh. No adequate attention was bestowed by the High Court to subject that evidence to close scrutiny. No valid ground were given to reject it. Therefore, without trenching into the Held of appreciation, we have gone through it and we find no good ground to reject the oral evidence. This apart the deceased himself described in 1963 the gemology attached to the plaint that Pavitri Devi is his daughter and her son as grandson. The High Court stated that there was no need to describe in the geomology of the females. Whether there existed the need or not, it now bears great relevance. As a fact, it establishes that he proclaimed that Pavitri Devi to be his daughter long before his death. In the gift deed also, though we find to be void, he reiterated her to be his daughter. That was almost one year prior to his death. We have no hesitation to hold that the evidence establishes that Pavitri Devi is the daughter of Brahmadeo Singh, She being the Class I heir succeeded to the estate of the deceased by intestate succession under Section 6 and she is entitled to represent the estate in the partition action. Accordingly by operation of Section 6 of the Act read with order 22 Rule 3 C.P.C. she is entitled to represent the estate of the deceased. The application for substitution stand succeeded. She is brought on record as legal representative of the deceased appellant. The order of the High Court is accordingly set aside. The matter is remitted to the High Court for disposal on merits. The appeal is allowed but with no order as to costs.