Patna High Court
Ram Daras Tiwary vs Ishwar Dayal Tiwary on 3 December, 2010
Author: S.Nayer Hussain

Appeal from appellate decree no.255 of 1991

Against judgment and decree dated 08.02.1991 passed by 7th Additional Judge, Bhojpur (Arrah) in Title Appeal No.20 of 1989 affirming the jud decree dated 18.1.1989 passed by 3rd Munsif, Arrah in Title Suit No.11

---

1. Jagdish Tiwary

2. Madan Tiwary Sons of Ram Daras Tiwary deceased

3. Ramadhar Tiwary

4. Rajesh Kumar Tiwary

5. Saraswati Devi

6. Ramawati Devi

7. Deovanti Devi Daughters of Ram DarasTiwary deceased

8. Nirmala Devi All residents of village Bariswan, P.S. Shahpur, District-Bhojpur.

....Defendant-Appellant-Appellants.

-Versus-

1. Lalita Kuer, widow of Ishwar Dayal Tiwary deceased.

2. Prem Prakash Tiwary

3. Sri Prakash Tiwary Sons of Ishwar Dayal Tiwary deceased

4. Pushpa Devi

5. Kiran Devi

6. Usha Devi Daughters of Ishwar Dayal Tiwary deceased

7. Aruni Devi @ Buchan Devi All residents of village Bariswan, P.S. Shahpur, District-Bhojpur.

.... Plaintiff-respondent-respondents.

For the appellants : M/s Indu Shekhar Prasad Sinha, Senior Advocate, Shivendra Narayan Sinha, Manish Kumar, Brajesh Kumar, Shashi Nath Jha and Ujjawal Kumar Sinha, Advocates.

For the respondents : M/s Shashi Shekhar Dwivedi, Senior Advocate & Ramesh Kumar Choudhary, Advocate.

P R E S E N T: HON'BLE MR. JUSTICE S.N.HUSSAIN

S.N.Hussain, J. This second appeal was filed by the sole original def

appellant-appellant against the sole plaintiff-respondent-respondent challenging judgments and decree of both the courts below. During the pendency of this second appeal, the appellant as well as the respondent died and their respective heirs were substituted.

2. This second appeal arises out of Title Suit No.11 of 1986 which was filed by the plaintiff-respondent with respect to lands of several plots and khatas situated in villages-Barisawan, Vimari, Mahapur and Devaichkundi under Sahpur Police Station within the district of Bhojpur detailed in Schedule-I of the plaint for the following reliefs:

> (a) Declaration that gift deed dated 01.12.1976 executed by Dhurendhra Tiwary in favour of defendant was forged, fabricated and for cancelling/setting it aside.
>
> (b) A decree of cost of suit in favour of the plaintiff.
>
> (c) Any other relief or reliefs to which the plaintiff is deemed entitled.

3. The claim of plaintiff was that the common ancestor of both the parties was one Kritarath Tiwary who had five sons, namely Har Prasad, Har Sewak, Mukhlal, Akchhaya Lal and Jageshar, out of whom Jageshar died issueless and both the sons of Har Prasad, namely Saruha and Ramdas also died issueless. It is also claimed that the plaintiff was the son of Akchhaya Lal and defendant was the son of Harsewak, whereas Dhurendhar was the son of Mukhlal. The further claim of plaintiff was that Dhurendhar and his brother also died issueless and hence the branch of Har Prasad, Jageshar and Mukhlal extinguished without any heir and the ancestral property which was coparcenery remained intact between the heirs of Harsewak and Akchhaya Lal only, namely plaintiff and defendant, out of whom defendant Ramdaras Tiwary, who remained in the village, was the Karta of the family, whereas the plaintiff mostly remained outside being in military service. It is also averred that due to quarrel between the lady members of the families of both parties they began to live separately about six years prior to the filing of the suit, but subsequently the plaintiff learnt that the defendant had fraudulently prepared a deed of gift said to have been executed by Dhurendhar

Tiwary in his favour with respect to the suit property, whereafter the plaintiff obtained a certified copy thereof and learnt that the deed of gift was illegal as the said Dhurendhar Tiwary was incapable of understanding anything and remained in long illness and was not competent to execute any such deed in respect of coparcenery properties.

4. On the other hand, the case of defendant-appellant was that the suit was barred by the law of limitation as the suit was filed in the year 1986 challenging the deed of transfer of 1976 without claiming any decree of title and possession or even for partition. It was also claimed that there was a partition between the three branches of the family, namely plaintiff, defendant and Dhurendhar Tiwary, whereafter all the said branches came in exclusive possession of their respective properties and they started separate dealing with them and also purchased properties in their own names and sold properties exclusively, hence there was no question of the entire family being coparcenery and the defendant being Karta thereof. The further claim of defendant was that Dhurendhar Tiwary was mentally and physically sound and alert and within his full senses while executing the deed of gift in favour of the defendant who was looking after Dhurendhar Tiwary who being issueless had no one else to care. Defendant further averred that Dhurendhar Tiwary himself got permission from Chakbandi authority for executing the deed of gift on his own free will. It was also contended that the deed of gift was a registered document having been given effect to and the defendant was getting rent receipts of his share as well as the purchased share of Dhurendhar, whereas the plaintiff was getting receipt of only the 1/3rd portion of land allotted to him in partition and hence he had full knowledge of the deed of gift of 1976, but he had filed the suit only in 1986 due to his greed for the properties of Dhurendhar Tiwary.

5. After considering the pleadings of the parties, the trial court framed the following issues for deciding the suit:-

(i) Whether the suit is maintainable?
(ii) Whether the plaintiff has got valid cause of action for the suit?

(iii) Whether the suit is barred by the law of limitation and the principles of waiver and acquiescence?

(iv) Whether the suit is properly valued?
(v) Whether deed of gift dated 01.12.1976 is forged?
(vi) Whether the plaintiff is entitled for cost of the suit?

(vii) Whether the plaintiff is entitled for any other relief or relie

6. After considering the respective pleadings of the parties as well as the evidence produced by them, Munsif-III, Ara decreed Title Suit No.11 of 1986 vide his judgment and decree dated 18.01.1989 after

arriving at the following findings:-

> (a) The property in suit is joint family property and has not yet been partitioned between the plaintiff and defendant, but both the parties have been separately executing sale deeds with respect to portions of the properties and purchasing other properties independently. Hence, issue no.(v) is decided in favour of the plaintiff and against the defendant.
>
> (b) Issue nos.(i), (ii), (iii), (iv) and (vi) are also decided in favour of the plaintiff and against the defendant.
>
> (c) There is no necessity of deciding issue no. (vii) separately.

7. Against the aforesaid judgment and decree of the trial court, the defendant-appellant filed Title Appeal No.20 of 1989. After considering the respective claims of parties, the court of appeal below formulated following points for deciding the appeal.

(i) Whether the branches of Kritarath Tiwary were joint at the time of allege deed of gift or whether separation or partition had already taken place at that time?

(ii) Whether Dhurendhar Tiwary had right to execute deed of gift in respect of Schedule-I property of the plaint?

8. After considering the arguments of learned counsel for both the parties and after perusing the evidence on record, 7th Additional District Judge, Bhojpur dismissed Title Appeal No.20 of 1989 on contest with cost vide his judgment and decree dated 08.02.1991 after arriving at the following findings:-

> (a) Defendant had stated in his deposition that Dhurendhar Tiwary was joint with him and he used to look after the properties of both of them, therefore his deposition is against his own pleading of previous partition and he had also not pleaded any case of re- union.
>
> (b) Separate acquisitions by separate coparcener are not evidence of separation and even separate residence does not indicate severance of joint status.
>
> (c) Separate tax assessment and separate entries in record of rights cannot legally indicate severance of joint status or any partition by metes and bounds.
>
> (d) Plaintiff has been able to prove that the ancestral property is still joint and there had been no separation or partition by metes and bounds.
>
> (e) The gift by a coparcener of the coparcenery property is void in law as coparcener is not entitled to execute deed of gift of joint property of the family. Reference is

made to Article 258 of Mullah's Hindu Law.

(f) Mere showing some circumstances with respect to separation in the family cannot conclusively prove separation or partition by metes and bounds.

(g) Unequivocal declaration of intention may be sufficient for severance in status in joint family, but such intention must be known to members, whereas in the instant case there is nothing on record to show that any member of the joint family ever made any unequivocal intention to separate or communicated it to other members.

9. Against the aforesaid judgments and decree of the courts below, defendant-appellant filed the instant second appeal which was admitted on 16.09.1991 by a bench of this court after framing following substantial questions of law:-

(i) Whether the learned courts below erred in holding that the suit was not barred under the law of limitation in view of Article 113 of the Limitation Act, 1963?

(ii) Whether the learned courts below committed any illegality in passing the impugned judgments in so far as they have failed to consider that for proving partition amongst coparceners it is not necessary to prove partition by metes and bounds as it is sufficient to prove partition by showing intention of the parties to separate?

10. Subsequently when the second appeal was taken up for final hearing by this court, learned counsel for the appellant raised another point as substantial question of law which is as follows:-

(iii) Whether the suit is barred under the provision of Section 34 of the Specific Relief Act, 1963?

11. Learned counsel for the defendant- appellants argued that the instant suit was filed on 07.02.1986 challenging deed of gift dated 01.12.1976 (Ext.- C) and hence being beyond three years it was clearly barred under Article 113 of the Limitation Act, 1963. It was further argued that the right to sue accrued immediately after the execution of deed of gift in question and hence according to the said provision the suit was to be filed within three years from the date when the right to sue accrued and hence it was clearly time barred, but the plaintiff wrongly took help of Articles 56 and 59 of the Limitation Act claiming that he learnt about the deed of gift in question only one month before the filing of the suit. He also averred that transfer by a coparcener is barred under the Hindu Law and hence the gift deed in question is a void document and where the deed of gift is void and mere declaration is sought, only Article 113 of the Limitation Act would be applicable. In this regard, he relied upon a decision of Calcutta High Court, in case of Kazem Sheik and others Vs. Danesh Sheik, reported in (1897) 1 Calcutta Weekly Notes 574 as well as two decisions of Patna High Court in case of Ghanshyam Chaudhury & Ors Vs. Basdeb Jha and others, reported in (1921) LX I.C.529 (Patna) and in case of Bibi Saleha & Others Vs. Md. Zakariya Khan & Others, reported in AIR 1950 SC 247.

12. Learned counsel for the appellants also argued that the idea of jointness and partition in case of Mitakshara coparcenery under the Hindu Law is defining of share of coparcener which may not be by metes and bounds as thereafter smaller coparcenaries of each coparcener is created without partition by metes and bounds. He further averred that the question is whether any coparcener, after such partition, i.e. secession of joint status or definement of share, can transfer, manage or deal separately and such partition can be manifested by different aspects as defined by the Supreme Court in case of Smt. Krishna Bai Bharitar Ganpatrao Deshukh Vs. Appa Saheb tujaramarao Nimbalkar & Ors, reported in 1979 (4) SCC 60. It is also argued that the requirements mentioned in the aforesaid case law were present in paragraph 20 of the judgment of the title appeal, but there was no appreciation of the aforesaid aspect of law by the lower appellate court. He further stated that partition by metes and bounds is not an essential ingredient of partition in a coparcenery of Hindu Law as has been held in a decision of Apex Court in case of Kalyani (dead) by L.Rs. Vs. Narayanan & Ors, reported in A.I.R.1980 SC 1173. He also relied upon a decision of the Privy Council in case of Mt. Bahu Rani & another Vs. Thakur Rajendra Baksh Singh, reported in A.I.R. 1933 PC 72.

13. Learned counsel for the appellants further contended that in paragraph 10 of his written statement, the defendant had claimed his possession since deed of gift, whereas in paragraph-9 of his written statement he has clearly mentioned the fact which referred to Section 34 of the Specific Relief Act. Hence, he stated that issue no.(i) framed by the trial court with regard to maintainability of the suit also included its maintainability under Section 34 of the Specific Relief Act, but no such point was formulated by the lower appellate court nor any discussion or attention was attributed to such an important issue while the matter was being decided by that court. Hence, he claimed that the case may be remanded to the appellate court on this point. In this regard, he referred to a decision of the Apex Court in case of Munilal Vs. Oriental Fire & General Insurance Co. Ltd. & another, reported in (1996) 1 S.C.C. 90.

14. On the other hand, learned counsel for the plaintiff- respondents argued that the question of limitation was neither raised by the defendant nor it was pressed by him at the time of framing of the issues, nor any evidence was led by him nor any argument with respect to it was made on behalf of the defendant either in the trial court or in the lower appellate court and, accordingly, no finding was recorded by either of the two courts below. Hence, he submits that a new question dependant upon certain facts, which ought to have been proved, cannot be raised now at the stage of second appeal. He also stated that if the document is sought to be declared void, there will not be any question of limitation, especially in view of Article 59 of the Limitation Act which provided three years time from the date of knowledge and the plaintiff had sufficiently pleaded and proved that he came to know about the deed of gift in question merely one month before the filing of the suit.

15. Learned counsel for the respondents also argued that for any act there has to be an intention and a communication, but the defendant failed to show any of them. It was further stated that there was sufficient pleadings duly proved by evidence that there was no separation or partition or definement of share in the family of common ancestor Kritarath Tiwary and only the plaintiff and defendant were living separately since six years prior to the filing of the suit, hence, coparcenery clearly subsisted. It was also asserted that defendant not only claimed mere definement of share rather

claimed complete partition by metes and bounds, whereafter neither joint family, nor coparcenery existed since long. It was averred that presumption of jointness in the family is strong in case of brothers and hence entire onus was upon the defendant to disprove jointness, but he miserably failed to support his pleading by any valid evidence and hence the courts below were justified in disbelieving the defendant. It was further submitted that no doubt, a proposition has been laid down by the Apex Court in case of Kalyani (dead) by L.Rs. Vs. Narayanan & Ors, reported in A.I.R. 1980 S.C.1173 with regard to intention of separation for division of right and property, but this proposition is of no help to the defendant as there is no material or pleading regarding any intention or communication.

16. Learned counsel for the respondents further argued that issue no.(i) framed by the trial court was merely a formal issue of maintainability in which there was no whisper about Section 34 of the Specific Relief Act. It was also claimed that in the written statement also some facts were mentioned, but no such issue was actually raised, hence neither any issue with respect to applicability of any provision of Specific Relief Act was formulated by either of the courts below, nor any evidence or arguments were led on that issue and hence the courts below were quite justified in not considering the said non-existent issue. It was further claimed that no foundational fact regarding applicability of any provision of the Specific Relief Act in the instant suit is present either in the pleadings or in the evidence and hence the defendant-appellants cannot be allowed to raise this point in a second appeal.

17. So far the first question of law raised by the appellants with regard to the suit being barred under the provisions of the Limitation Act, 1963 is concerned, learned counsel for the appellants has relied upon Article 113 of the said Act. The said Article provides that period of limitation for filing a suit for which no period of limitation is provided elsewhere in the Schedule of the Act would be three years from the date on which the right to sue had accrued. The suit out of which this appeal has arisen has been filed for the sole purpose of declaration that deed of gift dated 01.12.1976 executed by one Dhurendhar Tiwary in favour of defendant was illegal and for cancelling/setting it aside. Thus, it is clear that the plaintiff was claiming the said deed to be voidable document which was sought to be declared void and the plaintiff never claimed that the said deed was an ab initio void document fit to be ignored for declaration of his title. In the said circumstances,

Article 113 of the Act was not at all applicable to the facts and circumstances of the case, as for such a suit period of limitation has been specifically provided under Article 59 of the Act, according to which, the period of limitation for filing a suit to cancel or set aside an instrument was three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside first became known to him. In the said circumstances, the appropriate provision of law was Article 59 and not Article 113 of the Act as per the specific facts of this case. Hence, the period of limitation would be three years from the date of plaintiff's knowledge about the deed. Furthermore, the plaintiff had specifically pleaded and proved that he learnt about the impugned deed of gift only one month before the filing of the suit. As against the said claim of the plaintiff, the defendant miserably failed to produce any evidence and hence both the learned courts below were quite justified in

concurrently holding that the suit was not barred by the law of limitation. In these circumstances, the case laws relied upon by learned counsel for the appellants in case of Kazem Sheik (supra), in case of Ghanshyam Chaudhury (supra) and in case of Bibi Saleha (supra) are not applicable to the facts of this case as the instant suit was not for declaration of plaintiff's title after ignoring the deed of gift as ab initio void. Hence, this question raised by learned counsel for the appellants fails.

18. So far the third question of law raised by the appellants with regard to the suit being barred under the provision of Section 34 of the Specific Relief Act, 1963 is concerned, the said issue had neither been raised by the defendant in his written statement nor he got any such issue framed nor he raised the said issue at the time of argument either in the trial court or in the lower appellate court. Furthermore, no foundational fact regarding such an issue was present either in the pleadings or in the evidence or even in the argument of defendant at any stage of the suit. So far issue no.(i) framed by the trial court is concerned, it was a mere formal issue regarding maintainability without any whisper being made with regard to any

- 11 -

provision of the Specific Relief Act and the said formal issue regarding maintainability of the suit was, accordingly, decided by the learned courts below. Furthermore, the plaintiff had been claiming exclusive possession of the suit premises in his own right and it was only the deed of gift executed by Dhurendhar Tiwary in favour of defendant which was creating a cloud over his claim. In this regard, learned counsel for the appellants has relied upon a decision of the Supreme Court in case of Munilal (supra), but the said decision was passed in a completely different context on the question as to whether amendment of pleadings can be allowed when a suit was filed for mere declaration without seeking any consequential relief and hence the said ruling is not applicable to the facts and circumstances of this case. Thus, the plaintiff was quite justified in filing the suit only for declaration that the impugned deed of gift was illegal and for cancelling/setting it aside, as he was already in possession on the basis of his own right. In the said circumstances, the suit was clearly not barred under the provisions of the Specific Relief Act and hence this question raised by learned counsel for the appellants also fails.

19. So far the second question of law raised by the appellants with regard to necessity of proving partition by metes and bounds in a case where partition was amongst coparceners is concerned, learned counsel for the appellants has relied upon Articles 220 and 228 of the principles of Mulla's Hindu Law (Twentieth Edition) as well as upon two decisions of the Apex Court in case of Smt. Krishna Bai Bharitar Ganpatrao Deshukh (supra) and Kalyani (dead) by L.Rs (supra) as well as a decision of the Privy Council in case of Mt. Bahu Rani & another (supra).

20. Article 220 of the Mulla's Hindu Law is with respect to incidents of separate or self acquired property which provides that a Hindu, even if he be joint, may possess separate property and such property would belong exclusively to him,

- 12 -

whereas Article 228 of the Hindu Law is with respect to separate property providing that an acquisition in any of the ways provided therein would be separate property of the acquirer, which includes obstructed heritage, gift, Government grant, property lost to family, income of separate property, share on partition, property held by sole surviving coparcener, separate earnings and gains of learning.

21. The Supreme Court in case of Smt. Krishna Bai Bharitar Ganpatrao Deshukh (supra) specifically held that division of joint status may be brought about by any adult member of the joint family by intimating, indicating or representing to the other members in clear and unambiguous terms his intention to separate and enjoy his share in the family property, in severality and such intimation, indication or representation may be evidenced by an explicit declaration (written or oral) or is manifested by conduct of the members of the family in dealing separately with the former family properties. It was also held that service of notice or institution of a suit by one member/coparcener against the other members/coparceners for partition and separate possession may be sufficient to cause disruption of the joint status.

22. So far the other decision of the Supreme court in case of Kalyani (dead) by L.Rs. (supra) is concerned, it was held therein that partition in one sense is a severance of joint status and coparcener of a coparcenery is entitled to claim it as a matter of his individual volition and in this narrow sense all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member of the joint family to separate himself from the family and enjoy his share in severality and such an unequivocal intention to separate brings about a disruption of joint family status and thereby puts an end to the coparcenery. The Privy Council in its decision in case of Mt. Bahu Rani and another (supra) had held that the principle of joint tenancy appears to be unknown to Hindu Law except in case of coparcenery between the members of the undivided Hindu family governed by Mitakshara law.

- 13 -

23. In view of the settled principles of law, no doubt partition by metes and bound is not necessary in a Mitakshara coparcenery under the Hindu Law as division of the joint status may be brought about by any adult member of the coparcenery by intimating, indicating or representing to the other members in a clear and unambiguous terms, his intention to separate and enjoy his family property, in severality. But the aforesaid law also specifically provides that for any such division there has to be an intention and a communication by the person who wants separation. In the instant case, there is neither any pleading nor any evidence to show that any one of the coparcenery ever sought any division of the joint status either expressly or impliedly, rather it has been pleaded and proved that all the members of the family were living jointly six years prior to the filing of the suit, i.e. much after the execution of the impugned deed of gift. In the said circumstances, the aforesaid case laws relied upon by learned counsel for the appellants are not applicable to the facts of this case, as it was sufficiently proved that there was no intention of any coparcener for separation or partition or definement of share in the family of common ancestor Kritarath Tiwary and in that situation the sons and grand sons of Kritarath Tiwary, including Dhurendhar Tiwary, died issueless in jointness leaving only the plaintiff and the defendant, namely Ishwar Dayal Tiwary and Ram Daras Tiwary

and their respective children as coparceners.

24. Furthermore, the defendant had not only claimed definement of share but had also claimed complete partition by metes and bounds between the members of coparcenery, but although the entire onus of proving the same was upon the defendant, he miserably failed to prove any separation or partition by metes and bounds or definement of share or even any such intention of the donor or the donee. In the said circumstances, the impugned deed of gift as claimed by the defendant was executed by Dhurendhar Tiwary, although being a member of the coparcenery he was not entitled to transfer any undivided interest in the coparcenery and any such

- 14 -

transaction without the consent of other members of the coparcenery was absolutely illegal in view of the provisions of Article 256 and 258 of the Hindu Law. The property being coparcenery, any transfer made by one of the coparceners without the consent of other coparceners, cannot be challenged by any one other than the coparceners and hence such transfers are voidable only at the instance of a coparcener. Thus, the plaintiff being one of the coparceners was fully entitled to and was quite justified in seeking the relief of declaration that the deed of transfer executed by the other coparcener was illegal and for setting it aside, which was rightly upheld by the learned courts below.

25. In the aforesaid facts and circumstances, it is quite apparent that learned counsel for the appellants has failed to substantiate the questions raised by him either in law or on facts. Accordingly, this second appeal fails and is dismissed, but in the facts and circumstances of this case, there will be no order as to cost.

(S. N. Hussain, J.) Patna High Court Dated, the 03rd December, 2010.

A.F.R.

Sunil/