

IN THE HIGH COURT OF JHARKHAND AT RANCHI
S.A. No. 61 of 1995

Most. Khagia

.... . . . Appellant(s)

Versus

1. Mathura Mahto
2. Mahabir Mahto
3. Baldeo Mahto
4. Kunjia Devi

.... . . . Respondent(s)

CORAM :HON'BLE MR. JUSTICE GAUTAM KUMAR CHOUDHARY

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For the Appellant (s)	: Mr. Manjul Prasad, Sr. Advocate
	: Mr. Arbind Kumar Sinha, Advocate
	: Mr. Akhouri Prakhar Sinha, Advocate
	: Mr. Aniket Rohan, Advocate
	: Mr. Baban Prasad, Advocate
For the Respondent(s)	: Mr. Aayush Aditya, Advcoate
	: Mr. Aakash Deep, Advocate

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11/ 11.06.2024.

1. The appellant is the plaintiff and this appeal is preferred against the judgment of reversal passed by 5th Addl. District Judge, Giridih, in Title Appeal No. 53 of 1991.
2. The parties shall be referred to by their original placement in the suit and will include their legal representatives substituted at different stages of the suit.
3. The plaintiff filed the suit for declaration that the registered deed of gift dated 20.10.1986 purported to be executed by her in favour of defendants in respect of the suit land (3.38½ acres) was fraudulent, void and inoperative and the defendants have not acquired any title over the suit land on the basis of it, and for recovery of khas possession of the suit property.
4. As per the case of the plaintiff the suit land was the raiyati land of the plaintiff. Mother of the defendants is Deoki Devi, who happens to be the sister of her husband Kamalpat Mahto.
5. Plaintiff is a childless widow and after her husband's death in June, 1986 she was in need of money for her urgent domestic expenses and she approached defendant nos. 1 to 3, who are the sons of Deoki Devi, to execute a mortgage by conditional sale of her land for a consideration amount of Rs.4000/-.
6. The Defendants agreed to execute deed of sale with condition of repurchase with stipulation to re-convey the suit land to the plaintiff on return of the

amount.

7. It is averred that in collusion with the scribe, in place of deed of sale with condition of repurchase the deed of gift was fraudulently prepared on a false representation and the same was registered and no amount was paid to her as consideration money.
8. Later on, she executed a cancellation deed on 22.02.1988 and thereafter the suit for cancellation of the said deed was filed.
9. The case of the defendants is that the suit was bad for non-joinder of necessary party as Deoki Devi being the only legal heir of Dharam Mahto has not been impleaded. Deoki Devi was not the real sister of Kamalpat Mahto and the defendants are not the Bhaginas of Kamalpat Mahto.
10. As a matter of fact, Deoki Devi was the only daughter of Dharam Mahto who was the recorded tenant. Dharam Mahto had no son and hence he supported the widowed mother of Kamalpat Mahto and brought him along with his mother. Dharam Mahto began to maintain him along with his mother to whom he married in Chumawan as second wife.
11. Provision for maintenance was made in May, 1952 for his second wife and thereafter he declared that Kamalpat Mahto would be entitled to the extent of 5 Anna share from his land. Deoki Devi all along lived with her father Dharam Mahto.
12. Kamalpat Mahto died leaving behind plaintiff, who voluntarily executed a deed of gift in favour of defendants. Kamalpat Mahto was not the son of Dharam Mahto, therefore, he could not inherit the property of Dharam Mahto.
13. The averment regarding fraudulent execution of deed of gift has been denied.
14. On the basis of the pleadings of the parties, the following main issues were framed.
 - (i) **Is the suit bad for non-joinder of the necessary party?**
 - (ii) **Whether the plaintiff belongs to the family of Dharam Mahto?**
 - (iii) **Is the deed of gift dated 20.10.1986 executed by Khagia Devi in favour of Mathura Mahto illegal, void and inoperative?**
 - (iv) **Has the plaintiff got legal, valid and substantive title over the suit land?**
15. Learned trial Court decreed the suit on the ground that the executant was an illiterate and rustic lady aged about 50 years. In case of deed being executed by Pardanashin an illiterate woman, burden of due execution was on person seeking to sustain the transaction.
16. In the present case, scribe was not examined although he was alive at the stage

of trial and therefore, an adverse inference under Section 114(g) of the Evidence Act was drawn.

17. Learned trial Court also took note of the recital of the Ext-4 wherein it has been mentioned that after taking Rs. 4,000/- the gift deed for the land was executed. This was also corroborated by oral evidence of D.W.-2. Taking of consideration money for execution of a deed of gift falsified the plea that property had been conveyed by way of gift.
18. The learned First Appellate Court reversed the judgment of the learned trial Court on the ground that there was no evidence to show that there was partition after the deed of family settlement was executed by Dharam Mahto and also on the ground of non-joinder of necessary party Deoki Devi in the suit.
19. This appeal has been admitted to be heard on the following substantial question of law:

“Whether the learned appellate Court erred in law in dismissing the suit of the plaintiff as a whole even the deed of gift being declared as void and without considering as to whether even if the partition was not there, joint possession would have been given in favour of the plaintiff?”
20. It is argued by the learned Senior Counsel on behalf of the plaintiff/Appellant that suit for declaration of the gift deed to be void has been dismissed by the learned Appellate Court, however, it has concurred with the finding of fact with regard to issue No.5 that the deed of gift was vitiated by fraud. The learned Appellate Court noted “now, it well known that the gift is a gratuitous act and it does not involve any consideration. If the deed is executed on payment of consideration, it is not gift at all. The purported deed (Ext.-4) executed by Khagia Devi suffers from this defect. Therefore, it is not a gift of deed at all. Thus, I must hold that the gift deed is illegal, void and inoperative. The learned lower court has rightly decided the issue in favour of the plaintiff”. By citing this finding of the First Appellate Court learned counsel submits that the judgment of reversal passed in first appeal, on the ground of non-joinder of Deoki Devi was perverse, as she was not a party in the execution of the said deed.
21. It is conceded by the learned counsel on behalf of the respondent(s) that findings of both the learned Courts below that deed of gift dated 20.10.1986 executed by the plaintiff(s) was void, illegal and inoperative and the same has attained finality as in the cross objection has been filed with regard to this finding by the

defendants.

22. Learned counsel appearing on behalf of the appellant has confined his argument on the relief of recovery of possession granted by the learned trial Court.
23. The main point which has been strongly canvassed before this Court is that both sides were the heirs and descendants of Dharam Mahto, and no partition had taken place between them and, therefore, the recovery of possession with respect to the suit land could not have been allowed by the learned trial Court.
24. Mere declaration of the deed of gift to be void will not perforce lead to the conclusion that the plaintiff was entitled to recovery of possession of the suit land. It was a joint family property and without a proper partition suit, possession cannot be granted over the suit property to the plaintiff.
25. In reply, it is argued by the learned Senior counsel on behalf of the appellants that it is the specific case of the plaintiff as pleaded in para 8 of the plaint that after the death of the husband of the plaintiff, defendant(s) cultivated the suit land as *adhbataidar* of the plaintiffs on Chowraha basis. They gave the share of rice till the year 1986 when the deed was executed. Thereafter, they stopped making payment of the share of rice. It was in this way, the defendant(s) had come in possession of the suit property.
26. Had the plaintiff no title and possession over it, there was no question of getting the said gift deed executed by the defendants on payment of Rs. 4000/- . The land had already been duly mutated in the name of the husband of the plaintiff, Kamalpat Mahto and rent was being paid by him on grant of receipt which has been adduced into evidence and marked as Ext. 1 series.
27. Having considered the submissions advanced on behalf of both the sides, the matter boils down to the fact that a gift deed was executed by the plaintiff(s) in favour of the defendant(s) with respect to the property fully detailed in Schedule of the plaint. Both the learned courts below have returned a finding that the said deed was vitiated by fraud and has been declared to be void.
28. The main contention of the learned counsel for the defendant(s)/ respondents is that even if the said deed was declared to be void, recovery of possession regarding the suit property could not have been ordered by the learned Trial Court which is the substantial question of law before this Court.
29. Admission in pleading and admission in evidence are two different things. Provision dealing with admission made in pleading is provided under Order 12 and Order 8 Rule 5 of the CPC. Once there is an admission in pleading as

per the provision of the procedure code, it will dispense with further proof of it. It has been held in **Nagindas Vs Dalpatram AIR 1974 SC 471** that an admission in pleadings or judicial admissions by themselves can be made the foundation of the right of the parties. Relevancy of admission as evidence is provided under Section 21 of the Evidence Act, whereas Sections 17 to 20 define admission.

30. In either case the parties admitting the fact is estopped from raising a contrary plea.
31. In the present case there is an admission in pleading as well as in evidence that defendant(s) got the gift deed executed from the widow/plaintiff/ appellant (Most Kagia) of the case which has been held to be vitiated by fraud.
32. Now it is being argued that said property regarding which the gift deed was executed was a joint family property. If that was so, and the plaintiff had no title or possession over the suit property, then what was the occasion for getting the said deed of gift having been executed in their favour by a fraudulent instrument?
33. The very execution of the deed of gift executed by the plaintiff in favour of the defendants, along with rent receipts (Ext-1 series) in the name of the husband of the plaintiff(s), is clinching evidence regarding separate title and possession of the property of the plaintiff. Possession follows title, and once the gift deed is declared to be void, it will lead to anomalous situation to allow the defendant(s) to remain in possession of the suit land which was transferred to them by the said deed.
34. Substantial question of law is answered in favour of the plaintiff.

Under the circumstances, this Court is of the considered view that the judgment and decree passed by the learned First Appellate Court is not sustainable in law and is accordingly set aside and that of learned Trial Court is restored.

The instant Second Appeal is allowed.

(Gautam Kumar Choudhary, J.)

Sandeep/Pawan

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