

IN THE HIGH COURT OF JHARKHAND AT RANCHI
Second Appeal No. 43 of 1995 (R)

1. Mehrani Ekka
2. Sunil Nulan Ekka
3. Alok Ekka Appellants
Versus
Smt. Illias Oraon @ Elias @ Elice Oraon Respondent

CORAM: HON'BLE MR. JUSTICE GAUTAM KUMAR CHOUDHARY

For the Appellants : Mr. Suraj Kumar, Advocate
For the Respondent : Mr. Amar Kumar Sinha, Advocate
Mr. Sumit Kumar, Advocate

Order No. 18/ Dated : 10.06.2024

1. This second appeal is preferred by the defendant against the judgment of reversal passed by the first appellate Court in Title Appeal No. 23 of 1992.
2. Parties shall be referred to by their original placement in the suit and will include their legal representatives substituted at different stages.
3. Plaintiff filed the suit for declaration of right, title and possession over the lands detailed in Schedule B of the plaint.
4. The case of the plaintiff is that suit land was owned and possessed by one Johan Oraon who had two sons namely Nirmal Oraon and Anand Mashih. After the death of Johan Oraon, the lands were partitioned by his two sons and Schedule B land came in possession of Nirmal Oraon who later on gifted the entire land to the plaintiff who happen to be his daughter by registered deed of gift dated 13.05.1985, after obtaining permission by competent authority under Section 46 of the CNT Act. After the said gift, plaintiff's name was mutated in the revenue records and rent receipt was issued.
5. Case of the defendant is that there was no partition between the sons of Johan Oraon and it was a joint family property. Under the Customary Law, in Oraon community a female had no right of inheritance to any property.
6. On the basis of the pleadings of the parties, the following main issues were framed:-

- I. Is there unity of title and possession between the parties?
- II. Has the plaintiff got title and possession over the suit land?
- III. The gift deed dated 13.05.1985 legal, valid and operative?
- IV. Whether there was a previous partition between Nirmal Oraon and Anand Masih Oraon?
- V. Whether the plaintiff was entitled for inheritance under the customary law?

VI. Whether the plaintiff was entitled for partition as claimed by heirs?

7. The suit was dismissed mainly on the ground that after the permission was accorded by the SDO on 26.03.1985 under Section 46 of the CNT Act, the defendant party preferred appeal before the Deputy Commissioner and the appeal was allowed and the order granting permission was set aside. In view of the fact that order of permission was set aside, the deed of gift (Ext. 1) became *non est* in law without permission under Section 46 of the CNT Act. The trial court also held that order of permission by the SDO was not according to law.

8. Learned first appellant court reversed the judgment of the trial court, and decreed the suit of the plaintiff on the ground that appellate order passed in the Permission Case, was recalled vide order dated 12.10.1987 (Ext. 3) as the appeal of the defendant abated before the Deputy Commissioner on account of death of Nirmal Mahto. Therefore, the first appellate court differed with the finding of the trial Court that gift deed was executed without prior permission under Section 46 of the CNT Act. Further, it was held that plaintiff was in possession of the suit land since the execution of the deed of gift.

9. The instant second appeal has been admitted to be heard on the following substantial question of law:-

Whether the suit suffers from non-joinder of the Deputy Commissioner as party-defendant in the suit?

10. It is argued by the learned counsel on behalf of the appellant that Order I Rule 3 of the C.P.C. has been amended by insertion of the provision that in the suit for declaration of title for possession relating to immovable property, the Deputy Commissioner concerned shall also be impleaded as a defendant. It is submitted that Deputy Commissioner was a necessary party who was not impleaded and therefore, the suit was bad for non-joinder of necessary party and was liable to be dismissed on this score alone. Reliance is placed in the case of ***Marshallan Munda & Others Versus Most. Salma Mundain & Others, 1991 BBCJ 40***, High Court of Patna wherein it has been held that Deputy Commissioner is a necessary party. It is also argued that plaintiff was not a resident of the same village and after the marriage she was residing in Gumla where she was serving as a nurse and therefore, permission granted under Section 46 of the CNT Act was not in accordance with law. It is also submitted that learned first appellate court has not met with the decision of the trial court on the ground of Issue No.IV.

11. It is submitted on behalf of the plaintiff/respondent that Gift deed was

executed after the permission of the SDO and against the said order, the defendant preferred an appeal. During the pendency of said appeal, Nirmal Oraon died on 24.09.1985 and consequently the order dated 29.07.1986 was passed against the dead person which was subsequently recalled by the Deputy Commissioner vide order dated 12.10.1987 (Ext. 3). Thus, the order granting permission attained finality. Subsequent to the gift deed plaintiff came in possession and her name was duly mutuated in the revenue record of the Govt.

12. With regard to the substantial question of law, it is submitted that there was no error or fault on the part of the plaintiff as the petition under Order VI Rule 17 for amendment of the plaint was filed on 11.10.1991 which was allowed vide order dated 16.11.1991 to implead the Deputy Commissioner as the party. Necessary amendment in the cause title of the plaint, could not be done inadvertently, but the said error has caused no prejudice to the defendant. No claim has been made against the Deputy Commissioner as he was only a formal party.

FINDINGS

13. Plaintiff is the daughter of Nirmal Oraon and the claim of title is based on a registered deed of gift executed by her father in her favour.

14. This court is conscious of the fact that while hearing a second appeal, it cannot become a third court of fact and has to confine to the substantial question of law already framed. The first appellate court has returned a finding of fact regarding title and possession in favour of the plaintiff and the second appeal is admitted on the limited question of non-joinder of the Deputy Commissioner as a party during the suit. The order dated 16.11.1991 emphatically states that the amendment to implead the Deputy Commissioner, was allowed. Therefore, the clerical error in not reflecting the name of Deputy Commissioner in the cause title of the suit does not go to the root of the matter so as to affect the merit of the case. Furthermore, both sides are the members of Schedule Tribes and even non-impleadment of the Deputy Commissioner, cannot in all circumstance will result in the suit being bad for non-joinder of necessary party. Word ‘shall’ used in Order I Rule 3 cannot always be interpreted as mandatory to hold that impleading of the Deputy Commissioner is mandatory in all circumstance. It has been held in **Raza Buland Sugar Co. Ltd. v. Municipal Board, 1964 SCC OnLine SC 119**

8. The question whether a particular provision of a statute which on the face of it appears mandatory, inasmuch as it uses the word “shall” as in the present case — is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of

the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.

Under the circumstance, substantial question of law is answered in favour of the plaintiff/respondent.

Second Appeal is dismissed with cost.

(Gautam Kumar Choudhary, J.)

Anit