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Court : Patna

Decided On : Aug-28-1997

Judge : Gurusharan Sharma, J.

Appeal No. : Appeal From Original Decree No. 562 1979

Appellant : Vidya Devi and ors.

Respondent : Kausalya Devi and ors.

Disposition : Appeal Allowed

Prior history : Gurusharan Sharma, J. 1. Murat Mahto of village Chaakwai, Tola Baghi at present within Nawadah district, died leaving his three sons, Meghan Mahto, Baijnath Mahto, the defendant No. 1 and Nanhku Mahto, the original plaintiff.Baijnath Mahto got two sons, namely, Devi Prasad, the defendant No. , 9, who was given in adoption to one Daroga Mahto of village Amar Singh Bigha and Nand Prasad Nand Kishore Prasad, the defendant No. 2, Meghan Mahto left behind two sons, Harslal Mahto and Ramjee Mahto.

Judgement :

Gurusharan Sharma, J.

1. Murat Mahto of village Chaakwai, Tola Baghi at present within Nawadah district, died leaving his three sons, Meghan Mahto, Baijnath Mahto, the defendant No. 1

and Nanhku Mahto, the original plaintiff.Baijnath Mahto got two sons, namely, Devi Prasad, the defendant No. , 9, who was given in adoption to one Daroga Mahto of village Amar Singh Bigha and Nand Prasad Nand Kishore Prasad, the defendant No. 2, Meghan Mahto left behind two sons, Harslal Mahto and Ramjee Mahto. Lakhan Mahto son of Harslal Mahto died leaving behind his widow, Kaushalya Devi, the original defendant No. 3 and two sons, Vijay Mahto and Mukhlal Mahto, the original defendants and 5, Ramjee Mahto died leaving behind his widow,Lakshmi Devi the original defendant No. 6 and two sons, Awadhesh Mahto and Dinesh Mahto, the original defendants 7 and 8.

2. On 14.11.1972 Nanhku Mahto filed Title (Partition) Suit No. 266 of 1972 in the Court of the Second Subordinate judge, Gaya for partition of his 1/3rd share in the joint family property detailed in schedule A to the plaint.

3. During the pendency of the suit, on 21.2.1973 Nanhku Mahto executed a registered deed of gift (Ext.5) in favour of the defendants 4, 5, 7 and 8 in respect of his 1/3rd share in Schedule A properties and thereafter on 17.5.1973 he died unmarried on 7.8.1973 the defendants 3 to 8 appeared and filed a petition under Order 1, Rule 10 of the Code of Civil Procedure to be transposed as plaintiffs on the basis of Ext. 5 in place of thee deceased sole plaintiff.

In the meantime on 12.7.1973 the defendants 1 and 2 had already appeared. However, by order dated 10.8.1973 the said petition of the defendants 3 to 8 was allowed and they were transposed as the plaintiffs 1 to 6 in place of the deceased sole plaintiff. The transposed plaintiffs claimed partition of their 2/3rd share in Schedule A properties.

4. On 27.9.1974 and 10.2.1978 the defendants 1 and 2 filed written statement and additional written statement and contested the suit. According to them the defendant No. 1 had already separated prior to the vesting of zamindari in the State of Bihar and was allotted the lands detailed in Schedule 1 to the written statement. His two brother, Meghan Mahto and Nanhku Mahto remained joint. Nanhku Mahto died on 15.10.1972 unmarried and his estate devolved upon the defendant No. 1 alone by way of survivership. Therefore neither present partition suit (filed on 14.11.1972) was filed by Nanhku Mahto nor the deed of gift (executed

on 21.2.1973) was executed by him.

5. The proforma defendant 9, who after having been adopted by the said Daroga Mahto as his son, ceased to have any interest in the property of his natural father, neither appeared in the suit no filed any written statement nor contested it.

6. After creation of Nawadah district out of the old Gaya district and establishment of Nawadah judgship, the suit was transferred from Gaya to Nawadah.

7. By the impugned judgment and preliminary decree dated 26.5.1979 the Second Additional Subordinate judge, Nawadah held the plaintiffs entitled to partition of their 2/3rd share in schedule A properties. The case and claim of the contesting defendants 1 and 2 of separation and allotment of Schedule 1 to their written statement to the defendant No. 1 and death of the original plaintiff on 15.10.1972 were not proved and the deed of gift (Ext.5) executed by the original plaintiff in favour of the original defendants 4, 5, 7 and 8 the transposed plaintiffs was held to be valid. The parties had unity of title and possession over Schedule A properties and the plaintiffs were entitled to partition of their 2/3rd share therein.

8. In the present case the original plaintiff as well as the defendants 3 to 8, who were transposed as plaintiffs 1 to 6, after death of the original plaintiff claimed jointness and the original plaintiff, Nanhku Mahto does in the state of jointed with his brother Baijnath Mahto, the defendant No. 1 and sons and grandsons of his deceased brother, Meghan Mahto, the defendant 4, 5, 7 and 8 respectively, His estate, as he died unmarried and intestate, therefore, devolved on his nearest reversoner.

9. The contesting defendants 1 and 2 failed to prove separation and allotment of lands to the defendant No. 1 exclusively and as such the suit was filed in the state of jointness.

10. In order to prove the death of the original plaintiff on 15.10.1972 the defendants 1 and 2 brought on record the statutory death register maintained as Warisaliganj Anchal, wherein the relevant entries were marked as Ext. G but there was no entry in respect of death of Nanhku Mahto on 15.10.1972 therein and it

was unmutilated condition. It is true that the said death register was called for by the Court earlier and remained lying on the records of the suit from September, 1974 to 27.1.1976 and on the request of the Anchal Adhikari since there was delay in taking up hearing of the suit, it was returned back and was again called for when the hearing of the suit started. According to the contesting defendant after the said register was sent back to the Anchal Office the entry of death of Nanhku Mahto therein was removed and interpolations were made to deprive them to prove the date of death of the original plaintiff on 15.10.1972. Neither before the said death Register was called for in September, 1974 nor while it was lying on the records of the suit they obtained and produced a certified copy of the relevant entry or a death certificate and so the trial Court rightly did not believe their vevsion about removal of the entry Of the plaintiff's death from the register after it was sent back to the Anchal Office in January, 1976.

The trial Court was, in my opinion, justified in holding that the defendants failed to prove the death of Nanhku Mahto on 15.10.1972.

On the other hand, after consideration of the oral evidence of P.Ws. 3, 6 and 13 to 15 and D.Ws. 7 and 10 to 12 the trial court rightly held that the plaintiffs succeeded in proving the death of Nanhku Mahto on 17.5.1973. From this it was proved that not only the suit was filed by Nanhku Mahto but the deed of gift (Ext.5) was also executed by him. The trial court in this regard compared the report of two finger print experts, on behalf of the parties P.W. 20, in his report Ext. 7 after comparing the L.T.I.(Exts 6 to 6/E) of Nanhku on Ext. 5 with his admitted L.T.I, on the deed of exchange, Ext. 2 and the Vakalatnama opined that all the L.T.I. were of one and the same person D.W. 14 the another expert in his report, Ext. F on comparing (Exts. E/2 and E/3), the-L.T.I. on the deed of gift and the deed of exchange came to the conclusion that L.T.I, were different persons. However, the trial court accepted report Ext. 7 and concluded that the plaintiffs succeeded proving the L.T.I. of Nanhku on Ext. 5.

11. In such circumstance, in my view there remains only one question for consideration in this appeal as to whether in the state of jointness Nanhku's deed of gift (Ext.5) without consent of his coparcener, Baijnath Mahto was legal,valid

and operative.

12. It was not in dispute that the joint family was governed by Mitakshra school of Hindu Law and Baijnath Mahto was a coparcener of Nanhku Mahto and by virtue of Ext. 5 Nanhku gifted his undivided interest in the coparcenary property without consent of his coparcener.

13. It is well settled that in the Mitakshra school no coparcener can dispose of by gift even his undivided interest of the joint family property except with the consent of the other coparceners. The authority to make a gift depends upon the donor's power of disposal over the subject matter of gift. If it was his self acquired property, he was entitled to dispose it by gift or devise at his discretion. But if it was his joint property, then his power of disposal was necessarily limited by the rights of his coparceners.

14. Article 258 of Mull's Hindu Law provided that according to the Mitakshra Law as applied in all the states, no coparcener can dispose of his undivided interest in coparcenary property by gift. He may, however, make a gift of his interest with the consent of the other coparceners.

15. In Thamma Venkctasubramma v. Thamma Rattamma and Ors. : [1987]168ITR760(SC) , while considering the question of making a gift of his undivided interest in coparcenary property by a coparcener, it was held that a coparcener can make a gift of his undivided interest in the coparcenary property to another coparcener or to a stranger with the prior consent or all other coparceners. Such a gift would be quite legal and valid, otherwise such a gift by a coparcener was void.

16. In the said case the Apex Court observed a under:

By an alienation of his undivided interest in the coparcenary property, a coparcener can not deprive the other copartner of their right to the property. The object of this strict Rule against alienation by way of gift is to maintain the jointness of ownership and possession of the coparcenary property. It is true that there is no specific textual authority prohibiting an alienation by gift and the law in this regard

has developed gradually, but that is for the purpose of preventing a joint Hindu family from being disintegrated.

It was further observed as under:

The rigor of this Rule against alienation by gift has been to some extent relaxed by the Hindu Succession Act, 1956. Section 30of the Act permits the disposition by way of will of a male Hindu in a Mitakshra coparcenary property. The most significant fact which may be noticed in this connection is that while the Legislature was aware of the strict Rule against alienation by way of gift, it only relaxed the Rule in favour of disposition by a will the interest of a male Hindu in a Mitakshra coparcenary property. The legislature did not, therefore, deliberately provide for any gift by a coparcener of his undivided interest in the coparcenery property either to a stranger or to another coparcener. Therefore, the personal law of the Hindus governed by Mitakshra School of Hindu Law, is that a coparcener can dispose of his undivided interest in the coparcenary property by a will, but he can not make a gift of such interest.

17. In the present case it was neither the plaintiff's case nor anything stood recited the Ext. 5 that prior to its execution Nanhku Mahto had obtained prior consent of his coparcener. In the aforesaid background and applying the ration of the decision of the Apex Court in Thamrna Venkatasubramma (Supra) I hold that the deed of gift (Ext.5) was void.

18. Section 8 of the Hindu Succession Act, 1956 provides groups of the heirs of a male interstate into different categories and lays down that his heritable property devolves first upon the heirs in class I of the schedule. On failure of any such heir in class I, the property devolves, upon the enumerated heirs specified in Class II, an heir in the first entry in class 111 being preferred to one in the second entry. Likewise those in the second entry shall be preferred to those in the third entry and so on in succession according to Section 9 of the said Act. Having regard to Sections 9 and 11 of the Act the different heirs mentioned n what may be described as subdivision of any particular entry in class II of the schedule do not inherit simultaneously.

Accordingly, in my view, in the present case after the death of Nanhku Mahto, in absence of any of his class I heirs, his full brother, Baijnath Mahto, the defendant No. 1 alone succeeded to the estate left by him in preference to and to the exclusion of the sons and grandsons, the defendants 4, 5, 7 and 8 the transposed plaintiffs 2, 3, 5 and 6 of his deceased full brother Maghan Mahto.

19. In the result the impugned judgment and preliminary decree is set aside and modified to the extent that defendant No. 1 was entitled to 2/3rd and the plaintiff to the extent or 1/3rd share in Schedule A lands.

20. This appeal is, accordingly, allowed, but without costs.

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