

Phulia Devi and ors. Vs. Jagassi Devi and ors.

Phulia Devi and ors. Vs. Jagassi Devi and ors.

SooperKanoon Citation : sooperkanoon.com/126431

Court : Patna

Decided On : Nov-05-1997

Judge : P.K. Deb, J.

Appeal No. : Appeal from Appellate Decree No. 183 of 1980 (R)

Appellant : Phulia Devi and ors.

Respondent : Jagassi Devi and ors.

Disposition : Appeal Allowed

Judgement :

P.K. Deb, J.

1. This Appeal has been preferred under Section 100 of the Code of Civil Procedure against the concurrent findings of both the Courts below in Title Suit No. 4 of 1976.

2. The appellants as plaintiffs filed the above mentioned suit before the Munsif at Chatra for partition of their half shares in the suit property appertaining to Khata No. 10 fully described in the schedule at the foot of the plaint. According to the plaintiffs, the lands were raiyati lands and were recorded in the names of two brothers, namely, Lakshman Bardi and Laliya Bardi sons of Gyani Bardi and they had equal shares in the lands at Khata No. 16 and it was recorded specifically that

they have BIHSSA BARABAR during the last survey operations. Plaintiffs are the defendants of Laliya Bardi while the defendants are the descendant of Lakshman Bardi. Lakshman Bardi died about 35 years ago leaving three sons, namely, Sohar Bardi, Lato Bardi and Barho Bardi and these sons are the defendant Nos. 1 to 3. The minor sons of the defendant Nos. 1 to 3 had also been made parties while Barho Bardi was issueless. Lato Bardi has no son and has only a daughter and she has been made as defendant No. 5. Laliya Bardi i.e., the predecessor of the plaintiffs died about 25 years ago and left behind two sons Bandhan Bardi and Mohan Bardi. They are plaintiff Nos. 1 and 2 other plaintiffs are the sons of the plaintiff Nos. 1 and 2.

It was the case of the plaintiff that after the death of Lakshman Bardi, his sons and other co-sharers and recorded tenant Lalyia Bardi amicably divided the lands to the extent of half and half, according to the convenience, but without dividing by metes and bounds. Laliya Bardi remained in continued possession of his land which fell to his share and after his death his descendants i.e., the plaintiffs were in possession and the other half remained in possession of the defendant Nos. 1 to 4 while defendant No. 1 had gifted away his share to his daughter i.e. .defendant No. 5, by a Gift deed, which has been marked as Ext. E in the case. When there was no document of partition, the plaintiffs found difficulty in paying rent as the lands were not separated and there was also difficulty in improving of the shares of the land of the plaintiffs and as such they requested the defendants for dividing the lands by metes and bounds and to prepare a document of partition but the same was deferred with various pretext, as such ultimately the plaintiffs 1 to 5 filed the suit for partition of their half share.

3. The plaintiff's suit was contested by the defendant Nos. 1 to 3 and 5 by filing joint written statement. They took various pleas of non maintainability of the suit, that the suit was not maintainable in its present form as the plaintiffs wanted to get their title declared in the garb of a partition suit and as such the suit cannot be proceeded without seeking a relief for title.

According to the defendants, the original owner Jnani Bardi had another son namely Banshi Bardi and during his life time there was partition and as such

Banshi Bardi got the lands in Khata No. 10 while Lakshman and Laliya Bardi got the lands the Khata No. 16 and Gyani Bardi retained the land of Khata No. 5. It was the further case of the defendants that the plaintiff Nos. 1 and 2, Bandhan Bardi and Mohan Bardi had exchanged the lands from Banshi Bardi and as such only a small quantity of land namely O. 33 decimals remained belonging to the plaintiffs in Khata No. 16 which again by exchange was taken by the plaintiffs in lieu of Khata No. 10 land and the whole Khata No. 16 land remained in the title and possession of Lato Bardi as Lakshman Bardi had shifted to another village Sima, wherein two other sons i.e., defendant Nos. 2 and 3 were born and he remained there and Lato remained the title holder and possessor of the whole of the lands of Khata No. 16 and the same had been gifted away by him to his daughter, defendant No. 5.

4. The geneology had been given by the defendants in their written statement, which has also been mentioned in the Appellate Court's judgment at para-4 and the said geneology had not been denied from either of the parties. In the original Court, both parties adduced evidences both oral and documentary and also the Gift deed, Ext.E. was proved from the side of the defendants while the purchase deed of the plaintiffs from Banshi Bardi in Khata No. 10 had also been proved as Ext. 2. After hearing the parties and on scrutiny of the evidence on record, the Munsif, Chatra dismissed the suit holding that the plaintiffs were never in possession of the suit property and practically they had shifted to Khata No. 10 and the whole land remained with Lato Bardi, the defendant No. 1 and even if the plaintiffs' remained the share holder in the suit Khata, but they had been ousted and as such Lato Bardi, defendant No. 1 acquired title over the suit property by adverse possession and the same being gifted to defendant No. 5. The plaintiffs without coming up for setting aside that deed of gift or challenging the same, cannot come up with a partition suit in the garb of declaration of title and hence the suit was dismissed.

5. It should be mentioned here that with regard to exchange of the share of plaintiff's land between Khata No. 16 with that of Khata No. 10 with Banshi Bardi was found by the Original Court also to be not proved.

6. Against the dismissal of the suit, the plaintiffs-appellants filed Title Appeal No. 60 of 1978 and the appellate Court re-apprised the whole case independently and came to the finding that the defendants had failed to prove that the plaintiffs were not the co-sharers having half share over the suit property and that even if the plaintiffs were not in possession, their possession may be construed as the possession of the co-sharers i.e., the defendants but as the whole land had been gifted away to defendant No. 5 the present suit of partition was held to be not maintainable, observing in the following manner;

In view of the above admission of the plaintiffs regarding the execution and registration of a gift deed in respect of the suit land by Lato Bardi in favour of his daughter (defendant No. 5) and her possession there over it was clear that the plaintiffs must have filed the suit not as a pure and simple partition suit but as Title Suit for declaration of title and recovery of possession also after payment of advelorum Court fee which the plaintiffs did not do. Thus, the suit was not maintainable in the present form.

It was also held that the suit was not barred by limitation and by adverse possession and also not hit by the principles of waiver, acquiescence, estoppel and ouster as held by the original Court. Thus, the appeal was dismissed solely on the ground that the plaintiffs did not file a title suit as already there was a deed of gift in favour of defendant No. 5 by the defendant No. 1 about three years prior to the filing of the suit and as no advelorum Court fee was paid, and thus this Second Appeal has been filed and the following substantial question of law was framed vide order dated 17.8.1981:

Whether the Courts below erred in dismissing the plaintiffs-appellant's suit for partition inspite of the gift in respect of the suit property by a coparcener being void ab-initio?

7. It would be held by both the Courts below that the defendants had failed miserably to prove that the plaintiffs have lost their title in the suit property when they had purchased the land of Khata No. 10 from Banshi Bardi and that there was exchange between the plaintiffs and defendants in respect of the suit property, but still the suit was held to be not maintainable in the form of partition suit.

8. The admitted position remains that the plaintiffs have got half share over the suit property as per records and the plaintiffs No. 1 and 2 had purchased the land of Khata No. 10 from Banshi Bardi as of their individual capacity not being purchased from the joint fund of the coparcenary property. The plea of Benami transaction, oral exchange regarding, 33 decimals of lands of Khata No. 16 had been disbelieved by both the Courts and it was legally done so as there could not be any exchange of immovable properties amongst the Hindus orally. Benami transaction could also not be proved from the side of the defendants. Now, the position remains that as per records the plaintiffs have got half share over the suit property. In that view of the matter, the plaintiffs have got definitely a right to file a Partition Suit to get their share separated unless it could be proved that the title of plaintiffs over the suit property has been lost by the principle of ouster and of adverse possession. The 1st Appellate Court has held that the plaintiff's title of half share over the suit property has never been lost by ouster or by adverse possession. Then only because the defendant No. 5 had been gifted away mentioning the whole of the suit property by defendant No. 1 the plaintiff's title over the suit property cannot be said to be clouded and when clouding is not there the plaintiffs are not liable to come up for a Title Suit on payment of advelorum Court fee and in a Partition Suit, it is the settled principles of law that even if the title is challenged incidently then the same can be adjudicated within the purview of Partition Suit itself. It is not necessary that advelorum Court fee for the title should be paid and declaration of right and title sought. When both the Courts below found that the plaintiffs half share over the suit property had not been lost by adverse possession or by ouster or not hit by law of Limitation or by the principle of waiver, estoppel, and acquiescence then the plaintiffs suit ought not to have been thrown out on the ground of maintainability. There is error of law and misappropriation by both the Courts below and the wrong approach has been taken by both the Courts in deciding the crux of dispute between the parties.

9. About the substantial question of law as framed, it is the contention of Mr. N.K. Prasad appearing for and on behalf of the plaintiffs-appellants that when admittedly the suit property is a coparcenary property then any co-sharer or coparcener is not entitled to gift away his share even and such gift if it is made then the same is void abinitio. He has referred to Article 258 from the Book of

Mullas Principle of Hindu Law, wherein it was enunciated after consideration of various judgments of different High Courts that alienation of undivided coparcenary interest is always void abinitio and in respect of gift the same principle remains. But, on later judgments, it was held that the gift in toto and without any pre-condition cannot be said to be void abinitio in respect of the shares of the donor coparcener but the said gift would be a void one if the same has been done without the consent of the other coparceners. If the consent remains of the other coparceners then alienation by way of gift of the share of the coparcener doner shall be valid in respect of the title of the donee.

10. In that view of the matter, even if Lato Bardi, defendant No. 1 vide Ext. E had mentioned the whole of the lands of the suit property in Khata No. 16 in favour of daughter, defendant No. 5 then the same can be held to be valid in respect of his share alone and the same cannot bind the other coparceners. In respect of the consent, although such issue was not there before any of the Courts below, but it could be found that there was an admission from the side of the plaintiffs in framing the suit and mentioning the deed of gift in para 4 of the plaint wherein it was mentioned in the following words: 'The other half is in possession of the defendants 1 to 4. The plaintiffs have learnt that defendant No. 1 Lato Bardi has gifted his properties to his daughter defendant No. 5 and this is why she has been made a party to this suit.'

11. Mr. K.K. Sahay, appearing for and on behalf of the respondents has very much relied on these admission in the plaint to the effect that when the plaintiffs had relied about the gift deed, it was their duty to nullify that gift deed, if now it is the contention of the plaintiffs that the said deed was void abinitio. After such admission, according to Mr. Sahay, it does not lie in the mouth of the plaintiffs to challenge the gift deed as void abinitio.

12. The plaintiffs are not such concerned about the declaration of the gift deed in favour of defendant No. 5 to be void or voidable but they are interest about their half share within the suit property. When the plaintiffs have got half share over the suit property, their share in no way can be bound by the gift deed, Ext.E in favour of defendant No. 5. When defendant No. 1 had gifted away the said gift deed

would be in respect of his share alone without binding the shares of any other coparceners and when the plaintiffs have admitted that position and made the defendant No. 5 as defendant to be another share holder in the suit property then the question of voidability of the gift deed is not in question. Only this much can be said that the said gift deed cannot take away the half share in the suit property belonging to the plaintiffs. The gift deed would remain within the other half share of the defendant Nos. 1 to 4.

13. In that view of the matter, I find that the learned Courts below had committed error of law in dismissing the suit of the plaintiffs praying partition of their half share. Their half share not being in any way dependent on the gift deed of defendant No. 5. The question of declaration of title or for setting aside the gift deed is of no bearing in the present suit of partition and the plaintiffs can very well get their half share partitioned.

Hence, the appeal is allowed and the suit of the plaintiffs is hereby decreed preliminary for getting partition of their half share of the suit properties. The plaintiffs should get cost of all the Courts in their favour. The preliminary decree be drawn up accordingly.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com