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Court : Patna

Decided On : Feb-26-1993

Judge : S.B. Sinha and R.M. Prasad, JJ.

Appeal No. : Civil Writ Jurisdiction Case No. 739 of 1993

Appellant : Abdul Samad and ors.

Respondent : State of Bihar and ors.

Disposition : Application Allowed

Judgement :

S.B. Sinha, J.

1. This application is directed against the orders dated 12-9-1990 passed by the respondent No 5 and as contained in Annexure-3, the order dated 2-8-1991 passed by the respondent No. 3 and as contained in Annexure-4 to the writ application as also the order dated 24-9-1992 passed by the respondent No. 2 and as contained in Annexure-5 to the writ application as also the notification dated 18-8-1991,

2. The facts of the matter lie in very narrow compass.

Late Mohd. Maqbul Rub, the father of the petitioner executed deed of gift dated 18-4-1963 in favour of the petitioner Nos, 1 to 3 as contained in Annexure-1 to the

writ application. He executed another deed of gift dated 24-3-1972 as contained in Annexure-2 to the writ application. Yet by reason of the another deed of gift dated 25-J-1972 he gifted the property mentioned therein in favour of petitioner Nos. 1 to 4 which is contained in Annexure-2/1 to the writ application,

3. A land Ceiling proceeding was initiated against the aforementioned Mohd. Maqbul Rub and his co-sharers in the year 1973 which was registered as Ceiling Case No. 18/19 of 1973-74. As the said proceeding was pending as on 9-4-1981, in terms of Section 32-B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as the said Act), the same abated. Thereafter a fresh proceeding was initiated. Mohd. Maqbul Rub died leaving behind the petitioner and his legal representative. However after his death his widow was only substituted.

4. The petitioners have contended that in relation to the aforementioned deeds of gift no proceeding under Section 5 (1)(iii) of the Act had been initiated and a draft publication was made in terms of Sub-section of Section 10 of the Act.

5. An objection was filed against the said draft publication claiming inter alia that the lands which were the subject-matter of the aforementioned deeds of gift be excluded. The said objection was rejected by an order dated 12-9-1990 as contained in Annexure-3 to the writ application.

6. In February, 1991 the mother of the petitioners also died before publication under Section 11(i) of the said Act.

7. The petitioners preferred an appeal and the appellate authority was informed about the death of the mother of the petitioners.

The appellate authority dismissed the said appeal by an order dated 2-8-1991 and as contained in Annexure-4 to the writ application. Immediately thereafter a notification under Section 15(1) of the Act was issued on 18-8-1991 in the name of mother of the petitioner i.e. in the name of dead person.

8. The petitioners thereafter filed a Revision application which was registered as Case No. 51 of the Act. By an order dated 24-9-1992 as contained Annexure-5 to

the writ application the said revision application has also been dismissed.

9. Mr. Arun Kumar Ambastha, the learned Counsel appearing on behalf of the petitioner has raised a short question in support of this application.

The learned Counsel submitted that so far as the deed of gift dated 18-4-1963 is concerned, the same was covered by the provisions contained in Sub-section (5) of Section 5 of the Act as aforementioned deed of gift was executed within the permissible period.

10. It has further been submitted that the Governor of Bihar in exercise of his power conferred upon him under Article 213(1) of the Constitution of India promulgated an ordinance which came into force on 27-4-1971 known as Bihar Land (Fixation of Ceiling Area and Acquisition of Surplus Land) 4th Amendment Ordinance, in terms whereof a second proviso was added to Sub-section (5) of Section 5 of the said Act.

The said ordinance was re-promulgated by reason of Ordinance No. 64 of 1992. It has been contended that Section 17(2) of the Ordinance contained a saving Clause.

11. It in the meanwhile, Bihar Act No. 1 of 1972 was enacted which was given a retrospective effect and retroactive operation with effect from 9-9-1970. Although the said Bihar Act No, 1 of 1972 was given a retrospective effect from 9-9-1970, in terms of the saving Clause contained in Section 13(2) thereof all transactions held prior to coming into force of the said Act were saved.

12. The learned Counsel in support of this contention has relied upon a division bench decision of this Court in S, K. Musan and Ors. v. The State of Bihar and Ors. reported in 1977 BBCJ 54.

13. It has further been submitted that in the said notification even the Homestead lands upon which residential house of the petitioner stands as also the burial grounds had been included.

14. Mr. Raghiv Ahsan, learned Counsel appearing on behalf of the State, however, although did not controvert the position of law, submitted, that in order to obtain benefit of the deeds of gift, the same must be validity executed.

15. The learned Counsel pointed out that a finding of fact has been arrived at by the Collector that the said deed of gift was not accepted by the donees and thus the same being a void, the petitioner cannot take benefit about the same.

16. Sub-section (5) of Section 5 of the said Act, as it this stood reads thus:

(5) Any landholder, subject to the provisions of the tenancy law of the area may, if he has not already transferred, transfer, till the commencement of this Act and within I (one) year thereafter, by way of gift any land held by him as raiyat to his son, daughter, children of his son or daughter or to such other person or persons who would have inherited such land or would have been entitled to a share therein had the land holder died intestate in respect whereof, at midnight between the date of the commencement of this Act and the day just preceding such date so as not let exceed together with any other land held by the donee, the area the donee can hold under Section 5.

17. Sub-section (5) of Sec. (5) of the Act as originally enacted, permitted a transfer by a way of gift initially for a period of six months which was later on extended to one year by Bihar Act No. XVIII of 1962. Second proviso to the said Act was inserted by Bihar Ordinance No. 113 of 1971. In terms of the said provision landholder became entitled to transfer any land during the period of three months from the commencement of the said ordinance i.e. 27th December, 1971 by way of gift to his son, daughter, any children of his son or daughter, and other person or persons who would have inherited such land or would have been entitled to a share therein bad the landholder died intestate in respect thereof at midnight between the 26th and 27th December, 1971.

The said period was further extended by reason of ordinance No. 64 of 1972.

18. In 5, K. Musan v. State of Bihar reported in 1977 BBCJ 54, this aspect of the matter has been considered and it has been held therein as follows:

This proviso refers to the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land (Fourth Amendment) Ordinance No. 113 of 1971, Section 3 of which also contained a similar provision. Bihar Ordinance No. 13 of 1971 was published in the Bihar Gazette, dated the 27th of December, 1971 i.e. it came into force from that date. The registered deed of gift in favour of the petitioners of this case were, as stated earlier, made on the 1st February, 1972, and were within three months from that date. In the circumstances, in view of the provisions of Sub-sections (2) and (3) of Section 13 of the amending Act of 1972 (Bihar Act 1 of 1977), the registered deeds of gift dated the 1st of February, 1972 in favour of the petitioners, cannot be affected by the provisions of the said amending Act of 1972, and it was not open, therefore, to the respondents to ignore these registered deeds of gift in favour of the petitioners of this case.

19. Evidently, therefore, all the three deeds of gift were executed within the permissible period.

However, there cannot be any doubt that in order to derive benefit of the aforementioned deeds of gift the same must be valid in law. For constituting the valid deed of gift not only acceptance thereof by the donee is but also delivery of possession of the gifted properties is necessary.

20. Articles 149 and 150 of the Mulla's principles of Mohamedan Law read as follows:

149. The three essential of a gift.-It is essential to the validity of gift that there should be (1) a declaration of gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee as mentioned in Section 1:0, if these conditions are complied with, the gift is complete

150. Delivery of possession (i) It is essential to the validity of a gift that there should be a delivery of such possession as the subject of the gift is susceptible of. As observed by the Judicial Committee, 'the taking of possession of the subject-matter of the gift by the donee, either actually or constructively, ' is necessary to complete a gift, See Sections 145, 146, 152 and 154.

(3) Registration.-Registration of a deed of gift does not cure the want of delivery of possession,

(3) If it is proved by oral evidence that a gift was completed as required by law (Sections 149 and 150), it is immaterial that the donor had also executed a deed of gift, but the deed has not been registered as required by the Registration Act, Section 17(a)(p).

(4) A declaration in a deed of gift that possession has been given binds the heirs of the donor. But such a declaration is not conclusive and a recital in a deed of gift that possession has been given to a minor nephew (without the intervention of a father or guardian Section 156), was on the facts held to be insufficient to support a gift as against the heirs of the donor.

21. However from a perusal of the order dated 2-8-1991 passed by the respondent No. 3 and as contained in Annexure-4 to the writ application as it appears that the delivery of possession of gifted properties had been found only upon considering the stipulations made therein. Acceptance of gift can be proved by oral evidence ; similarly delivery of possession of the gifted properties can also be proved by conduct of the parties subsequent thereto and surrounding circumstances.

The petitioners were not made parties in the original proceedings. The question with regard to the validity of the deed of gift was not considered by the Collector under the Act. The Collector, therefore, had no material other than the deed itself to come to the conclusion that the said deeds of gift were void.

22. In this situation, in our opinion, an opportunity should be given to the petitioner to show that the said deeds of gift are valid in law.

23. As the matter has to be remanded before the Collector, the petitioner should also be permitted to show that their homesteads as also burial grounds have been included which do not come within the purview of the definition of the land as contained in Section 2(f) of the said Act before the Collector.

It would also be open to the state to adduce such evidence or evidences as it may deem fit and proper.

24. Further, as noticed hereinbefore, the notification has been issued in the name of a dead person.

25. For the reasons aforementioned, this application is allowed the impugned order as contained in Annexure-3, and 4 to the writ application and the notification are set aside and the matter is remitted to the Collector under the Act for a fresh decision in accordance with law.

26. The petitioner may appear before the Collector within four weeks from today.

In the facts and circumstances of the case, there will be no order as to costs.

R.M. Prasad, J.

27. I agree.

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