

Har Prasad Vs. Mst. Ram Devi

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Court : Allahabad

Decided On : Dec-14-1962

Reported in : AIR1964All64

Judge : S.S. Dhavan, J.

Acts : Hindu Law; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11

Appeal No. : Second Appeal No. 206 of 1957

Appellant : Har Prasad

Respondent : Mst. Ram Devi

Advocate for Def. : Ambika Pd. and ;Raja Ram Agarwal, Adv.

Advocate for Pet/Ap. : Baleshwari Prasad, Adv.

Disposition : Appeal dismissed

Judgement :

S.S. Dhavan, J.

1. This is a defendants' second appeal from the concurrent decisions of the Courts below decreeing the plaintiff-respondent's suit for a declaration of her title as owner of the shop and for recovery of possession in case she was found out of it. The plaintiff Smt. Ram Devi is the sister of defendant Har Prasad and the dispute

is about the ownership of a shop in Jaswantnagar. She alleged in her plaint that her father Jwala Prasad had four sons, Har Prasad the defendant, Beni Prasad, Tribeni Prasad, and Gur Prasad, and three daughters, Maha Devi, Sukh Devi, and Ram Devi the plaintiff. In 1918 one of the sons, Beni Prasad, filed a suit for partition as a result of which the shop in dispute became the separate property of her father. In 1927 he executed a deed of gift in her favour donating this shop and other properties. She appointed her own brother the defendant Har Prasad, as her Mukhtar-e-Am for the management of these properties, but he played her false and began to assert a rival title with her tenants with the result that she was compelled to revoke his authority and then filed the present suit for a vindication of her right. Har Prasad resisted the suit and denied the plaintiff's title altogether. He alleged that his father Jwala Prasad was not the owner of the properties but only a co-parcener along with his sons. He also assailed the deed of gift as fictitious transaction made by his father for the purpose of defeating his creditors. He also contended that an earlier suit by the plaintiff (suit No. 633 of 1947) with regard to the same property having been dismissed, that decision operated as *res judicata* between the parties and barred the present suit.

2. The trial Court found that the shop remained the joint property of Jwala Prasad and his three sons after Beni Prasad had separated from the family, but the deed of gift was valid because all the sons had given their consent to it by attesting it. It also held that the gift in favour of the plaintiff was genuine and not made to defeat the creditors. He rejected the defendant's plea of *res judicata* on the ground that the earlier suit was not decided on merits but dismissed on an application by the present plaintiff that she did not want to press it. On these findings it decreed the plaintiff's suit and the lower appellate Court confirmed this decision. The defendant has now come to this Court in second appeal.

3. Mr. Baleshwari Prasad learned counsel for the appellant who argued this case with his usual tenacity repeated before this Court some of the arguments which were rejected by the Courts below. First he contended that the finding of the Courts that Jwala Prasad was competent to execute the deed of gift is erroneous. Counsel pointed out that the plaintiff's version that the shop was the separate property of Jwala Prasad having been rejected, the onus was on her to prove that

the other coparceners remained Joint, but there was nothing to show whether the status of the remaining members of the family was joint or separate after Beni Prasad had separated from them. The Courts below had wrongly presumed that the family was joint and Jwala Prasad executed the deed of gift as the karta with the consent of the other coparceners. Mr. Baleshwari Prasad pointed out that after the filing of the suit for partition by one of the co-parceners the presumption of jointness disappears, and the Court cannot presume without evidence that the remaining members continued as co-parceners, as they could have continued as tenants in common. This argument ignores the fact that the other three brothers of Beni Prasad were minors at the time when he separated. The finding of the lower appellate Court is that under the decree for partition one-sixth share of Beni Prasad alone was partitioned. After his exit from the joint family the father and three minor sons were left. There will always be a presumption that a minor is joint with his father and this status cannot be disturbed during his minority except by a decree of the Court or the operation of the law. Therefore the finding of the lower Court that Jwala Prasad was joint with his three remaining sons including the defendant is correct.

4. Learned counsel then argued that the view of the Court that the defendant and his two brothers gave their consent to the gift is based on no evidence. I do not agree. The Court has attached great significance to the fact that all the three brothers, who had become majors at the time, attested the gift deed. Mr. Baleshwari Prasad argued that attestation is no evidence of consent, for ordinarily an attestator does not know the contents of the document to which he is asked to sign as a witness. This argument ignores the relationship between the parties in this case. The father executed a deed of gift transferring some joint properties to an unmarried daughter and all her brothers attested the gift deed. That document was read out to learned counsel in Court and it reveals that the father was very anxious to get her married and to provide for her as he had done in the case of her elder sister. I have no doubt that the three brothers snared the sentiments of father and accepted his approval by attesting the deed. The ordinary rule that an attestator does not know the contents of the document which he signs will not apply where a father makes a deed of gift in favour of his unmarried daughter and the document is attested by all her brothers. This transaction has all the moral

attributes of a family transaction, I think the view of the, lower Court that the brothers gave their consent is correct.

5. Lastly the learned counsel argued that the decision in the earlier suit, No. 633 of 1947 operates as res judicata in the present dispute and bars the plaintiffs suit. I do not agree. There was no decision on merits in that suit which was dismissed on an application by the plaintiff Smt. Ram Devi. That application Exhibit A-25, was read out to learned counsel. The plaintiff stated in it that the suit had been filed by her agent, one Tribeni Prasad, without her authority and was unauthorised. She stated that she had dismissed her agent and did not want to prosecute her suit. The most significant statement in that application is that she obtained the defendant's consent to forego costs, which shows that the application had his approval. This document makes it obvious that not only there was no decision which can operate as res judicata In the present suit, but in fact there was no suit properly authorised by the plaintiff. The view of the lower Courts that the dismissal of that suit cannot bar the present suit is correct.

6. No other point was urged.

7. The appeal is dismissed with costs.

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