
(2005) 01 GAU CK 0035
In the Gauhati High Court
Case No : Second Appeal No. 95 of 1997

Intaz Ali Choudhury

APPELLANT

Vs

Asia Mia Coudhury and Others

RESPONDENT

Date of Decision : 24-01-2005

Acts Referred:

Transfer of Property Act, 1882 — Section 10, 2, 53

Citation : (2005) 2 GLR 429 : (2005) 2 GLT 49

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : C.K. Sharma Baruah, A.K. Baruah and A. Dey, for the Appellant; N. Choudhury, S.C. Keyal and B.W. Phira, for the Respondent

Final Decision : Dismissed

Judgement

Ranjan Gogoi, J.—This is a plaintiff's second appeal against the judgment and decree of reversal, dated 21.4.1997 passed in Title Appeal No. 8 of 1995.

2. The basic facts that would be necessary for a proper appreciation of the question(s) of law arising in the present second appeal may be noticed hereunder.

The appellant, as the plaintiff, instituted a suit being Title Suit No. 55 of 1992 in the Court of the Learned Munsiff No. 2, Silchar (now Civil Judge Junior Division No. 2). According to the plaintiff, the suit land measuring 15 kathas 11 chattaks covered by different dags of separate R.S. Pattas situated at village Ambikapur Part X, Ph. Barakpar, District Cachar was gifted to him by one Sona Bibi by executing a deed of gift dated 1.11.1981. According to the plaintiff, the suit land and some other lands fell to the share of his donor, Sona Bibi, on the basis of a family partition effected by and between the predecessors-in-interest of the defendants No. 1 to 23 by means of written agreements dated 14.9.1948 and 30.8.1952. According to the plaintiff, on the basis of permission for construction granted to him by the Silchar Development Authority, he had taken steps to start the construction whereupon the defendants created obstructions and forcibly

entered into the suit land and continued to illegally occupy part of the same. Accordingly, the suit in question was filed praying for the relief of declaration of right, title and interest; for confirmation of possession as well as for recovery of possession of part of the suit property, details of which are available in the schedule to the plaint.

3. The claim raised by the plaintiff in the suit was disputed by the defendants No. 1 to 9 by filing a joint written statement. According to the defendants, by the agreement, dated 14.9.1948 Sona Bibi was given only the right of enjoyment over 1 Bigha of land appertaining to Dag No. 133 of R.S. Patta No. 53. By the said agreement dated 14.9.1948, the power of alienation of the said property was specifically denied to Sona Bibi. Thereafter it appears that the share of one of the parties to the family partition fell short and the aforesaid shortage was adjusted against the land allotted to Sona Bibi for her enjoyment and a supplementary deed of agreement was executed by and between the parties on 30.8.1952 which visualised reversion of the property given to Sona Bibi, on her death, in favour of Nosi Mia Choudhury and Md. Gabru Mia Choudhury, i.e., two other persons included in the deed of family partition dated 14.9.1948. According to the defendants in the suit, as the deed of family partition specifically denied the power of alienation of the property allotted to Sona Bibi and as what was granted was only a right to use the property during her lifetime, Sona Bibi had no legal authority to gift the suit land in favour of the plaintiff by executing the deed of gift dated 1.11.1981. On the aforesaid basis, the right, title and interest of the plaintiff to the suit property as well as the consequential reliefs prayed for in the suit were sought to be denied by the defendants.

4. The learned trial Court on a consideration of the rival pleadings and the contentions advanced took the view that the restraint on the right to alienate the suit property, as imposed by the deeds of family partition dated 14.9.1948 and 30.8.1952, were contrary to the provisions of Section 10 of the Transfer of Property Act and that such a restraint on the beneficial enjoyment of ownership of immovable property was opposed to public policy. Accordingly, the learned trial court thought it proper to hold that the plaintiff had derived a valid title on the basis of the gift deed dated 1.11.1981 executed by Sona Bibi. The suit of the plaintiff was consequently decreed by the learned trial court.

In the appeal filed, the learned First Appellate Court took the view that the property having vested in Sona Bibi on the basis of a family partition, the conditions laid down in the said family partition would operate to deny any right of alienation in favour of the donor of the plaintiff and therefore the plaintiff could not have derived any valid title from Sona Bibi on the basis of the deed of gift dated 1.11.1981. Accordingly, the decree passed by the learned trial court was reversed.

5. On the basis of the conclusions reached by the two learned Courts below, the question of law that would require to be answered by this Court in the present appeal is whether the restriction on the right of alienation contained in the deeds

of family partition dated 14.9.1948 and 30.8.1952 are valid in view of the provisions of Section 10 of the Transfer of Property Act or the principles underlying the aforesaid provisions ?

6. I have heard Sri C. K. Sarma Baruah, learned senior counsel appearing for the appellant and Sri N. Choudhury, learned senior counsel appearing for the respondents.

7. Learned counsel appearing for the appellant has argued that while it may be correct that property vested in a particular person under a family partition may not be by way of a transfer, yet having regard to the well recognised principle that the enjoyment of ownership of a property must include the right to alienate the same, the principle behind Section 10 of the Transfer of Property Act must be held applicable to property acquired under a family partition also. Restraint of any kind on transfer of property, it is contended by the learned counsel for the appellant, is opposed to public policy and that is why, Courts have not hesitated to read the principles underlying Section 10 and even Section 53 of the Transfer of Property Act to family partitions. Reliance has been placed in this regard on two judgments of the Thattaliyath Panchali and Others Vs. Cheruvari Panniyodan Manni and Others, and Govindan Sukumaran and Others Vs. Narayani Kunjulakshmi and Others, On the aforesaid basis, it is the further argument of the learned counsel for the appellant that the restrictive clause in the deeds of family partition dated 14.9.1948 and 30.8.1952 must be held by this Court to be non est in law and the plaintiff must be held to have derived a good title to the suit property on the basis of the gift deed dated 1.11.1981 executed by Sona Bibi.

8. Sri N. Choudhury, learned counsel for the respondents in the course of his arguments did not make a serious endeavour to dissuade this Court from taking the view that the principles underlying Section 10 of the Transfer of Property Act should be held applicable to a family partition. According to Sri Choudhury the said issue raised would be altogether irrelevant for the purposes of the present case inasmuch as Section 10 would govern the rights acquired under a family partition only when there is devolution of ownership in the property. According to Sri Choudhury, under the Muslim Personal Law, while ownership of land has to be unlimited in duration, interest of limited duration in the matter of use of such property is well recognised. Reliance in this regard has been placed on a judgment of the Privy Council reported in AIR 1948 134 (Privy Council) What was conveyed to Sona Bibi, the donor of the plaintiff, is such a limited right to enjoy the property during her lifetime. Section 10 or its principles will therefore have no application to the present case, it is argued. Sri Choudhury has further argued that even if Section 10 of the Transfer of Property Act is held to apply, by virtue of Section 2 of the Act, it is the Muslim Personal Law, as noted above, which will hold the field.

9. The rival submissions advanced on behalf of the parties have received the most anxious consideration of this Court. While it is true that the Kerala High

Court in the cases noted above as well as the Bombay High Court in a decision reported in Jagannathpuri Guru Kamaleshwarpuri Vs. Godabai and Another, has taken the view that though a partition may not amount to a transfer of property, yet the principles underlying Section 10 and 53 of the Transfer of Property Act will be applicable to property devolving on a beneficiary following such partition, it will not be necessary for this Court to record its views in the matter. It is trite law that no question of law should be decided by a Court unless such a decision is absolutely imperative to resolve the controversy before the Court.

10. The crucial determination in the present case is to whether in the family partition deeds dated 14.9.1948 and 30.8.1952, ownership of the suit property had been conferred on Sona Bibi ? A perusal of the aforesaid deeds, which have been exhibited as Exhibits A and B in the suit would clearly go to show that what was conferred on Sona Bibi is a right to use the property. No ownership in the property had been vested in her. If a mere right to enjoy the property had been conferred on Sona Bibi by the two partition deeds in question, Sona Bibi cannot be understood to be vested with anything more than what has been expressly conferred by the partition deeds. The question of applicability of the principles underlying Section 10 of the Transfer of Property Act to determine the rights of Sona Bibi following the family partition and the further question as to whether Section 10 of the Transfer of Property Act can be understood to have predominance over an established principle of Muslim Personal Law are questions that will arise only if the property is transferred absolutely i.e. ownership had been vested in Sona Bibi by the family partition deeds. In the present case what had been conferred on Sona Bibi by the aforesaid two partition deeds is a right to use and enjoy the property during her lifetime; no further right including the right to alienate had been conferred. Neither any such right can be read to have been conferred by having recourse to the principles underlying Section 10 of the Transfer of Property Act. In the present case, after conferring a limited right to use the property during her lifetime, the right to alienate the property was expressly denied to Sona Bibi. The right to alienate may be a necessary adjunct of a right of ownership; such a right, i.e., to alienate, will however, not normally follow a right of user. As a limited right i.e. right to use and enjoy the property during her lifetime had been conferred and the right to alienate was specifically denied to Sona Bibi, this Court must hold that Sona Bibi had no right to gift the suit property to the plaintiff/ appellant by means of the gift deed dated 1.11.1981. No right or title to the suit property could, therefore, have been conferred by Sona Bibi on the plaintiff.

11. On the basis of the discussions that have preceded, the question of law arising for this Court's determination, as noticed above, shall stand accordingly answered. Consequently, the instant appeal has to be dismissed and the judgment and decree dated 21.4.1997 passed by the learned First Appellate Court in Title Appeal No. 8 of 1995 shall stand affirmed. However, having regard to the issues involved this Court does not make any order as to costs.