

(2006) 07 PAT CK 0083
In the Patna High Court
Case No : C.R. No. 40 of 2004

Munni Lal Mahto and Others

APPELLANT

Vs

Chandeshwar Mahto and Another

RESPONDENT

Date of Decision : 24-07-2006

Acts Referred:

Citation : (2006) 07 PAT CK 0083

Final Decision : Allowed

Judgement

Navaniti Prasad Singh, J.—The five appellants being three brothers and two nieces (daughters of pre deceased brother) filed a Partition Suit. Defendants were their parents as defendants 1 and 2 and their other brother defendant No. 3 and his son defendant No. 4. It was prayed that in respect of properties, as mentioned in the plaint and claimed to be joint family property, their shares be declared and properties be partitioned by metes and bounds. On 30.06.1975, a preliminary decree in the said Partition Suit was passed whereby each was awarded 1/7th share in the joint family properties. A genealogy is given hereunder:

Mangroo Nahto Bulki Devi (Defendant 1) (Defendant 2) /
----- / / / / Munni Lal
Sita Sharan Paras Nath Jagdish Mahto Chandeshwar Mahto Prasad Prasad
Mahto (Pet 1) (Pet 2) (Pet 3) (dead) (O P 1) / / ----- Ravindra Mahto / /
(O P 2) Urmila Devi Chameli Devi (Pet 4) (Pet 5)

2. From the genealogy referred to above, it would be seen that as per the preliminary decree, father got 1/7th share, mother got 1/7th share, plaintiff No. 1 got 1/7th share, plaintiff No. 2 got 1/7th share, plaintiff No. 3 got 1/7th share, plaintiffs No. 4 and 5 being daughters of pre deceased brother got 1/7th share jointly, defendant No. 3 got 1/7th share and defendant No. 4 was entitled to his share from his father defendant No. 3. After the preliminary decree, the father executed a registered deed of gift for his entire share on 03.01.1979 gifting it to the plaintiffs that is four out of five of his sons. He later died in 1982. Similarly

on 01.05.1987, mother gifted her entire 1/7th share by a registered deed of gift in favour of her four sons as aforesaid to the exclusion of defendant No. 3 and died in the year 1989. It seems thereafter in course of final decree preparation, an application was filed on behalf of defendants No. 3 and 4 for amending the preliminary decree by reason of death of the parents. It was asserted that the parents having died, there were left only five sons which included one pre deceased son and, as such, prayed that the preliminary decree should now read as granting 1/5th share to each. This was contested by the plaintiffs on the ground that after preliminary decree was passed, there being severance of status, the parents had gifted their shares to them in entirety and that being so, the shares of the parents would merge with the shares already allotted to the plaintiffs and no part in share of the parents would enure to the benefit of the surviving defendants. The trial Court, relying on the judgment of the Apex Court in the case of Thamma Venkata Subbamma (Dead) by Lr Vs. Thamma Rattamma and Others, held that a gift by a coparcener of his undivided share in coparcenary property without the consent of all the other coparceners is void and, as such, held that the gift deeds were void and unenforceable. As a consequence, it was held that there being only five shares left, the preliminary decree was amended to 1/5th share each. This has brought the plaintiffs to this Court against the said order. The plaintiffs-petitioners have submitted that the learned trial Court acted without jurisdiction in declaring the gift deeds void and the judgment of the Apex Court had no application to the facts of the present case. Upon notice, opposite parties being defendant No. 3, opposite party No. 1 and defendant No. 4 being opposite party No. 2 before this Court have appeared. Parties have been heard.

3. Parties are not at dispute with regard to the facts and the dates, as mentidsoned above. Therefore the question is whether the trial Court was right in holding that the gift deeds executed by the parents were invalid, because if the gift deeds were invalid then their shares would devolve equally on their five sons as there was no testamentary disposition otherwise. But if the gift deeds were valid then their shares would get merged with the shares already declared in favour of the plaintiffs to the exclusion of opposite parties No. 1 and 2. The result would be the share of opposite parties No. 1 and 2 would remain unaltered by reason of death of their parents whereas the shares of the plaintiffs-petitioners would increase proportionately.

4. Learned Counsel for the defendants-opposite parties have placed strong reliance on judgment of the Apex Court in Thamma Venkata Subbamma (Dead) by Lr Vs. Thamma Rattamma and Others, . It is strongly contended that gift of coparcener of their coparcenary interest in joint family property without consent of other coparceners is void. This is, in my view, unexceptionable principle of Hindu Law. The reason for the said principle is that so long as coparcenary that is joint family continues, the coparcenary interest is an indeterminate. It may increase or decrease by reason of death or birth in the family. It becomes determinate only when the status of jointness is broken. In such a situation in a

continuing joint family, the coparceners have an indeterminate interest which obviously cannot be gifted. The principle as noticed and laid down by the Apex Court is not open to dispute but the question is does it apply to the facts of the present case. The learned Counsel has also placed great reliance on an unreported Division Bench judgment of this Court in the case of Pavitri Devi v. Smt. Ajhola Kumari and Ors. being First Appeal No. 582 of 1968 disposed of on 11th February, 1984 and the appellate judgment of the Apex Court in the case of Pavitri Devi and Anr. v. Darbari Singh and Ors. in Civil Appeal No. 1592 of 1993 disposed of on 07.09.1993. In that case, the fact, in short, was that a suit for partition was filed. The suit was dismissed. First Appeal was filed before this Court. During pendency of the First Appeal, some of the coparceners made gifts. This Court and the Apex Court held that the gifts by a coparcener of his coparcenary interest prior to partition was void and unenforceable. On basis of the aforesaid decision reported and unreported, it is submitted that the trial Court rightly avoided the two gift deeds.

5. In my view, the said decisions are not applicable to the facts of the present case for the simple reason that in the present case, gifts were made after preliminary decree of partition was passed and shares of members have been determined though physical division of property by metes and bounds was yet to be done. Once a preliminary decree in a Partition Suit is passed, the law is well settled. It amounts to severance of status of joint family. The coparcenary comes to an end. The parties are no more coparcener. They are tenants in common in joint possession and no sooner the coparcenary comes to an end, as indicated above, the parties are then free to gift their physically undivided share, their share being definite. I am fortified by the two decisions of the Apex Court in this regard. In the case of Kalyani (Dead) by Lrs. Vs. Narayanan and Others, , it has been held that partition in one sense is a severance of joint status and a coparcener of a coparcenary is entitled to claim it as a matter of individual volition. The judgment holds that once there is a partition then there is a disruption in the joint family status and the rights are crystalised although not immediately followed by a de facto actual division of the subject matter of dispute. This decision clearly shows that the effectuate partition, it is not necessary that all joint family properties must be divided by metes and bounds and till that is not done, the joint family would continue. This judgment clearly lays down otherwise. The fact is that the moment the preliminary decree was passed, the joint family status stood disrupted and the parties became tenants in common. This aspect of the matter has been recently also noticed by the Apex Court in the case of M.L. Subbaraya Setty and Ors. v. M.L. Nagappa Setty and Ors. AIR 2002 SC 2066 wherein it has been held that severance of joint family status takes place no sooner preliminary decree is filed even though properties are not physically partitioned. Members of the joint family becomes tenants in common of the family property from the said day.

6. Taking the aforesaid position in law, it is clear that in the present case, the gifts were made long after preliminary decree was passed. There was severance

of status of joint family long before gifts were made. There was no coparcenery in existence. The judgments relied by opposite parties has no application and in view of the judgment as referred to above being Kalyani (Dead) by Lrs. Vs. Narayanan and Others, and AIR 2002 SC 2066, the gift deeds cannot be impeached and that being so, they would enure to the plaintiffs proportionately.

7. It is also submitted on behalf of the opposite parties that so far as joint family coparcenery interest is concerned, in view of Section 31 of Indian Succession Act, the same can be disposed of by a testamentary disposition only. The answer is short. If without severance of status of jointness, a person dies under Hindu Law as it was, his share would extinguish whereas the share of other coparceners would increase. He has no right to make a testamentary disposition of undivided share. Section 31 of the Indian Succession Act makes an exception which is a statutory exception to the general law but has no application to the present case for the simple reason that the joint family status stood disrupted long before gifts were made.

8. In view of the aforesaid, it is held that the trial Court failed to exercise the jurisdiction vested in it and wrongly declared the gift deeds to be void. As a consequence thereof, the order of the trial Court is set aside and it is directed that the shares of the parents would devolve on the plaintiffs proportionately to the exclusion of defendants No. 3 and 4.

9. This civil revision application is, accordingly, allowed.