

(1951) 01 PAT CK 0010
In the Patna High Court
Case No : A.F.A.D. No. 1745 of 1948

Pragash Choudhury

APPELLANT

Vs

Dulhin Butani Kuer

RESPONDENT

Date of Decision : 24-01-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Contract Act, 1872 — Section 16
Evidence Act, 1872 — Section 111

Citation : AIR 1951 Patna 457

Hon'ble Judges : C.P. Sinha, J;B.P. Sinha, J

Bench : Division Bench

Advocate : N. Bagchi and R. K. Bagchi, for the Appellant; Lalnarain Sinha and R.S. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

C.P. Sinha, J.—The deft is the applt in this second appeal having lost in both the Cts below. The pltf Dulhin Butani Kuer, daughter of one Dwarka Choudhury, had brought this suit for declaration of her title to & recovery of possession over the disputed lands together with mesne profits on the allegation that the deed of gift dated 28-2-1921 & the bazidawa dated 13-3-1939, were fraudulent, illegal & void.

2. The pltf's case was that the property in suit belonged to her father Dwarka Choudhury, who died leaving behind him his widow Mt. Gango Kuer & his daughter, the pltf Mt. Gango Kuer, on the death of Dwarka Choudhury, succeeded to his properties. As she was a purdanashin lady, her affairs were looked after by the deft who was a son of her sister's husband & this deft lived with her although he was a resident of another village. The deft was able to get deed of gift executed by the said Mt. Gango Kuer on 28-2-1921 in his favour, transferring to him all the properties left by Dwarka Choudhury & which are the subject matter of this suit. The pltf further alleged that fraud had been committed by the

deft upon Mt. Gango Kuer in getting this deed of gift executed in his favour. Mt. Gango Kuer died in the year 1934 & the pltf succeeded her as the only daughter left by Dwarka Choudhury. She lived at her husband's place & the management of the properties was, as before, left with the deft. It is further said that the pltf who also is a "purdanashin" lady, was fraudulently induced to execute a deed of "bazidawa" dated 13-3-1939. Some two years before the suit, when the deft stopped giving produce of the lands to the pltf & when she attempted to take khas possession, she was resisted by the deft who disclosed the nature of the two documents on the basis of which he asserted title to the properties in suit.

3. The defence was that the pltf was not the daughter of Dwarka Choudhury & that Mt. Gango having died in the 1928, the suit, which was brought in the year 1945, was barred by limitation & adverse possession. It was further alleged that the deft was the son-in-law of Dwarka Choudhury, the last male holder, having married his only daughter named Mt. Lagni & that the two ladies, namely, Mt. Gango Kuer & the pltf had, with full knowledge & free will & after having independent advice, executed the two documents in question in his favour. It was also said that the pltf had relinquished all her rights in the properties by means of the "bazidawa", aforesaid, & that no title was left With her.

4. The Cts below have concurrently found that the pltf is the daughter of Dwarka Choudhury & that Mt. Lagni, the wife of the deft was not his daughter & consequently the deft was not the son-in-law of Dwarka Choudhury; that Mt. Gango Kuer died in 1934 & so the suit was not barred by limitation or adverse (Possession. The Cts below have also found that no fraud was committed by the deft in. getting the two deeds, & deed of gift & the deed of "bazidawa.", executed by the two ladies in his favour. The finding of the final Ct further is that Article 91, Limitation Act has no application.

5. The learned counsel for the applt has contended, firstly, that upon the findings the deed of gift by the pltf's mother to the deft being a valid document & the pltf not having repudiated the same -- rather having affirmed the said gift by her "bazidawa" deed of 1939 -- she was not entitled to maintain the present suit, &, secondly, that the suit was barred by three years" limitation under Article 91, Limitation Act.

6. It is true that under the Hindu Law an alienation by a widow of her husband's estate without legal necessity is not altogether void but only voidable by the next reversioner. He may affirm it or he may treat it as nullity. If the reversioner elects to affirm the alienation, he & the persons taking under him are precluded from exercising his or their rights to avoid the alienation & from questioning the transaction, (AIR 1927 227 (Privy Council) It appears however that this point was not raised by the deft at any stage of the litigation & if this point had been a question of law, pure & simple, the applt had been entitled to raise, this point even in second appeal. In my view however, the determination of this point depends upon the finding of fact -- whether or. not this deed of "bazidawa" was executed by the pltf, a "purdanashin" lady, with the knowledge as to the import

of the document she was executing. As the point was not raised in the manner in which it is raised before this Ct, there was no consideration by the Cts below as to whether or not the pltf had substantially understood her rights & that she was in any manner affecting her rights by executing this deed of "bazidawa". Although independent legal advice is not in itself essential, "the disposition made must be substantially understood & must really be the mental act, as its execution is the physical act, of the person who makes it". ("Wajid Khan v. Ewaz All Khan", 18 IA 144: 18 Cal 545 PC. This view of the matter was re-affirmed by the P. C. in the case of "Kundal Lai v. Mt. Musharraf Begam", The only points pressed before the Cts below were, the question of limitation & whether Mt. Lagni, the wife of the deft, was the daughter of late Dwarka Choudhury; & no other point appears to have been, pressed there. I, therefore, find that the question of affirmance of the deed of gift by the pltf cannot be gone into at this late stage in second appeal & I would accordingly hold that there is no merit in the first contention of the applt.

7. It has been urged by Mr. Bagchi, the learned counsel for the applt that the suit is barred under. Article 91, Limitation Act. I find, however, that this point had been expressly abandoned by the applt in the Ct below, as the Ct below says:

"Before me three years" limitation under Article 91, Limitation Act has not been urged. Probably the learned Advocate accepted the finding of the learned Subordinate Judge on this point."

In view of the fact that deft had accepted the finding of the trial Ct on the question of applicability of Article 91 to this case, I do not feel inclined to let the applt re-open the matter once again before this Ct. The applicability of Article 91 will depend upon, whether or not the terms of the deed of "bazidawa" were understood by the pltf at the time she was executing that document, that is to say, whether this document was executed after the pltf had understood the "pros" & "cons" of the transaction into which she was entering. I have already said that in the Cts below the question, whether the pltf had understood the terms of the document, was not raised. The applt, therefore, is not entitled to raise that point once again in this Ct when he had abandoned this point in the Cts below. In the view I take, it is not necessary to decide, whether the deed of relinquishment, by which no title to any property was conveyed, is covered by the provisions of Article 91, Limitation Act.

8. The result is that the appeal fails & it must be dismissed with costs.

B.P. Sinha, J.

9. I agree to the order proposed.