

Ram Sakal Singh

Vs

Mosamat Monako Devi (Dead) and Others

Civil Appeal No. 1441 of 1986

(K. Ramaswamy, S. Saghir Ahmed JJ)

21.02.1997

ORDER

1. This appeal by special leave arises from the judgment of the Patna High Court, 1984, dismissing the second appeal in limine at the admission stage.
2. The undisputed facts are that one Sheo Charan Singh, the common ancestor, left behind him two sons, Lal Singh and Shanker Singh. Shanker Singh left behind him son Banjhoo Singh who died issueless. Lal Singh had seven sons by name, Kirtarth Singh, Padarath Singh, Ujagir Singh, Sukhari Singh, Ratan Singh, Budhan Singh and Mangru Singh. We are concerned, in this litigation, with Sukhari Singh of this branch. It is now an admitted case that Sukhari Singh had executed a gift deed with respect to the properties mentioned in Schedule A of the plaint in favour of the appellant, a stranger to the family, on 4-12-1959. Thereafter, he cancelled the gift deed by another deed on 4-4-1960. He thereafter executed a sale deed in favour of the first respondent on 22-11-1970. Therefore, the first respondent filed a suit in 1995 for a declaration that the gift deed dated 4-12-1959 was obtained by the appellant by playing fraud on Sukhari Singh and, therefore, it was voidable. He also sought a declaration that Sukhari Singh had validly executed, after its cancellation, the sale deed in his favour. He also sought decree for possession of the Schedule A properties. Pending the suit, the notification under Section 3 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (for short "the Act") was issued in the year 1974-75 and, thereafter, an objection was raised, apart from the other pleadings, that the suit stood abated by operation of Section 4(1)(c) of the Act. It was also pleaded that Sukhari Singh had validly executed gift deed in favour of the appellant on 4-12-1959 and, therefore, the sale in favour of the respondent was not binding on him. The trial court upheld the contention of the appellant but Issue 4 on the question of fraud, was decided against the appellant. On appeal, the District Judge decided both the points against the appellant and held that the document, the gift deed dated 4-12-1959, is voidable and that the civil court alone could give declaration. As a result, the suit had not abated. The appellate court also recorded a finding that gift deed was obtained by playing fraud and, therefore, it was a voidable document. Accordingly, the declarations came to be made. The suit was declared on that basis. As stated earlier, the High Court has dismissed the second appeal in limine. Thus, this appeal by special leave.
3. Shri Ranjit Kumar, learned counsel for the appellant, with his usual through preparation and clarity of his submission, raises threefold contention. Under Section 4(1)(c) of the Act, the suit stands abated and, therefore, the civil court was devoid of jurisdiction to proceed with the trial to decree the suit. He also contends that Sukhari Singh, having gifted over the undivided share in the joint family property, had no right to alienate the property by way of sale in favour of the respondent. So that sale deed itself is invalid in law. All these questions touch upon the properties

held by Sukhari Singh which should be gone into by the consolidation authorities but not by the civil court. The contentions are resisted by Shri Rakesh K. Khanna, learned counsel for the respondents. He argues that the consistent view of the Patna High Court is that if a document is wholly void, the civil court has no jurisdiction to go into its legality. But if the document is voidable, unless the civil court gives a declaration that the document is voidable, consolidation authorities get no jurisdiction to decide the matter. As a consequence, civil court alone has the jurisdiction to decide the dispute and give the declaration, as sought for. He also contends that the question whether Sukhari Singh had divested himself of the joint interest had in the joint family, was not an issue nor is any finding in this behalf recorded. Therefore, the question cannot be gone into in this appeal. He has further stated that in view of the finding recorded by the appellate court that the gift deed executed in favour of the appellant was voidable, Sukhari Singh had power to dispose of his property. The sale made in favour of the respondent is valid. He further contends that pending appeal, Respondents 7, 8 and 15 have died and an application to delete them from the array having been filed, the appeal stands abated.

4. In view of the respective contentions, the primary question which arises for consideration is whether the civil court has jurisdiction to go into the question of declaration that the gift deed is void or voidable ? Section 4 of the Act postulates thus :

"4. The effect of notification under Section 3(1) of the Act. - Upon the publication of the notification under sub-section (1) of Section 3 in the Official Gazette the consequences, as hereinafter set forth, shall, subject to the provisions of this Act, from the date specified in the notification till the close of the consolidation operation, ensue in the area to which the notification relates, namely :

(c) every proceeding for the correction of records and every suit and proceeding in respect of declaration of rights or interest in any land lying in the area or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any court or authority whether of the first instance or of appeal, reference or revision, shall, on an order being passed in that behalf by the court or authority before whom such suit or proceedings is pending stand abated."

5. As a consequence of the publication of the notification under Section 3(1) of the Act, every proceeding for the correction of record and every suit and proceeding in respect of declaration of right or interest in any land lying in the area or for declaration or adjudication of any other right in regard to such proceedings can or ought to be taken under the Act, pending before any court or authority whether in the first instance or in appeal, reference or revision, shall, on an order being passed, in that behalf by the court or authority before whom such suit or proceedings is pending, stand abated. Therefore, the prohibition of the civil court to proceed further, after the publication of the notification under Section 3(1), was in respect of the declaration of a right or interest in any land lying in an area or for the declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under the Act. All pending proceedings before the court, either at the trial or in appeal or reference or revision, shall stand abated, unlike in U.P. Act, only on an order being passed in that behalf by the concerned court or authority before whom such suit or proceedings is pending. The next question is as to when consolidation authorities get jurisdiction to declare that a gift deed executed by a holder of a land under the Act is obtained by fraud or collusion etc. ? This controversy was considered by this Court in *Gorakh Nath Dube v. Hari Narain Singh*. After considered of the entire case-law in that behalf, this Court had held thus : (SCC p. 538,

para 5)

"... We think that a distinction can be made between cases where a document is wholly or partially invalid so that it can be disregarded by any court or authority and one where it has to be actually set aside before it can cease to have legal effect. An alienation made in excess of power to transfer would be, to the extent of the excess of power, invalid. An adjudication on the effect of such a purported alienation would be necessarily implied in the decision of a dispute involving conflicting claims to rights or interests in land which are the subject-matter of consolidation proceedings. The existence and quantum of rights claimed or denied will have to be declared by the consolidation authorities which would be deemed to be invested with jurisdiction, by the necessary implication of their statutory powers to adjudicate upon such rights and interests in land, to declare such documents effective or ineffective, but, where there is a document the legal effect of which can only be taken away by setting it aside or its cancellation, it could be urged that the consolidation authorities have no power to cancel the deed, and, therefore, it must be held to be binding on them so long as it is not cancelled by a court having the power to cancel it."

6. On the facts in that case since the declaration of one-half share in the property was a matter within the jurisdiction of the consolidation authority, this Court had held that the suit stood abated.

7. In *Paras Singh v. Baikunth Singh* [(1979) 12 PLJR 567] and *Tarkeshwar Upadhyaya v. Mahesh Kahar* [AIR 1981 Pat 348], the learned Single Judge had held that a suit for cancellation of the deed on the ground that they were executed by an insane person would stand abated. If the notification under Section 4(c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act is already published, the civil court has no jurisdiction. A Division Bench in *Jiwan Pandey v. Mahendra Rai* [1985 PLJ 686] had held that when the decree is voidable but not void, the suit does not get abated since the civil court alone has to grant declaratory relief to avoid the decree. Later, a reference was made to the Full Bench decision of the Patna High Court for resolving the conflict. Following the ratio in *Gorakh Nath Dube* case [(1979) 12 PLJR 567], the Full Bench in *Sheoratan Chamar v. Ram Murat Singh* [(1985) 33 BLJR 45 : AIR 1985 Pat 179] had held in part 14 that all cases where lis is rested wholly on a document or transfer deed, the proceedings would abate if such document is void. But no such abatement would result if the same is voidable and the same has to be set aside by the court for adjudication. Therein also the voidity or voidability of the gift deed was in question. Having found the gift deed voidable, the Full Bench held that the suit was not abated. The same view was reiterated by another Division Bench in *Dharmnath Pandey v. Dhumun Manjhi* [(1985) 33 BLJR 110]; *Jaleshwar Tiwary v. Suresh Tiwary* [(1986) 34 BLJR 378] and *Shivaji Rai v. Rajendra Rai* [(1993) 1 BLJR 258].

8. It is thus settled law that if the document is invalid, it can be disregarded by the court or the authority and it may proceed to consider declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under the Act. Since we have in the present case proceedings before the consolidation authorities, it would necessarily imply in the adjudication of a dispute involving conflicting claims in respect of rights or interests in land which is the subject-matter of the proceedings before the consolidation authorities but if a dispute relating to the land was in respect of the land and was based upon a document where its validity is impugned, it is for the court to declare such document effective or ineffective and the legal effect would hinge upon such a declaration. Based thereon, if the document requires to be set aside or cancelled, the consolidation authorities under the Act have no power to cancel such deed. Therefore, the

proceedings would not abate. As held, if the document is void, the proceedings pending in any court or authority stand abated.

9. Therefore, the civil court gets jurisdiction to declare the document to be voidable. In consequence, the notification under Section 3(1) does not have the effect of abatement under Section 4(1)(c) of the Act. If the document is void, there would be no need to set aside or cancel the document/deed. Then the consolidation authorities get exclusive jurisdiction to deal with all questions relating to declaration of a right or interest in any land or for declaration or adjudication of any other right in regard to such proceedings. The court or authority before whom any suit etc. is pending should record that the suit or proceedings have abated leaving it to the parties to avail of the remedy under the Act.

10. The appellate court has gone into the question of fraud and recorded the finding thus :

"Having learnt about such a fraudulent deed of gift Sukhari Singh cancelled it by another deed dated 4-4-1960. But, Defendant 1 somehow, obtained the deed of gift to him. Defendant 1 never came in possession over the properties covered by the deed of gift and the same are coming in possession of the plaintiffs and the other defendants.

... even if it is held that it is a voidable document because of fraud and undue influence practised upon Sukhari Mahto (sic Singh), it must be held that the plaintiffs are entitled to get the deed of gift set aside and cancelled.

That, although the scribe of the deed of gift and attesting witnesses Ram Prabesh are dead but the attesting witness Ram Bachan and the identifying witness Dukdama as also several other persons who have been named by DW 2 and who are alive and who are said to have seen the Rasid Behi have not been examined and, therefore, competent person who could have testified regarding the execution of the deed of gift and exchange of the equivalent have been purposely withheld, which in the circumstances point at the fraudulent nature of the deed of gift in question.

In the instant case, I have already shown that the plaintiffs have alleged that the executant, namely, Sukhari was slow of understanding, fraud was practised in obtaining the deed of gift and he was subjected to coercion, undue influence and misrepresentation and had he known about the true nature of the document he would not have executed that deed. The plaintiffs have not denied that Sukhari had executed the deed of gift in suit. An alternative relief has been asked for the cancellation of the deed of gift in the suit as it is illegal and invalid. The appellants have cited (Surajmani Devi v. Janaki Devi [1981 BLJ 112]) in support of their contention that there a suit has been filed for declaration of the title on the ground that the registered deed of gift is illegal and void on account of fraud practised upon the executant, it cannot be held to be void ab initio and it is a voidable document and has to be set aside on the ground of fraud. In my opinion, the facts of the case cited above are similar to the facts of the present suit under consideration, and, upon the allegations in the plaint the deed of gift is not a void document rather it is a voidable document and it is held accordingly. That being so, the suit shall not abate under Section 4(1)(c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 as decided in the above-quoted decision in Devi case [1981 BLJ 112].

Accordingly, it is held that the suit has not abated and the decision of the Additional Subordinate Judge in this regard is reversed and set aside.

In the result, the suit is decreed and the plaintiffs are entitled to recover possession of the suit lands. The deed of gift dated 4-12-1959 is also hereby cancelled and it is held to be not binding on the plaintiffs and the defendants other than the contesting Defendant 1. The title of the plaintiffs with respect of the suit properties is hereby declared. Thus, the appeal is allowed on contest, but, in the circumstances of the case without cost of this appeal."

11. In view of the above finding recorded after elaborate consideration, the District Judge held that the gift deed 4-12-1959 was voidable. Therefore, the declaration that the gift deed is voidable is well justified. The contention that it is void is devoid of force. As a consequence, the civil court had jurisdiction and the suit had not abated. The question whether Sukhari Singh had only undivided joint interest in the coparcenary and that he had denuded himself of the same after he had executed another gift deed in favour of one of his agates, was not in issue before the trial court or the appellate court nor is any finding recorded to that effect. As a result, we cannot hijack the procedure and go into the question for the first time. Therefore, Sukhari Singh having, admittedly, cancelled the gift deed executed in favour of the appellant, which was found to be a voidable document, the respondent had got the title to the property under the sale deed. As such the declaration of title granted in his favour is legal and valid. It is true that the trick of the pleading and camouflaging of the relief cannot conclusively confer jurisdiction on the civil court or the consolidation authorities to decide a particular dispute in question. The substratum of the list has to be considered and decided on the basis of the pleadings and evidence on record. In this case, the relief of declaration of title, as asked for, was the first relief in the plaint and declaration of title was only consequential to the declaration of the voidability of the gift deed executed in favour of the appellant. Unless the document was avoided, Sukhari Singh could not get any title to alienate the property by a sale deed to the respondent. Therefore, the declaration of the voidability would be the main relief and the declaration of the title on the basis of the sale deed is consequential to the primary relief. Therefore, the declarations of the title and the consequential decree for possession are sequential to the first declaration. The reliefs in the suit, as a whole, are to be granted by the civil court only.

12. The next question is whether the appeal before this Court stands abated. It is true that an application came to be filed and an order came to be passed deleting Respondents 7, 8 and 15, who died pending appeal. With regard to Respondent 7, Smt. Kamala Devi, since she died issueless, the question of abatement does not arise because if the appellant succeeds, the share of her agates would get enlarged. Therefore, the appeal does not get abated. But with regard to Respondents 8 and 15 the stand taken by the appellant is not correct in law. Order 22, Rule 4 CPC postulates that in case one of the respondents on record dies, appeal does not stand abated unless the interest held by them is joint and indivisible. In this case, the interest held by them is joint and indivisible. It is true that, in the application, it was stated that Respondents 9 and 10 are already on record to replace Respondent 8 and he was deleted on that premise. Similarly, Respondent 16, who is the son of Respondent 15, replaced him on his death pending appeal. The appellant has stated that Respondent 16 was already on record and, therefore, Respondent 15 was deleted. The procedure adopted is not correct in law. The order of this Court is that the consequence of their deletion would be considered at the time of disposal. It is the mistaken perception of the counsel. The deceased are not to be deleted but the legal representatives who are not already on record are to be transposed as legal representatives of the respective deceased respondents. Order 22, Rule 4(1) CPC postulates that where one of the two or more defendants/respondents dies and the right to sue does not survive against the surviving

defendants/respondents alone or a sole defendant/respondent, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit/appeal. Under sub-rule (5) if such an application is not made within the prescribed limitation, the suit/appeal, in consequence, gets abated under clause (b) of sub-rule (5). Only on an application made to set aside the abatement and for condonation of the delay showing sufficient cause for failure to make the application within the specified time, the court having regard to the facts of the case, may condone the delay and order abatement. The salutary principle to bring on record the legal representative/representatives is to have the estate of the deceased in the litigation represented in the absence of which the court would be unable to pronounce upon the rights of the deceased vis-a-vis parties to the suit. That is manifested by Rule 6 of the Order 22 CPC which provides that after hearing the case and before judgment is pronounced, if one of the parties dies, there would be no abatement by reason of such death. It is, therefore, one of the duties of the counsel to ensure proper representation by a legal representative of the estate of the deceased. An application should be duly, and within limitation, filed and it is the duty of the court to pass order as per law.

13. Shri Ranjit Kumar, obviously due to mistaken perception of the procedural part, has, instead of seeking transposition of the legal representatives to represent the estate of the deceased Respondents 8 and 15, sought deletion of the names of the deceased. Without there being already on record some persons eligible and entitled in law to represent the estate of the deceased, the deceased defendants/respondents were deleted. The consequence of deletion is that the decree of the courts below as against the deceased becomes final. If the decree is inseparable and the rights of the parties are indivisible between the contesting parties and the deceased, the consequence would be that the suit/appeal stands abated as a whole. But if one of the respondent/respondents or defendant/defendants is already on record, what needs to be done is an intimation to the court by filing a formal application or memo to transpose the existing defendant/defendants or respondent/respondents as legal representatives of the deceased defendant/defendants or respondent/respondents. In view of the mistake committed by the counsel, the court has to consider the effect thereof. On the fact, we think that cause of justice would get advanced if the misconception as to the procedure on the part of the counsel is condoned and if Respondents 8 and 15 instead of being deleted Respondents 9 and 10 are substituted and transposed as the legal representatives of the deceased Respondent 8 and Respondent 16 is transposed as legal representative of Respondent 15.

14. However, in view of the above findings, on merits the appeal stands dismissed but, in the circumstances, without costs.