

# ORISSA HIGH COURT

Ganesh Mahanta

Vs

Sukria Bewa

Second Appeal No. 386 of 1962

(G.K. Misra, J.)

26.04.1963

## JUDGMENT

**G.K. Misra, J.**

1. Defendants 3 to 5 are the appellants. The following geneology would show the relationship of the parties. Plaintiffs filed the suit for partition claiming one third share for plaintiff 1, one-third for plaintiffs 2 and 3 and one-third for defendant 1. The disputed properties belonged to Gorachand. On his death his widow Lata inherited these properties as a limited owner. On 8th May, 1946, she executed a registered deed of gift in favor of defendant No. 2 in respect of Schs. B/1 and B/2 of the plaint and delivered possession. Plaintiffs filed original suit No. 138 of 1946-47 in the Court of the Munsif of Baripada challenging the alienation and obtained a declaration that it was not binding on their reversionary right beyond the life time of the widow. As both the Courts below have decreed the suit for partition in respect of the entire properties and as there is no dispute amongst the parties that schedules B/2 to B/4 are liable to partition, the history of previous litigation with regard to schedules B/2 to B/4 need not be mentioned. On the 13th February 1957 defendant 2 re-transferred schedule B/1 property in favor of Lata by a registered document (Ext. B) styling it as "DANA PRATYAHARA PATRA". On 19th October 1957 Lata transferred this very property by a registered sale deed (Ed. A) in favor of defendants 3 to 5. She died on 11th February 1958 whereafter the suit for partition has been filed.

2. The defense is that Lata acquired full ownership after the Hindu Succession Act, 1956, (hereinafter called the Act) and the transfer by Ex. A conveys full title in schedule B/1 property to defendants 3 to 5. The defense with regard to the properties in other schedules need not be mentioned in view of the undisputed position already stated.

3. Mr. Mohanti advanced the following contentions :-

- (i) The registered deed of gift dated 8th May 1946 executed by Lata in favor of defendant 2 is void ab initio and transfers no title to defendant 2 whose possession after the transfer was that of a trespasser :

- (ii) As the transfer was void, Lata was in possession of schedule B/1 property at the time of the commencement of the Act and held the property as a full owner and not as a limited owner. Though on that date defendant 2 was in actual physical possession, his possession was that of a trespasser without acquiring a title by prescription by being in possession for more than 12 years. The possession of such a trespasser is the possession of Lata in law within the meaning of Section 14(1) of the Act; and
- (iii) As Lata was full owner, her transfer in favor of defendants 3 to 5 by registered sale deed dated 19th October 1957 (Ex. A) is valid and cannot be questioned by the plaintiffs who are not reversioners.

4. The first contention of Mr. Mohanty that the deed of gift dated 8th May 1946 executed by Lata in favor of defendant 2 is void ab initio and conveys no title in favor of defendant 2, is based on a fundamental Misconception of law. As was observed by their Lordships of the Supreme Court in *Kalishankar Das v. Dhirendranath*<sup>1</sup>, the interest of a Hindu widow in the properties inherited by her bears no analogy or resemblance to what may be described as an equitable estate in English law and which cannot be followed in the hands of a 'bona fide' purchaser for value without notice. The Hindu widow's estate has been described as qualified proprietorship with powers of alienation only when there is justifying necessity, and the restrictions on the powers of alienation are inseparable from her estate. For legal necessity she can convey to another an absolute title to the property vested in her. If there is no legal necessity, the transferee gets only the widow's estate which is not even an indefeasible life estate, for it can come to an end not merely on her death but on the happening of other contingencies like remarriage, adoption etc. If there is no necessity in fact, or if the aliene could not prove that he made *bona fide* enquiries and was satisfied about its existence, the transfer is undoubtedly not void, but the transferee would get only the widow's estate in the property which does not affect in any way the interest of the reversioner.

5. The aforesaid principle that a transfer without legal necessity is not void, but the transferee would get only the widow's estate in the property without affecting the interest of the reversioner is fully applicable to the case of gift by a widow. In the case of sale without legal necessity, the absence of legal necessity is to be established. In the case of a gift, there is absolutely no room for advancing the theory of legal necessity, because gift is a transfer of certain existing movable or immovable property made voluntarily and without consideration and accepted by or on behalf of the donee. When the gift itself is without consideration, the question of application of that consideration, either for legal necessity or for the benefit of the estate, does not arise. By the gift itself the widow's title vests in the donee. The nature and character of the title in the donee are the same as vested in the widow before the transfer and that is widow's estate. The transfer is not void as against the donee. It is perfectly valid as between the widow and the donee, and the widow cannot bring a suit for eviction of the donee as her title is completely extinguished by the gift. The transfer is voidable at the instance of the reversioner on the death of the widow. In a Bench decision of this Court reported in *Sansir Patelin v. Satyabati Naikani*<sup>2</sup>, Mr. Justice Mohapatra gave identical illustration in support of the aforesaid view which is as follows-

"We will give a further illustration. A female heir executes a deed of gift; the donee on the basis of the deed of gift obtains only a limited ownership of the female heir and it will enure during the lifetime of the female heir as she is not the full owner in respect of this

property and the property is no longer hers as she had parted with all her right, title and interest therein on the basis of the deed of gift. On her death, the property must revert back to the heirs of the last male owner and, therefore, the conception of a reversioner can never be said to have been abrogated."

By the deed of gift Lata's widow's estate in the property was completely extinguished and the donee (defendant 2) acquired the widow's estate and was not a trespasser vis-a-vis Lata. The first contention of Mr. Mohanti is wholly devoid of force.

7. On the aforesaid conclusion, the second contention that Lata was in possession on the date of commencement of the Act even though defendant 2 was in possession, does not arise for determination. On this question the Supreme Court in *Kotturuswami v. Veerayya*<sup>3</sup>, did not think it necessary to go to that extent. Their Lordships construed the word 'possessed' in Section 14 in a broad sense and in the context as meaning "the state of owning or having in one's hand or power." The actual physical possession of the widow or her constructive possession through licensees, lessees or mortgagees were construed as coming within the word 'possessed' in Section 14. In ILR 1957 Cut 700 their Lordships did not accept the view in *Venkayamma v. Veerayya*<sup>4</sup>, that even if a trespasser is in possession, the widow would be said to be in possession under Section 14 of the Act. A learned Single Judge of the Patna High Court in *Ramsewak v. Sheopujan*<sup>5</sup>, dissented from the aforesaid Orissa view, but later a Division Bench of the same High Court in *Ram Gulam v. Palakdhari Singh*<sup>6</sup>, followed the Orissa decision as laying down the correct law. I am bound by the Bench decision of this Court which correctly represents the law. There is no merit in the second contention.

8. As I have discussed above defendant 2 acquired only the widow's estate by the gift in his favor. His re-transfer on 13th February 1957 by Ex. B, even if genuine and not fraudulent or collusive as has been held by the trial Court, would transmit to Lata the same title which defendant 2 himself had. In this regard the declaration made in O. S. 138 of 1946-47 that her gift in favor of defendant 2 was not binding on the reversioners after her death, does not make any difference in the legal position. Even if such a suit had not been filed, the interest of the alienee or the donee in the property would be that of a limited owner. Section 14(1) does not purport to enlarge the right, title or interest of the alienee with regard to the transfers effected prior to the commencement of the Act. By Ex. B. Lata would again get the widow's estate. The position would be made clear by an illustration. Supposing defendant 2 had effected a transfer not in favor of Lata but in favor of another male who is in law always entitled to hold the property as a full owner. Would the transferee in such a case acquire a limited right or a full ownership? The obvious answer is that he would acquire only a limited right as the donee cannot transmit any title higher than what he himself had. The position does not become in any way different merely because defendant 2 re-transferred the property in favor of a female. Though the transfer is subsequent to the Act, Lata acquired only a limited right and did not acquire full ownership on account of the limited nature of the interest of the transferor. The trial Court has found that Ex. A was without consideration. Even if it were for consideration, Lata could not transmit a higher title than what she got by Ex. B. The third contention has no merit.

9. All the contentions fail. The appeal fails and is dismissed, but in the circumstances without costs.

Appeal dismissed.

Cases Referred.

<sup>1</sup> AIR 1954 SC 505

<sup>2</sup> ILR 1957 Cut 700

<sup>3</sup> AIR 1959 SC 577

<sup>4</sup> AIR 1957 Andh Pra 280

<sup>5</sup> AIR 1959 Pat 75

<sup>6</sup> AIR 1961 Pat 60