AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.1486 of 1999

1.a) Shyam Lal, S/o Ramu Ram, aged about 38 years, R/o Village Ranpur Khurd, Post Parsa, Tahsil & P.S. Ambikapur, District Surguja (C.G.)

1.b) Sukh Lal, S/o Ramu Ram, aged about 43 years, R/o Village Ranpur Khurd, Post Parsa, Tahsil & P.S. Ambikapur, District Surguja (C.G.)

1.c) Shiv Lal, S/o Ramu Ram, aged about 38 years, R/o Village Ranpur Khurd, Post Parsa, Tahsil & P.S. Ambikapur, District Surguja (C.G.)

(Plaintiffs)/
---- Appellants

Versus

1. Mansuram (since dead) Through Legal Heirs

   1.A. Nageshwari Bai, W/o Late Mansuram, aged about 35 years

   1.B. Hirasay, S/o Late Mansu, aged 18 years

   1.C. Somari, D/o Late Mansu, aged 16 years, Minor,

   1.D. Gayatri, D/o Late Mansu, aged 11 years, Minor,

   1.E. Hariprasad, S/o Late Mansu, aged 8 years, Minor,

   1.F. Munni, D/o Late Mansu, age 3 years, Minor,

   No.1C to 1F Minors, through their mother Nageshwari Bai (Respondent No.1.A.)

   All R/o Village Ranpurkhurd, P.S. & Tahsil Ambikapur, District Surguja (C.G.)

2. Ramadhar, S/o Jagatram, age 33 years, Caste Rajwar, R/o Village Ranpur Khurd, PS/Tehsil Ambikapur, District Sarguja (C.G.)

3. Jagatram (deleted)

4. The State of M.P. (now the State of C.G.), through Collector, Sarguja, Ambikapur.

(Defendants)/
---- Respondents

For Appellants: Mr. A.K. Prasad, Advocate.
For Respondents No.1A to 1F and 2: -
None present.
For Respondent No.4 / State: -
Mr. Rahul Tamaskar, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

06/10/2018

1. The substantial question of law involved, formulated and to be answered in this plaintiff's second appeal, who died during the pendency of second appeal, states under: -

> "Whether gift of undivided share can be said to be valid in the eye of law?"
>
> (For sake of convenience, parties would be referred hereinafter as per their status shown in the plaint before the trial court.)

2. The suit properties mentioned in Schedule A & B of the plaint were self-acquired properties of Hiran – father of original plaintiff Sahni which were settled in his name during the Surguja State Settlement vide Ex.P-2. According to the plaint averment, Hiran died in the year 1964-65 and the suit properties were succeeded by his widow Bundeli and his daughter plaintiff Sahni. They are averred to be Hindus and said to be governed by the provisions of the Hindu Succession Act, 1956. It is their further case that when the defendants started interfering in the suit property, it was brought to the light that a gift deed dated 10-2-1966 (Ex.D-1) was said to have been executed by Bundeli (widow of Hiran) in favour of defendants No.1 & 2 which is pleaded to be obtained fraudulently and it was also pleaded that the plaintiff's mother – Bundeli was not competent

to execute the gift deed of undivided family property so as to bind the plaintiff, as the suit property was jointly held by widow of Hiran – Bundeli and daughter Sahni.

3. The defendants filed their written statement before the trial Court and disputed the date of death of Hiran by stating inter alia that Hiran died in the year 1960-61 and at that time, the Madhya Pradesh Land Revenue Code, 1959 had already come into force with effect from 2-10-1959 and the properties mentioned in Schedule-A of the plaint were inherited solely and exclusively by his widow Bundeli under Section 164 of the Code (unamended) and therefore she was competent to gift the property in favour of defendants No.1 & 2 by gift and it has rightly been gifted vide Ex.D-1 dated 10-2-1966.

4. The trial Court on appreciation of oral and documentary evidence on record framed as many as fifteen issues and held that the gift deed dated 10-2-1966 executed by Bundeli in favour of defendants No.1 & 2 vide Ex.D-1 is null and void, as Hiran died in the year 1964-65, and therefore Section 8 of the Hindu Succession Act, 1956, would be applicable, as such, the property was jointly succeeded by the plaintiff and her mother Bundeli and therefore Bundeli cannot make gift of the joint family property so as to bind the plaintiff, and decreed the suit holding the gift deed to be null and void.

5. In appeal preferred by the defendants, the first appellate Court allowed the appeal after taking the additional documents under Order 41 Rule 27 of the Code of Civil Procedure, 1908, on record

and held that Hiran died in the year 1960-61 and during that period, unamended Section 164 of the M.P. Land Revenue Code, 1959, was in force from 2-10-1959 to 8-12-1961 and therefore as per that provision, Bundeli alone had succeeded the suit property to the exclusion of her daughter Sahni and as such, she was competent to make gift of the suit property in favour of defendants No.1 & 2, and set aside the decree and dismissed the suit.

6. Feeling aggrieved against the judgment & decree passed by the first appellate Court, this second appeal under Section 100 of the CPC has been preferred in which substantial question of law has been formulated and set-out in the opening paragraph of the judgment.

7. Mr. A.K. Prasad, learned counsel appearing for the appellants/LRs of the plaintiff, would submit that the first appellate Court is absolutely unjustified in upsetting the well reasoned finding of the trial Court qua the death of Hiran by granting application under Order 41 Rule 27 of the CPC and further erred in holding that the unamended provision of Section 164 of the M.P. Land Revenue Code, 1959, which was in force from 2-10-1959 to 8-12-1961, would be applicable as such, the finding recorded by the first appellate Court is completely perverse and liable to be set aside.

8. None appeared for LRs of respondent No.1 and for respondent No.2, though served with notice.

9. Mr. Rahul Tamaskar, learned Panel Lawyer, has appeared for the State/respondent No.4.

10. It is the plaintiff's case setup before the trial Court that the suit property was held by Hiran vide Ex.P-2 and he died in the year 1964-65 and after his death, his widow Bundeli and his daughter Sahni – the plaintiff herein succeeded the property as per Section 8 of the Hindu Succession Act, 1956 and Bundeli alone had no right to gift her undivided share in favour of defendants No.1 & 2 which the trial Court has accepted and held that Hiran died in the year 1964-65 and therefore Bundeli and plaintiff Sahni both being Class-I heirs under Section 8 of the Hindu Succession Act, 1956, Bundeli alone being the widow of Hiran was not competent to make gift of her undivided share in favour of defendants No.1 & 2 which has been reversed by the first appellate Court holding that Hiran died in the year 1960-61.

11. In order to reverse the finding of the trial Court, the first appellate Court has relied upon the additional documents taken on record under Order 41 Rule 27 of the CPC. A careful perusal of one of the documents i.e. *sanshodhan panji* No.116 recorded on 11-1-1961 would show that Hiran died in the year 1959 and on that basis, the first appellate Court held that death of Hiran took place in the year 1960-61.

12. The Madhya Pradesh Land Revenue Code, 1959 came into force with effect from 2-10-1959 and unamended Section 164 of the said Code remained in force from 2-10-1959 to 8-12-1961 according to which widow is one of the Class-I heirs and daughter is Class-II heir and the amended provision which came into force with effect from 8-12-1961 provides that subject to personal law, the interest of

Bhumiswami shall, on his death, pass by inheritance, survivorship or bequest, as the case may be.

13. The Supreme Court in the matter of **Santosh Hazari v. Purushottam Tiwari (deceased) by L.Rs.**[1] has laid down two principles for reversing the judgment by appellate court and held as under: -

> "15. … While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See *Madhusudan Das v. Narayanibai*[2]) The rule is – and it is nothing more than a rule of practice – that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See *Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh*[3]) Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in

1 (2001) 3 SCC 179
2 (1983) 1 SCC 35 : AIR 1983 SC 114
3 AIR 1951 SC 120

> second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one."

14. On a careful perusal of the principles of law for reversing a judgment, it is quite vivid that the first appellate Court must come into close quarters with the reasonings assigned by the trial Court and then assign its own reasons for arriving at a different finding in order to discharge the duty of the first appellate Court.

15. Reverting to the facts of the present case in light of the principles of law for reversing a judgment laid down in **Santosh Hazari** (supra), it would be apparent that the trial Court has recorded a finding that Hiran died in the year 1964-65 which was based on the evidence available on record. Jagatram (DW-1), who was examined before the trial Court on 18-9-1993, in his examination-in-chief clearly held that Hiran died prior to 30-35 years, meaning thereby, if 30 years prior from the date of examination is taken as date of death of Hiran, the date of death would come roughly to 17-9-1963 and if it is taken to be 35 years, it would be 17-9-1958. In either case, death of Hiran is prior to 2-10-1959 and after 8-12-1961 when Section 164 of the M.P. Land Revenue Code, 1959 was amended which provides that subject to his personal law the interest of Bhumiswami shall, on his death, pass by inheritance, survivorship or bequest, as the case may be.

16. The first appellate Court simply taken the documents *sanshodhan panji* dated 11-1-1961 on record in which it has been stated that Hiran died in the year 1959, and thereby taken and held the date of death of Hiran as 1960-61 and reversed the decree of the trial Court in which death of Hiran was recorded to be in the year 1964-65 which is

impermissible in law. The unamended provision of Section 164 of the M.P. Land Revenue Code, 1959 was applicable from 2-10-1959 to 8-12-1961. The first appellate Court could have reversed the finding of the trial Court by recording a specific finding that Hiran died in between 2-10-1959 to 7-12-1961. In absence of that finding, on the basis of material available on record, the first appellate Court was absolutely unjustified in holding that unamended Section 164 of the Code would apply in which only widow (Bundeli) who is Class-I heir would succeed to the exclusion of her daughter. Therefore, the finding of the first appellate Court that Hiran died in the year 1960-61 and thus, unamended Section 164 of the Code would apply is a finding which is wholly perverse to the record and is liable to be set-aside.

17. Now, coming to the question of law, whether gift of undivided share can be said to be valid in the eye of law, this question is well settled and the accepted principle is that coparcener has no power to gift his undivided share and gift by such coparcener is void.

18. In the matter of **Thamma Venkata Subbamma (dead) by LR v. Thamma Rattamma and others**[4], the Supreme Court has held that a coparcener under the Mitakshara law has no power to gift his undivided share unless he is sole surviving coparcener and gift by such coparcener is void ab initio. Paragraphs 12, 13, 14 and 17 of the report state as follows: -

> "12. There is a long catena of decisions holding that a gift by a coparcener of his undivided interest in the coparcenary property is void. It is not necessary to refer to all these decisions. Instead, we may refer to the following statement of law in Mayne's Hindu Law, eleventh ed., Article 382 :

4 (1987) 3 SCC 294

> It is now equally well settled in all the Provinces that a gift or devise by a coparcener in a Mitakshara family of his undivided interest is wholly invalid …. A coparcener cannot make a gift of his undivided interest in the family property, movable or immovable, either to a stranger or to a relative except for purposes warranted by special texts.

13. We may also refer to a passage from Mulla's Hindu Law, fifteenth edn., Article 258, which is as follows :

> *Gift of undivided interest*.–(1) According to the Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of the other coparceners.

14. It is submitted by Mr. P.P. Rao, learned Counsel appearing on behalf of the respondents, that no reason has been given in any of the above decisions why a coparcener is not entitled to alienate his undivided interest in the coparcenary property by way of gift. The reason is, however, obvious. It has been already stated that an individual member of the joint Hindu family has no definite share in the coparcenary property. By an alienation of his undivided interest in the coparcenary property, a coparcener cannot deprive the other coparceners of their right to the property. The object of this strict rule against alienation by way of gift is to maintain the jointness of ownership and possession of the coparcenary property. It is true that there is no specific textual authority prohibiting an alienation by gift and the law in this regard has developed gradually, but that is for the purpose of preventing a joint Hindu family from being disintegrated.

17. It is, however, a settled law that a coparcener can make a gift of his undivided interest in the coparcenary property to another coparcener or to a stranger with the prior consent of all other coparceners. Such a gift would be quite legal and valid."

19. The principle of law settled in **Thamma Venkata Subbamma** (supra) has been followed with approval by the Supreme Court in the matter of **Pavitri Devi and another v. Darbari Singh and others**[5] further

5 (1993) 4 SCC 392

following its earlier decision in the matter of **Mukund Singh v. Wazir Singh**[6] in which it was held that a gift of coparcener's property by a member is void and it was further held that a disposition *intra vivos* by gift of coparcenary property except either with the consent of other coparceners or between coparceners or in exceptional circumstances is void.

20. The aforesaid decision of the Supreme Court i.e. **Thamma Venkata Subbamma** (supra) has again been followed in the matter of **Baljinder Singh v. Rattan Singh**[7] with approval and it was clearly held that transfer by coparcener of his undivided interest in coparcenary property by a gift, subject to certain exceptions, is void or voidable.

21. Finally, reverting to the facts of the present case in light of the principles laid down in the aforesaid judgments holding that coparcener has no power to gift his undivided share and the same is void ab initio, therefore, plaintiff's mother Bundeli had no right to gift the suit property in favour of defendants No.1 & 2 in exclusion of the plaintiff and same is rightly held to be void by the trial Court, as such, the judgment & decree of the first appellate Court cannot be sustained, it is liable to be set aside and is hereby set aside and that of the trial Court is restored.

22. Consequently, the substantial question of law is answered in negative. The second appeal is allowed leaving the parties to bear their own cost(s). A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma

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6 (1972) 4 SCC 178
7 (2008) 16 SCC 785

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.1486 of 1999

Shyam Lal and others

Versus

Mansuram (since dead) Through Legal Heirs and others

Head Note

Transfer by coparcener of his undivided interest in coparcenary property by a gift is void.

सहदायिक द्वारा सहदायिकी सम्पत्ति में उसके व्यक्तिगत हित का दान द्वारा अंतरण शून्य है।