

CASE NO.:
Appeal (civil) 4231 of 1999

PETITIONER:
RENU DEVI

RESPONDENT:
MAHENDRA SINGH AND ORS.

DATE OF JUDGMENT: 04/02/2003

BENCH:
R.C LAHOTI & BRIJESH KUMAR

JUDGMENT:
JUDGMENT

2003(1) SCR 820

The Judgment of the Court was delivered by

R.C. LAHOTI, J. Rameshwar Singh had two wives, (i) Ram Sakhi, and (ii) Dhaneshwari Devi. From the first wife Ram Sakhi Rameshwar Singh has a son, namely, Mahendra Singh. From Dhaneshwari Devi Rameshwar Singh has another son, namely Suresh Prasad. Mahendra Singh has four sons, namely, Dilip, Pradeep, Rajesh, and Rakesh. Suresh Prasad has two sons, namely, Ranjan and Rajkumar. The family had substantial landed property. A suit for partition was filed by Suresh Prasad and his two sons, Ranjan and Rajkumar (referred to as 'Group-1' for the sake of convenience) impleading Rameshwar Singh and Dhaneshwari Devi as defendants 1 and 2 ('Group-2' for convenience) and Mahendra Singh, Dilip, Pradeep, Rajesh and Rakesh as defendants 3 to 7 ('Group-3' for convenience). The suit for partition though initially contested, ended into a compromise based whereon a compromise decree was passed on 13.2.1978.

A perusal of the compromise application dated 11.1.1978 shows that three schedules of the property were drawn up. Schedule No.1 sets out full description of the property which Group-1 got in the share. Schedule No. 2 sets out full description of the landed property and houses which fell to the share of Group-2. Schedule No. 3 sets out full description of the landed property which fell to the share of Group-3. Wherever something had remained to be done for the separate possession and enjoyment of the property falling to the share of each of the groups, recitals in that regard were incorporated in the body of the compromise petition. This compromise decree was acted upon. There is no controversy that each of the groups was either already in PL "session or took over possession over that property which had fallen to its share in accordance with the three schedules annexed with the compromise petition. The compromise decree was not engrossed on stamp paper. It appears that one of the parties made an application for drawing up final decree in terms of the decree dated 13.2.1978. referred to as the preliminary decree, in the so-called final decree proceedings. There was no contest and a final decree engrossed on the requisite stamp paper was drawn up on 24.5.1979. The contents of final decree are just a reproduction of the preliminary decree inasmuch as either in the description of the divided property or in the shares no variation had taken place between 13.2.1978. and 24.5.1979.

It is not disputed that House No. 270, situated on Plot No. 885 of Lalji Tola had fallen to the share of Group-2, i.e., Rameshwar Singh and Dhaneshwari Devi. By a registered deed of gift dated 22.3.1979. Rameshwar Singh and Dhaneshwari Devi of Group-2 gifted their right, title and interest in the property to Renu Devi wife of Suresh Prasad, i.e., the daughter-in-law of Rameshwar Singh and Dhaneshwari Devi and the grandsons Ranjan and Raj Kumar.

Members of Group-3 (defendants No. 3 to 7 in the partition suit) were in possession of 4 rooms., which is the suit property in the present proceedings, and had fallen to the share of Rameshwar Singh and Dhaneshwari Devi of Group-2 (defendants No. 1 and 2 in the partition suit) but they were actually in occupation of Group-3, i.e. defendants 3 to 7 in the partition suit. The compromise petition recited that Group-3 would reside free of cost for one year in 3 rooms alongwith latrine and bathroom which is towards southern portion and one room towards northern portion. The compromise decree further recited that if they (i.e. Group-3) could not construct their own house within a year than they would continue to reside in that part of the house but subject to payment of monthly rent to Group-2 (i.e. defendants No. 1 and 2 in the partition suit) calculated at the prevalent rate of rent minus Rs. 10.

Subsequent to the passing of the final decree three suit came to be filed. Title Suit No. 191/80 came to be filed by Dilip S/o Mahendra Singh laying challenge to the compromise decree. Title Suit No. 112/79 was filed by Renu Devi, Ranjan and Rajkumar (herein after called 'the plaintiffs-appellants') seeking possession over 4 rooms alongwith latrine and bathroom which had continued in possession of Mahendra Singh and his sons (hereinafter called 'the defendants-respondents') under the compromise decree. The plaintiffs-appellants claimed title over the suit property under the decrees dated 13.2.1978 and 24.5.1979 read with deed of gift dated 22.3.1979. Money Suit No. 73/ 84 also came to be filed by the plaintiffs-appellants against the defendants-respondents claiming recovery of rent consistently with the terms of the decrees referred to hereinabove. The Trial Court dismissed all the suits. Three appeals were preferred. Money Appeal No. 12/88 arising out of Money Suit No.73/84 and Title Appeal No. 129/88 arising out of Eviction suit No. 112/ 79 were allowed by the First Appellate Courts and decrees for eviction as also for recovery of rent were directed to be passed in favour of appellants and against the respondents herein. Title Appeal No. 132/88 arising out of Title Suit No. 191/80 filed by Dilip S/o Mahendra Singh has been dismissed and the dismissal of his suit upheld in Title Appeal No. 132/88. Dilip S/o Mahendra Singh has not pursued the challenge to partition decree and so the legality and validity of the partition decree has achieved finality and is not open to question any further. The appellate decree in Money Appeal No. 12/ 88 and Title Appeal No. 120/88 were put in issue by filing second appeals by Mahendra Singh and his sons. The High Court has by its impugned common judgment dated 23.6.98 delivered in the two appeals allowed the appeals and directed the eviction suit as also the rent suit to be dismissed. The singular ground on which the High Court has proceeded is that Rameshwar Singh and Dhaneshwari Devi acquired their separate title in the joint property only by the final decree dated 24.5.1979 and therefore they were legally incompetent to gift their property by the deed dated 22.3.1979 so as to transfer title to the donees inasmuch as before 24.5.1979 the date of the final decree they did not have any title in the property. In these appeals by special leave filed by Renu Devi and her two sons it is the legality of the abovesaid findings arrived at by the High Court which is to be examined.

For the reasons stated hereinafter, we find it difficult to sustain the judgment and decree and the reasoning assigned by the learned Single Judge of the High court.

In a suit for partition of property or separate possession of a share therein Order XX Rule 18 of the CPC contemplates decree to be passed in the following terms.

"Order XX Rule 18.

Decree in suit for partition of property or separate possession of a share therein. - Where the court passes a decree for the partition of property or for the separate possession of a share therein, then, -

(1) if and in so far as the decree relates to an estate assessed to the

payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector, deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties, interested in the property and giving such further directions as may be required."

A preliminary decree declares the rights or shares of parties to the partition. Once the shares have been declared and a further inquiry still remains to be done for actually partitioning the property and placing the parties in separate possession of divided property then such inquiry shall be held and pursuant to the result of further inquiry a final decree shall be passed. A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree the rights of the parties are finally determined and a decree is passed in accordance with such determination, which is, the final decree. (See : CPC by Mulla Vol. 1, 1995 Edn., page 21). The distinction between preliminary and final decree is this : a preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in the preliminary decree which inquiry having been conducted and the rights of the parties finally determined a decree incorporating such determination needs to be drawn up which is the final decree.

In the case at hand, a perusal of the decree dated 13.2.1978 and the contents of the compromise application with the three schedules of properties annexed thereto shows that the property was partitioned by metes and bounds; not only the shares but the property actually falling to the share of each of the 3 groups were actually defined and given to the party entitled thereto. The decree dated 13.2.1978 demarcates the properties forming subject matter of partition by metes and bounds. For all practical purposes the decree dated 13.2.1978 was a final decree. Under order XX Rule 18 of the CPC it is not necessary to pass a preliminary decree; the Court may pass a preliminary decree if it is required. If the rights of the parties are finally determined and no further inquiry remains to be held for the purposes of completing the proceedings in partition then there is nothing in law which prevents the Court from passing a final decree in the very first instance. Often such are the cases which are based on compromise. The present one is such a case. However, still one of the parties sought for a final decree being drawn up. The Court and the parties acted under the misapprehension that the decree dated 13.2.1978 was a preliminary decree and therefore a final decree was needed to be drawn up. As we have already stated the final decree dated 24.5.1979 is nothing but a reproduction of the schedules contained in the preliminary decree dated 13.2.1978. The only difference is that the decree dated 24.5.1979 is engrossed on stamp papers which the decree dated 13.2.1978 was not.

The learned counsel for the appellants has invited our attention to a Division Bench decision of the Patna High Court in Raghubir Sahu v. Ajodhya Sahu and Ors., AIR 32 (1945) Patna, 482 wherein the learned Judges have held:

"In the present case, the decree was passed on compromise. It was admitted that by the compromise, the properties allotted to the share of each party were clearly specified and schedules of properties allotted to each were appended to the compromise petition. Therefore, no further inquiry was at all necessary. In such circumstances, the decree did not merely declare the rights of the several parties interested in the properties but also

allotted the properties according to the respective shares of each party. Therefore, it was not a preliminary decree but it was the final decree in the suit. A compromise decree in a partition suit allotting specific parcels to the parties is a final order for effecting partition : 9 Luck 270. There being already a final decree, the only thing that remained to be done was to engross it on a stamped paper under Article 45, Stamp Act, 1889. The decree to be engrossed on the stamp will bear the date of the decree, 17th December, 1921, and will declare the position of the parties in respect of the properties on that date. There is not time limit prescribed by the statute for the engrossment of a partition decree on stamp of requisite value. In fact no date was fixed by the Court for the purpose. Therefore, mere engrossment of the decree on stamped paper of the requisite value will not in any way affect the interest of the parties in respect of the properties though, changes may have taken place in regard to the properties since the decree was made on 17th December, 1921. The only effect of engrossment of the decree on stamped paper would be that it will be rendered legally effective which it is not until so engrossed."

In our opinion, the law has been correctly stated by the Division Bench of the Patna High Court. The learned counsel for the appellants also relied on a Special Bench (3 Judges) decision of the Chief Court of Oudh in Muzaffar Husain v. Sharafat Husain and Ors., AIR (1933) Oudh. 562 which in turn relies on a Madras High Court decision in Thiruvengadathamiah v. Mungiah, (1912) 35 Mad, 25. The principles of law laid down in the two decisions support the view taken by the Division Bench of the Patna High Court. We find ourselves in agreement with the view of the law taken by the Oudh Chief Court and Madras High Court. The decree dated 13.2.1978 being a decree effecting partition by metes and bound ought to have been engrossed on requisite stamp papers. The deficiency stood supplied by the same being rewritten on stamp papers on 24.5.1979. The event dated 24.5.1979 validated the decree dated 13.2.1978 and it became effective and binding with effect from 13.2.1978 itself. Inasmuch as the decree dated 13.2.1978 partitioned the property by metes and bounds whereunder the suit property fell to the share of Group-2 therein, i.e., Rameshwar Singh and Dhaneshwari Devi, they were entitled in law to transfer by way of gift the property which had fallen to their share to their daughter-in-law and the grandsons. The donees acquired a valid legal title thereunder. The High Court was not right in holding that unless and until the final decree was passed on 24.5.1979 till then a gift of the property covered by the two decrees could not have taken place in between on 22.3.1979. There is yet another aspect of the matter. Assuming it for a moment that on 22.3.1979 the donors had not actually acquired title to the property and yet they had gifted this property to their daughter-in-law and grandsons it cannot be denied that they had a pre-existing interest in the suit property by virtue of their being members of the Joint Hindu Family and their interest and right to partition having been upheld by the so-called preliminary decree dated 13.2.1978. By the subsequent decree dated 24.5.1979 they did acquire a clear and complete title in the same property which they had gifted on 22.3.1979. On the principle of the feeding the grant by estoppel the subsequent acquisition of title under the decree dated 24.5.1979 shall ensure to the benefit of the donee under the deed of gift dated 22.3.1979 for whatever infirmity there was (though we have held that there was none) in the title of Rameshwar Singh and Dhaneshwari Devi stood cured by the final decree 24.5.1979. The doctrine of feeding the grant by estoppel which is in essence a principle of equity stands statutorily recognised in India by Section 43 of the Transfer of Property Act. Section 43 of the T.P. Act does not in terms apply to the facts of the present case, inasmuch as the deed dated 22.3.1979 is not a transfer for consideration: we are referring to Section 43 abovesaid as illustrative of the doctrine and its statutory recognition in India Law.

The rule of feeding the estoppel, as recognized in English law and set out in Rajapakse v. Fernando, (1920) AC 892, 897 is, 'where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent

acquisition, goes automatically to the earlier grantee, or as it is usually expressed, feeds the estoppel.' Mulla states in the work on Transfer of Property Act (Ninth Edition, 2000, at p. 310). The Principle is based partly on the common law doctrine of estoppel by deed and partly on the equitable doctrine that a man who has promised more than he can perform must make good his contract when he acquires the power of performance. In *Tilakdhari Lal v. Khedan Lal*, Lord Buckmaster stated the rule of estoppel by deed as follows-

"If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate, the instantly passes".

Though there is some doubt expressed by Indian scholars and authorities if the common law doctrine of 'the estate instantly passes' is applicable in India but there is no doubt that the doctrine of feeding the estoppel applies in India. The rule is that if a man, who has no title whatever to the property, grants it by a conveyance which in form carries the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. (See Mulla, *ibid.* p. 312). Equity treats that as done which ought to be done. The doctrine may not apply if the deed of transfer itself was invalid or if the third party has acquired title bona fide, for consideration and without notice. In the present case the execution and registration of deed of gift dated 22.3.1979 is not disputed. Nor is there any illegality or invalidity attaching with the deed. The rule of estoppel by deed would clearly apply. Could Rameshwar Singh and Dhaneswari Devi have denied there own title in the gifted property qua the donees or could they have disputed their title vesting in the donees by the deed of gift? The answer is 'no'. That being so, the third parties, i.e. the respondents herein who have no title, muchless a pre-existing title in the suit property cannot question the title of donors vesting in the donee. The defect, if any, in the decree dated 13.2.1978 which was nothing except of not being engrossed on requisite stamp papers, was cured on 24.5.1979. The contents of decree came to be engrossed on requisite stamp papers. The decree dated 24.5.1979 would in the facts and circumstances of the case, relate back to the date 13.2.1978.

In either case the reasoning applied by the learned Single Judge of the High Court is not sound in law and cannot be sustained.

Shri S.B. Upadhaya, the learned counsel for the respondents placed reliance on four decisions of this Court in his effort at defending the judgment of the High Court which decisions we propose to refer only in fairness to him. In *Nachlappa Chettiar v. Subramaniam Chettiar*, [1960] 2 SCR, 209 it was held that by a preliminary decree the suit is not terminated till a final decree passed and in-between the Court has jurisdiction to make an order of reference under Section 21 of the Arbitration Act, 1940. In *Gajanan Krishnaji Bapat and Anr: v. Dattaji Raghobaji Meghe and On.*, [1995] 5 SCC, 347 it was held that a preliminary decree being merely declaratory decree it is the final decree which is executable and limitation for execution runs from the date of final decree. In *Shanker Balwant Lokjhande (dead) by Lrs. v. Chandrakant Shanker Lokhande and Anr.*, [1995] 3 SCC, 413 it was held the final decree works out and finalises the rights and interests declared by the preliminary decree. In *M.L Subbaraya Setty (dead) by Lrs. and Ors. v. M.L. Nagappa, Setty (dead) by Lrs. and Ors.*, [2002] 4 SCC, 743 it was observed that the actual partition is effected by passing of the final decree and therefore the valuation of the property to be taken into consideration is the one as on the date of final decree. None of the decisions deals with a situation as has arisen in the present case nor with the question of law arising for decision herein.

For the foregoing reasons, the appeals are allowed. The judgment and decree of the High Court are set aside and those of the First Appellate Court are restored.

In the facts and circumstances of the case, as the parties are closely related, we leave the parties to bear the costs as incurred throughout.

JUDIS