

SUPREME COURT OF INDIA

Gulamhussain Kutubuddin Maner

Vs.

Abdulrashid Abdulrajak Maner

(V. N. Khare and S.N. Variava JJ.)

19.07.2000

ORDER

1. Kutubuddin Maner (hereinafter referred to as 'donor') owned property No. 1629 situate within the municipal limits of Ward No. 7 of Kohlapur town. The donor died on 19.12.1972 leaving behind four sons including the plaintiff-appellant and defendant No. 2, two daughters and his wife as his heirs. The donor before his death, executed a registered gift deed dated 3.6.1972 in favour of his minor grandson, defendant No. 7. The minor grandson was the son of donor's eldest son who is defendant No. 2. Smt. Meher Nigarabi, wife of defendant No. 2, was appointed as a guardian of minor donee and she, on behalf of the minor donee, accepted the gift. Subsequently, the plaintiff-appellant who is one of the sons of the donor, filed a suit for Letter of Administration of the estate of donor and also for possession. The gift deed executed by the donor was challenged on the ground that, under the Mohammedan Law, the mother is not competent to act as a guardian of her minor son during the lifetime of minor's father or grandfather. The trial court accepted the case of the plaintiff-appellant and decreed the suit. The decree of the trial court was affirmed by the First Appellate Court. However, in second appeal, the High Court took the view that, since mother has accepted the gift as an agent of her husband, the gift deed was valid. Consequently, the appeal was allowed and decree of the trial court was set aside. It is against the said judgment of the High Court the plaintiff-appellant is in appeal before us.

2. We have heard Counsel for the parties. On the argument of the learned Counsel for the parties, the first question that arises for our consideration is whether, under Mohammedan Law, a mother can be appointed to act as guardian of her minor son during the lifetime of the minor's father. So far as this question is concerned, the High Court relying upon the decision of this Court in Valia Peedikakkandi Kutheessa Umma and Ors. v. Pathakkalan Naravanath Kumhamu and Ors. allowed the appeal filed by the defendant-respondent. We find that the said decision is not applicable to the case of defendant-respondent, whereas, it squarely applies to the case of the plaintiff-appellant. We shall advert to the said decision slightly later. Under Mohammedan Law, gift is a donation conferring right of property without exchange. The gift is in the nature of contract where there must be a tender of property, acceptance of the property by the donee and delivery of possession of the property. It is only when these three ingredients are satisfied, a gift is completed. The object behind the compliance of three ingredients is that, there may not be any future dispute in respect of the property that is gifted to the donee. In the present case, it is not disputed that the father of a minor was alive at the time of execution of the gift. The question, that arises is whether, during the lifetime of father, can a mother be appointed as guardian of her minor son and accept the gift on his behalf. In *Musa Miya Walad Mahammad Shaffi and Anr. v. Kadar Bax Walad Khaj Bax and Anr.* AIR 1928

Privy Council p. 108 it was held that the gift by the grandfather to his minor grandson when the father was alive without delivery of possession was invalid. In *Suna Mia v. S.A. S. Pillai* 1932 11 Rang. 109 a gift to minor through the mother was considered invalid. In *Musa Miya and Anr. v. Kadar Bax* ILR 52 Bom. 316 P.C it was held that a gift by a grandfather to his minor grandson when the father was alive, without delivery of possession to the father was invalid. The Supreme Court in the case of *Valia Peedikakkandi Kutheessa Umma* (supra), after considering the said decisions held, thus:

"Both these cases involve gifts in favour of minors whose fathers were alive and competent. They are distinguishable from those cases in which there is no guardian of the property to accept the gift and the minor is within the care either of the mother or of other near relative or even a stranger. In such cases, the benefit to the minor and the completion of the gift for his benefit is the sole consideration."

The aforesaid passage from *Valia Peedikakkandi Kutheessa Umma* case (supra), unambiguously holds that where the father of a minor is alive the mother of the minor cannot act as a guardian of her minor son to accept the gift on his behalf. In view of the said legal position, we are of the view that where the father of a minor is alive, the mother of a minor cannot be appointed as a guardian of a minor to accept the gift on his behalf.

3. Coming to the next question as to whether the decision of this Court in *Valia Peedikakkandi Kutheessa Umma* case (supra) is applicable to the case of the defendant-respondent. In the said case the property was gifted by a husband to his minor wife who had attained discretion. At the time of gift, the father or grand-father of minor wife were not alive and minor wife had only her mother. On such facts, this Court in *Valia Peedikakkandi Kutheessa Umma* case held, as thus:

"In our judgment, the gift in the present case was a valid gift. Mammotty was living at the time of the gift in the house of his mother-in-law and was probably a very sick person though not in marzulmaut. His minor wife who had attained discretion was capable under Mohammedan Law to accept the gift, was living at her mother's house and in her care where the husband was also residing. The intention to make the gift was clear and manifest because it was made by a deed, which was registered and handed over by Mammotty to his mother-in-law and accepted by her on behalf of the minor."

4. The aforesaid view of this Court can be applied where the father or the grandfather of the minor are not alive, and in such cases the mother and in her absence any other person could be appointed as a guardian of the minor which is not the case before us. Here, we find that the father of the minor was alive and therefore, the mother could not have been appointed to act as a guardian of minor and to accept the gift on his behalf and, therefore, the gift executed by the donor in favour of minor donee was invalid.

5. The second question that arises is whether a husband can appoint his wife as his agent to act as a guardian of his minor son. The High Court was of the view that under Mohammedan Law, the theory of agency is not excluded and since in the instant case the mother accepted the gift on behalf of her minor son in the presence of her husband and her husband was already in partial possession of the property, the said circumstances give rise to the inference of agency given by minor's father to the minor's mother who accepted the gift. The High Court consequently held that the mother accepted the gift for her son on behalf of her husband. After considering the matter we are not

deposed to go into the wider question as to whether the husband can appoint his wife as his agent to act as the guardian of his minor son in view of the fact that such a case was not pleaded by the defendant-respondents in their written statement. Besides that no evidence at all was led by the defendants that the husband appointed his wife as his agent to act as guardian of his minor son. The fact that there was neither any pleading nor was any evidence to that effect, and in the absence of such requirement of law, the High Court could not have held the wife acted as an agent of her husband in accepting the gift on behalf of the minor.

6. The third question that arises is whether the suit filed by the plaintiff-appellant is maintainable. The High Court was of the view that since the other property of the donor was not included in the suit, therefore, the suit for Letter of Administration in respect of the property in dispute was not maintainable. This view of the High Court is erroneous and is not based upon evidence on record. The relief prayed for in the plaint filed by the plaintiff reads as thus:

"A relief for Letter of Administration in respect of the estate of the plaintiff's father may be granted together with the suit property and a separate share of the plaintiff therein, may be awarded to the plaintiff by effecting partition and delivering actual possession thereof."

6. A perusal of the relief shows that the plaintiff-appellant prayed for a relief of Letter of Administration in respect of the estate of plaintiff's deceased father, which included the other property also. Since there was no dispute in regard to any other property, the trial court dealt with the property, which was in dispute. Under such circumstances, the suit filed by the plaintiff-appellant was maintainable and the High Court committed an error in holding that the suit filed by the plaintiff-appellant was not maintainable.

7. For the aforesaid reasons, we are of the view that the appeal deserves to succeed. Consequently, the judgment and order under appeal is set aside and the appeal is allowed with costs.