

SUPREME COURT OF INDIA

Khursida Begum

Vs.

Komammad Farooq

C.A.No.2845 of 2006

(Anil R.Dave and Adarsh Kumar Goel, JJ.)

01.02.2016

JUDGMENT

Adarsh Kumar Goel, J.

1. Validity of gift deed dated 24th February, 1976 executed by late Hazi Azimuddin in favour of the plaintiff Rafiuddin is the sole question for consideration. The courts below have held the same to be a gift of undivided share of property which was capable of division and thus invalid under Muslim Law being hiba-bil-musha. It has also been held that gift was of no effect as possession was not delivered to the donee. Factually, the gift was held to be genuinely executed.

2. Facts are as follows : The appellant filed suit for recovery of the amount received by the defendants by way of rent to the extent of one-third share of the plaintiff (based on gift deed in his favour by his father) in the property which was rented out to the tenants. Claim of the plaintiff is that his father late Hazi Azimuddin was the absolute owner of the suit property. In the sale deed, his father got the names of the defendants (brothers of the plaintiff) recorded as owners to the extent of two-third. On 24th February, 1976, he gifted his one- third share to the plaintiff by a registered deed and informed the tenants. After the gift deed, the plaintiff was to get one- third share of the rent. The total rent was Rs.50/- per month. From 1st January, 1977, the defendants received the entire rent and did not pay the plaintiff's share to him. Thus, the plaintiff was entitled to recover one-third of the amount falling to his share.

3. The respondents defendants contested the suit denying the validity of the gift deed. It was stated that Hazi Azimuddin was 95 years old suffering from certain ailments and was not in a fit condition to make the gift deed. He had no right in the property and had never recovered any part of the rent. There was an oral family arrangement under which the defendants became the exclusive owners and Hazi Azimuddin relinquished all his rights.

4. The trial Court framed following issues :

- “1. Whether the disputed property has come to the defendants 20 years prior to the institution of the suit by way of oral family arrangement between late Azimuddin and the defendants and they are in possession as owners in their shares for 20 years?
2. Whether Late Azimuddin on 24.2.76 made a valid gift of 1/3 undivided share in the disputed property in favour of the plaintiffs and was receiving the rent from tenants in his lifetime till 1.1.77 and was paying 1/3 part of it to the plaintiffs?
3. Whether sufficient court fees has been paid?
4. Whether the suit is for partial partition of the property of Azimuddin. If yes, then whether suit for partial partition cannot continue?
5. Whether the suit is barred by limitation?
6. Whether the other sons and daughters of Azimudin are necessary party to the suit. If yes, what is the effect of non-joinder of necessary parties to the suit?
7. Relief.”

The trial Court dismissed the suit. It was held that no family arrangement had taken place as claimed by the defendants. Hazi Azimuddin alone was receiving the rent from the tenants till his death as shown by the rent receipts and other documents which were proved on record. Gift deed dated 24th February, 1976 was duly executed. Hazi Azimuddin himself had gone to the office of the Sub Registrar. The case of the defendants that he was not in a fit state of health was not accepted. However, gift of undivided property was not valid as the plaintiff was never given actual or symbolic possession of one-third share of property and that the gift was hiba-bil- musha. The High Court dismissed the appeal.

5. We have heard learned counsel for the parties.

6. Learned counsel for the appellants submitted that once the gift was held to have been duly proved in favour of the appellant who was minor, transfer of possession was not required to be proved. Further, the property being in possession of the tenant, execution of gift deed by itself amounted to transfer of constructive possession. It was further submitted that the gift could not have been declared invalid on the ground that it related to undivided share of divisible property which was not the plea in the written statement. There was no absolute bar to such gift. Even if there is such a bar in certain situations, there are exceptions to the rule which apply. One of the exceptions is that property is freehold property in a large commercial town which is clearly applicable to the present case. The courts below thus erred in holding the gift to be illegal on that ground.

7. Learned counsel for the respondents supported the impugned judgment.

8. Before we advert to the issue, it will be appropriate to refer to the finding recorded by the courts below. The trial court observed:

"Now, it only remains to be decided as to what is the effect of the said gift-deed. I have gone through Section 206 of Muslim Law which is as follows :

206. Hiba of undivided property (hiba-bil-mushaa) Subject to the provisions of Sec. 207 a hiba of an undivided share in property which is capable of division is invalid except in the following cases :

a. Where it is made by one co-sharer in the property to another;
b. Where the property admits of definite ascertainment of shares and is capable of separate enjoyment without division;

c. Where it is made to a minor who is under the custody of the donor and to whom the donor transfers a part of the property;

d. Where the property is freehold property in a large commercial town (c) For Hiba-bil-Mushaa, it is settled principle of Muslim Law that gift of undivided share in property, which is capable of division is invalid except in 4 aforesaid cases. In my view, this disputed Hiba does not fall in any of above-stated exception and it can be said to be invalid. I have gone through the judgment cited by the Learned Counsel for the plaintiff according to which even if the case is covered under exception "c" and "d", even then it has to be said that handing over of possession is necessary in Hiba-bil-Mushaa. If the possession has not been handed over, then the principle of Musha would be applicable and that Hiba will be considered invalid.

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The plaintiff has totally failed to prove that on 24.2.76 or later, they had been handed over possession actual or symbolic of undivided 1/3 share of the property. In such circumstances, it has to be said that the principle of Musha would be applicable to Hiba and Hiba that has been made on 24.2.76 is not as per the rules and is invalid. As a consequence this issue is decided against the plaintiff."

9. The High Court held

"Bare reading of the above provision would show that the gift in question in the present case does not come in any of the exceptions mentioned above. It has also not been pleaded or proved in any manner that the property in question is freehold property in a large commercial town, so as to attract clause (d) of the exception as referred to above. After having considered the entire facts and circumstances of the present case, in view of the clear provisions of law, as referred to above, I find no error or illegality in the judgment and decree passed by the trial court so as to call for any further interference of this court."

10. Learned counsel for the parties have referred to the principles of Mohammedan Law as compiled in "Mulla Principles of Mohammedan Law, 20th Edition by Lexis Nexis, paras 152 and 160 which are :

"152. Delivery of possession of immovable property (1) Where donor is in possession - A gift of immovable property of which the donor is in actual possession is not complete, unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession.

(2) Where property is in the occupation of tenants - A gift of immovable property which is in the occupation of tenants may be completed by a request by the donor to the tenants to attorn to the donee, or by delivery of the title deed or by mutation in the Revenue Register or the landlord's sherista. But if the husband reserves to himself the right to receive rents during his lifetime and also undertakes to pay Municipal dues, a mere recital in the deed that delivery of possession has been given to the donee will not make the gift complete.

(3) Where donor and donee both reside in the property - No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. The principle for the determination of questions of this nature was thus stated by West, J. in a Bombay case. "When a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession without any physical departure or formal entry.

160. Gift of mushaa where property divisible. A gift of an undivided share (mushaa) in property which is capable of division is irregular (fasid), but not void (batil). The gift being irregular, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. If possession is once taken the gift is validated. Exceptions - A gift of an undivided share (mushaa), though it be a share in property capable of division, is valid from the moment of the gift, even if the share is not divided off and delivered to the donee, in the following cases –

- (1) where the gift is made by one co-heir to another.
- (2) where the gift is of a share in a zemindari or taluka
- (3) where the gift is of a share in freehold property in a large commercial town.
- (4) where the gift is of shares in a land company."

11. A perusal of the above shows that while gift of immovable property is not complete unless the donor parts with the possession and donee enters into possession but if the

property is in occupation of tenants, gift can be completed by delivery of title deed or by request to tenants to attorn to the donee or by mutation. It is further clear that gift of property which is capable of division is irregular but can be perfected and rendered valid by subsequent partition or delivery. Exceptions to the rule are : where the gift is made by one co-heir to the other; where the gift is of share in a zemindari or taluka; where gift is of a share in freehold property in a large commercial town, and where gift is of share in a land company.

12. The courts below appear to have quoted "Mohammedan Law" by B.R. Verma, Law Publishers (India) Pvt. Ltd, 13th Edition which is by and large to same effect as Mulla's book on the subject.

13. The courts below have held the gift to be invalid on the ground that it was gift of undivided property which is capable of division and was not covered by any of the exceptions to the rule that gift of such property is irregular. It is submitted by learned counsel for the appellant that the property is freehold property in the city of Jaipur, which is a large commercial town. This has been wrongly ignored by the courts below on the ground that there was no pleading or proof to that effect. Description of property mentioned in plaint and in the gift deed itself shows that it is commercial property in the city of Jaipur which is the capital of the State of Rajasthan and is, thus, a large commercial town. Requirement of possession is also met when right to collect rent has been assigned to the plaintiff under the gift deed itself, genuineness of which stands proved.

14. We find force in the submission. The gift had no infirmity under the Muslim Law either on the ground that the possession was not delivered or on the ground that the gift was hit by Hiba-bil-Musha. The gift was by father to his minor son. Property is under tenancy. The gift is by a registered deed. Right to collect rent stands transferred to donee. The property is located in the city of Jaipur which is mentioned in Para 2 of the plaint as well as in the gift deed. The courts below are not justified in not giving effect to the gift which has been held to be genuine.

15. Accordingly, we allow this appeal, set aside the impugned judgment and decree the suit.