SUPREME COURT OF INDIA

D. N.Joshi

Vs.

D.C.Harris

C.A.No.6139 of 2009

(R.Banumathi and A.M.Khanwilkar,JJ.,)

03.07.2017

JUDGMENT

A.M.Khanwilkar,J.,

1. This appeal challenges the final judgment and order dated 19.08.2006 passed by the High Court of Uttarakhand at Nainital in Second Appeal No.1269 of 2001 (Old No.1139 of 1974). By the said decision, the second appeal filed by the respondents-plaintiffs was allowed and their suit for eviction has been decreed.

2. The predecessor in title of the respondents-plaintiffs had filed a suit bearing Suit No.52 of 1966 before the Munsif Court, Nainital in respect of the House Property No.51, Mohalla Sakahawat Ganj, Haldwani, consisting of 6 rooms with toilet, one kitchen and two verandahs. The predecessor in title of the respondents had purchased the said house from one Zamir Ahmad. The predecessor in title of the appellants (defendant) was inducted as a tenant in the said premises during the life time of the previous owner, Akhtari Begum, who died in 1954.

3. According to the respondents, the suit property was gifted by Akhtari Begum to her brother Zamir Ahmad (for short "the donee") by way of a gift deed dated 31.05.1949. In the said gift deed, the donor has clearly stated that:

> "and I (donor) agree that Taheer Ahmad (donee) has acquired title and possession like me and all rights of ownership as I had shall vest in him"

4. After purchasing the suit property from Zamir Ahmad by way of a sale deed dated 10th October, 1965, the respondents' predecessor in title demanded rent for the suit premises from the defendant (predecessor in title of the appellants). Since the defendant denied the title of the plaintiff, suit for eviction as also for arrears of rent and damages was filed by the plaintiff against the defendant.

5. The said suit was dismissed by the Munsif Court, Nainital vide its judgment dated 26.09.1969. The trial court held that the gift deed was not valid as it was not accompanied by giving possession of the suit property to the donee and that the donee (Zamir Ahmad) did not have a valid title of ownership which he could transfer to the plaintiff. On this finding, the trial court opined that no relationship of landlord and tenant existed between the parties.

6. The judgment of the trial court came to be affirmed in appeal being Civil Appeal No.59 of 1969, by the District Judge of Kumaon, Nainital. The District Judge also held that the gift deed was invalid as delivery of possession by the donor (Akhtari Begum) to donee (Zamir Ahmad) had not been proved.

7. The respondents filed a second appeal before the High Court of Judicature at Allahabad in 1974, under the unamended Section 100 of the Code of Civil Procedure (for short "C.P.C."). Since there was no requirement to frame substantial question of law, the appeal was filed raising only grounds of challenge as enumerated under the unamended section. After filing of the second appeal bearing No.1139 of 1974, the Registrar of the Allahabad High Court passed an order on 20.05.1974, to the following effect:-

> "Presented today.
> Admit and register.
> Lay before Court on 8.7.74 for hearing u/o LXI Rule 11 CPC
>
> Sd/- Registrar
> 20.5.1974"

8. Thereafter, the said appeal was not listed for hearing for about 6 years. On 13.03.1980, the appeal was listed for hearing under Order LXI, Rule 11. It was summarily dismissed for default with the observation that no question of law, much less substantial question of law, was involved. By this time, the C.P.C. was amended in the year 1976 whereby substantial question of law was required to be formulated in the memo of second appeal and by the High Court whilst admitting such appeal.

9. As the second appeal was dismissed for default, the respondents moved an application for restoration of the appeal. The said appeal was restored on 7th May, 1980, after recalling the earlier order. That order reads thus:

> "Heard learned counsel for the appellants. I recall my order dated 13.03.1980."

10. Thereafter, the learned Single Judge by a separate order admitted the second appeal on the same day, with one word, "Admit". After establishment of the High Court of Uttarakhand at Nainital, the second appeal stood transferred to that High Court and was assigned a new number being Second Appeal No. 1269 of 2001.

11. Under the amended Section 100 of C.P.C., substantial questions of law were required to be framed. Therefore, an application for amendment of the second appeal was filed before

the High Court of Uttarakhand by the respondents (appellants in the said appeal) for adding substantial questions of law.

12. The said application was opposed by the appellants. But, after hearing both the parties, the High Court allowed the application for amendment and observed that the court would frame questions of law at the time of hearing of the appeal. The said order dated 15th July, 2006, reads thus:

> "15.07.2006 Sri S.P. Dubey Learned Counsel for the appellant has submitted an Amendment Application before this Court and the copy of the said application has been served to Sri Arvind Vashisht learned Counsel for the respondents(s). It has been alleged that the substantial question of law as shown in para 2 of the Amendment Application may be added in the Memo of Appeal. Sri Vashist learned Counsel for the respond.ent objected that the questions mentioned in the Amendment application do not arise in the present appeal. No substantial question of law has been framed by this Court. The Court will have to frame the question afresh at the time of hearing. This point will be con.sid.ered at the time of framing of substantial question of law. Amendment application is allowed. Let the amendment be incorporated within a week. List this case on 05.08.2006 for orders."

This order has not been challenged by the appellants.

13. At the stage of hearing of the appeal, the Learned Single Judge of the High Court, being conscious of the earlier order dated 15th July, 2006, in the impugned judgment, has noted thus:

> "9. Section 100 of Cod.e of Civil Procedure, 1908, was amend.ed vid.e Act No. 104 of 1976 w.e.f 01.02.1977 whereafter it became necessary to formulate the substantial question of law at the time of admitting the Second Appeal. Since the Second Appeal was presented before Allahabad High Court on 20.05.1974 and admitted there, as such at that point of time it was not necessary to formulate substantial question of law that is why it appears that in this appeal no substantial question of law was formulated.. However, following question of law is involved in this appeal, which requires to be answered:- Whether both the Courts below erred in law in holding that Hiba (gift) by Akhtari Begum in favour of Zamir Ahmad was not valid for want of delivery of possession with the same, if so, its effect?"

14. The High Court of Uttarakhand, by its impugned judgment and decree, allowed the appeal filed by the respondents herein by holding that the gift deed dated 31.05.1949 was valid and was accompanied by possession. The High Court also referred to the judgment dated 15.02.1978 passed by the High Court of Judicature at Allahabad in relation to a dispute between the respondents herein and another tenant, in which the High Court found the selfsame gift deed dated 31.05.1949 as valid. Significantly, the said decision was challenged before this Court. That petition for special leave was dismissed on 24.04.1978.

15. Aggrieved, the appellants-defendants have challenged the impugned judgment, whereby the suit was decreed in favour of the respondents-plaintiffs and ordering eviction of the appellants-defendants from the suit premises with consequential directions.

16. The principal argument of the appellants-defendants is that: the High Court has exceeded its jurisdiction, firstly, by deciding the second appeal filed by the respondents-plaintiffs which was admitted without formulating the substantial question of law and secondly, because the High Court has re-appreciated the evidence to overturn the concurrent findings of facts on merit as recorded by two courts below. As regards the first point, reliance has been placed on the decisions of this court in *Kanai Lal Garari And Others Versus Murari Ganguly And Others*[1], *Narayanan Rajendran And Another Versus Lekshmy Sarojini And Others*[2], *Biswanath Ghosh (Dead) by Legal Representatives And Others Versus Gobinda Ghosh Alias Gobindha Chandra Ghosh And Others*[3], *Ashok Rangnath Magar Versus Shrikant Govindra.o Sangvikar*[4] and *Syeda Rahimunnisa Versus Malan Bi (Dead) By Legal Representatives And Another*[5]. Reliance is also placed on Section 97 of the Code of Civil Procedure Amendment Act 104 of 1976, in particular, clause (m) of sub-section (2) thereof. This is repeal and saving clause. Sub-section (2) opens with a non-obstante clause. The said provision including clause (m) thereof, reads thus:

> " 97. (1) (2)Notwithstanding that the provisions of this Act have come into force or the repeal under sub-section (1) has taken effect, and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897,-
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> (a) to (l) (m) the provisions of section 100 of the principal Act, as substituted by section 37 of this Act, shall not apply to or affect any appeal from an appellate decree or order which had been admitted, before the commencement of the said section 37, after hearing under rule 11 of Order XLI; and every such a.dmitted appeal shall be dealt with as if the said section 37 had not come into force;
>
> (n)" Reliance is also placed on the provisions of Order XLI, Rule 11 and Order XLII, Rule 1 and 2 of the C.P.C. to contend that the High Court has acted without jurisdiction to admit the second appeal without formulating substantial question of law and also because it unjustly interfered with concurrent findings of facts."

17. The respondents-plaintiffs, on the other hand, contend that the second appeal in question was filed prior to coming into force of the C.P.C. Amendment Act, 1976. It was admitted by the Registrar of the High Court on 20.05.1974 and was directed to be placed before the court for hearing under Order XLI, Rule 11. It is submitted that an order of admission was passed by the learned Single Judge of the High Court on 07.05.1980, after the Amendment Act came into force. But, before the appeal was taken up for final hearing, the respondents-plaintiffs moved an application for amendment of the appeal memo whereby the substantial questions of law were formulated. The learned Single Judge allowed that application on 15.07.2006. That order has been allowed to attain finality by the appellants-defendants. Thus, the ground

now urged by the appellants-defendants, that the appeal could not have been admitted without formulating substantial question of law, is unavailable. Moreso because, after hearing both the parties, the court, in fact, formulated the substantial question of law and has answered the same in the impugned judgment delivered on 19.08.2006. In that sense, it is not a case of deciding the second appeal sans substantial question of law. With regard to the second contention pertaining to the finding on merits, it is the case of the respondents-plaintiffs that the High Court has merely corrected the manifest error committed by both the trial court and the appellate court in interpreting the efficacy of the subject gift deed and of misapplication of the legal position in that regard. It is submitted that the High Court acted well within its jurisdiction in following the decision of the High Court of Judicature at Allahabad rendered in another proceeding between the respondents-plaintiffs and another tenant so as to conclude that the subject gift deed was valid and that the predecessor in title of the respondents had become owner of the suit property and was entitled to seek a decree of eviction against the appellants-defendants

18. The moot question is: whether the judgment under appeal rendered by the High Court should be treated as nullity and non est, as contended by the appellants? It is an admitted position that the second appeal was filed in the High Court of Judicature at Allahabad in 1974 and was admitted by the Registrar of the High Court on 20.05.1974 with further direction to list it for hearing before the court under Order XLI, Rule 11 on 08.07.1974. The second appeal was in fact, taken up for such hearing by the learned Single Judge on 13.03.1980, albeit after the amendment of Section 100 of C.P.C. (vide Act 104 of 1974) which had already come into force on 01.02.1977. The appellants-defendants may be justified in relying on clause (m) of Section 97 (2) of the Act 104 of 1976 which uses the expression "appeal had been admitted" on or before 01.02.1977. In the present case, the order of admitting the second appeal was passed by the Registrar on 20.05.1974. That order, however, has been passed by the Registrar in exercise of delegated powers under the High Court Rules and is not ascribable to an order passed under Order XLI, Rule 11 of C.P.C., which reads thus:

> "11. Power to dismiss appeal without sending notice to Lower Court- (1) The Appellate Court after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day may dismiss the appeal.
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> (2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.
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> (3) The dismissal of an appeal und.er this rule shall be notified to the Court from whose decree the appeal is preferred,.
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> (4) Where an Appellate Court, not being the High Court, dismisses an appeal und.er sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accord.ance with the jud.gment."

Sub-rule (1) of Rule 11 envisages fixing a day for hearing when the appellants or his pleader will be heard. Further, it is an enabling provision entitling the court to dismiss the appeal. Rule 11A postulates that every appeal shall be heard under Rule 11 preferably within sixty days from the date on which the memorandum of appeal is filed. Rule 12 provides that if the appeal is not dismissed after hearing under Rule 11, the court must fix a day for hearing the appeal. Neither Rule 11, 11A nor 12 prescribe that the court shall formulate substantial question of law before fixing a day for hearing the appeal. That duty of the court is spelt out from Order XLII dealing with appeals from Appellate Decrees.

19. We may now usefully refer to the provisions of Order XLII of C.P.C., which applies to the case on hand. It contains three Rules. The same read thus:

> "1. Procedure-The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.
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> 2. Power of Court to direct that the appeal be heard on the question formulated by it.- At the time of making an order under rule 11 of Order XLI for the hearing of a second appeal, the Court shall formulate the substantial question of law as required by section 100, and in doing so, the Court may direct that the second appeal be heard on the question so formulated and it shall not be open to the appellant to urge any other ground in the appeal without the leave of the Court, given in accord.ance with the provision of section 100.
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> 3. Application of rule 14 of Order XLI-Reference in sub-rule (4) of rule 14 of Ord.er XLI to the Court to first instance shall, in the case of an appeal from an appellate decree or order, be construed as a reference to the Court to which the appeal was preferred from the original decree or order."

20. On a conjoint reading of Rule 2 of Order XLII with Rule 11 of Order XLI, it is evident that the court is obliged to formulate substantial question of law on the day of hearing of the appeal (for admission under Rule 11) so that the second appeal can be heard on the question of law so formulated. The latter part of Rule 2 of Order XLII presupposes that the grounds of challenge by the appellants will be circumscribed by the substantial question of law so formulated. At the same time, it gives enough discretion to the High Court to permit the parties to argue any other ground, only with the leave of the court. The purport of Section 100 has already been delineated by this court in several decisions, after the Amendment Act of 1976. The appellants-defendants have rightly invited our attention to those decisions.

21. In the case of Kanai Lal Garari (supra), the court found that the High Court, while exercising its jurisdiction under Section 100 of C.P.C., had failed to formulate substantial question of law, which it was obliged to do at the beginning of the hearing itself. In the case of Narayanan Rajendran (supra), the court noticed that the High Court, in exercise of jurisdiction under Section 100 of C.P.C., had set aside the concurrent finding of facts and

that too, without formulating any substantial question of law for its determination. After adverting to the earlier decisions of this court, it was held that the High Court must consider the second appeal afresh after formulating the substantial question of law and thus relegated the parties before the High Court. In the case of Biswanath Ghosh (supra), it has been noted that the High Court had formulated the substantial question of law and considered the same while allowing the appeal. The court restated the settled legal position that the jurisdiction of the High Court to entertain a second appeal is confined only to such appeal which involves a substantial question of law. The High Court must first formulate the substantial question of law at the time of admission of the appeal. It is the duty cast upon the High Court to formulate substantial question of law before hearing the appeal, failing which the judgment will vitiate. Reverting to the next decision in the case of Ashok Rangnath Magar (supra), the court has found as of fact, that the High Court, without formulating substantial question of law, heard the appeals and reversed the judgment and decree passed by the trial court. In the case of Syeda Rahimunnisa (supra), the court found that the High Court committed error in adjudicating questions which did not arise for consideration in the facts of that case; and further had reversed the concurrent finding of facts. In paragraph 28, the court opined that the questions formulated by the High Court did not satisfy the test of "substantial questions of law" within the meaning of Section 100 of C.P.C., whereas, the questions decided by the High Court were essentially questions of fact.

22. It is not necessary to multiply the authorities dealing with the purport of Section 100 of C.P.C. It is well settled that the High Court is obliged to formulate substantial question of law for its determination so that the arguments can proceed on that basis. In the present case, the High Court admitted the second appeal on 7 th May, 1980 without formulating any substantial question of law. However, that order is not challenged by the appellants. Admittedly, the respondents-plaintiffs had not even articulated any substantial question of law in the memorandum of appeal filed in 1974. Presumably because, at the relevant time in 1976, there was no requirement to formulate substantial question of law in the memo of appeal. However, that deficiency was sought to be cured by the respondents-plaintiffs by taking out a formal application for amendment of the memorandum of appeal and permission to urge the substantial questions of law framed in the amendment application. The respondents-plaintiffs sought leave of the Court to urge the following substantial questions of law:

> " "14-A" Whether the defendant/respondent having denied the title of the land lord appellant have incurred the liability of being evicted on this score alone.
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> "14-B" Whether there existed a relationship of landlord and tenant in between Zamir Ahmad the predecessor in interest of the appellants and the respondents.
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> "14-C" Whether the Court below erred in holding the actual transfer of possession of the property was not effected in accordance with the Mohmmadan law and

wrongly held that the transfer of possession was necessary for a gift and overlooked the provision of Mohammad Law that no such transfer was necessary.

"14-D" Whether the Court below failed to consider the documentary and oral evidence on record the letter of defendant to Zamir Ahmad also was owner of the disputed property and plaintiff fully proved that the Zamir Ahmad was owner of the disputed property both court have not considered this fact.

"14-E" Whether the gift was perfectly legal valid und.er the Mohammedan Law the donor has no other nearer heir and name of the donee having been mutated over the property after the gift this fact was also not considered by the Court below.

"14-F" Whether the Akhtari Begum executed a valid gift deed in favour of the Zamir Ahmad and Zamir Ahmad executed the valid sale deed in fa.vour of the appellant in the year 1965 and plaintiffs name mutated in all the record this fact was also not considered by the Court below.

"14-G" Whether the plaintiff fully proved the relation of the landlord and tenant but the court wrongly given the finding against the appellants. "

This application was allowed by the court vide order dated 15.07.2006. The said order has been extracted in the earlier part of the judgment in its entirety. It is possible to suggest that the court did not frame any substantial question of law and left the same open, to be done at the time of hearing of the appeal. The appellants-defendants have neither challenged this order nor insisted before the High Court to formulate substantial questions of law before notifying the second appeal for hearing. When the second appeal was ready and taken up for hearing, the High Court, at the outset, indicated the scope of second appeal and the substantial question of law which it intended to examine in the judgment to be delivered by it. That is manifest from paragraph 9 of the impugned judgment, which has been extracted in paragraph 13 of this judgment. The High Court then proceeded to examine that question of law which it thought was involved in the second appeal and was similar to the substantial question of law formulated by the appellants-defendants in the amendment application, in particular, ground 14 C.

23. In other words, in the facts of the present case there has been substantial compliance of Section 100 of C.P.C., as amended. Significantly, the proviso to Section 100 (5) read with the latter part of Rule 2 of Order XLII enables the High Court to reframe the substantial question of law already formulated and even permit any other substantial question of law not formulated, after recording reasons, if it is satisfied that the case involves such question. This discretion has been bestowed on the High Court to ensure full, complete and effectual adjudication of all the matters in issue between the parties and to do complete justice. In our opinion, therefore, in the facts of the present case, there has been compliance of Section 100 of C.P.C. as also Order XLII of C.P.C. It is not open to the appellants-defendants to now raise an issue of non-formulation of substantial question of law while admitting the appeal,

having failed to challenge the order dated 07.05.1980 (admitting the second appeal) and dated 15.07.2006 (allowing the respondents-plaintiffs to amend the memorandum of second appeal with an observation that the court will formulate the substantial question of law at the time of hearing of the appeal). Suffice it to note that the High Court, has, in fact, formulated a substantial question of law and heard the parties on that question, as can be discerned from paragraph 9 of the impugned judgment. Therefore, we do not find any merit in the first contention raised by the appellants-defendants.

24. Reverting to the second point raised by the appellants - that the High Court should not have interfered with the finding of facts. This contention also does not commend to us. For, the High Court has analysed the entire issue in correct perspective and justly relied upon another decision of the High Court between the respondents-plaintiffs and another tenant in relation to the selfsame gift deed. In paragraphs 14 to 17, the court observed thus:

> "14. Now, this Court has to examine the validity of the gift deed dated 31.05.1949. Both the courts below have held the gift deed as invalid on the ground that it is not found proved that the possession was delivered by Akhtari Begum to his brother Zamir Ahmad at the time of Hiba. On examination of evid,ence on record, I found the findings of both the courts below erroneous, misconceived and against the evidence on record. Admittedly, the defendant was in possession of the property in question as a tenant. As such, no physical possession was to be delivered by Akhtari Begum to Zamir Ahmad. If afterwards instead of Akhtari Begum, Zamir Ahmad started taking rent of the house from the tenant (defendant), it is nothing but the consequences of delivery of possession by Akhtari Begum to Zamir Ahmad. Since it has been found proved, as discussed above that admittedly in the year 1962, 1963 and 1964, rent was collected by Zamir Ahmad from the defendant, it cannot be said that he was not in possession of the property. Needless to say that Akhtari Begum had already died by then in the year 1954. Therefore, the view taken by the courts below that Hiba in favour of Zamir Ahmad made by Akhtari Begum is not valid, is erroneous in law and cannot be upheld
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> 15. On behalf of the appellants, my attention was drawn to the judgment dated 15.02.1978 passed by Allahabad High Court in Second Appeal No. 1639 of 1972 Tika Ram Kharkwal Vs. B.C. Harris (that was in relation to dispute between present plaintiffs and another tenant) in which Allahabad High Court has found the gift deed dated 31.05.1949 as valid and upheld the decree of ejectment of tenant in said case. From the perusal of said ejectment, it is clear that the tenant in said case was also living in another portion of the same house No. 51 of Mohalla Sakhawat Ganj. In said judgment, Allahabad High Court has found that the possession given by Akhtari Begum at the time of Hiba was a constructive possession, as the accommodation was in the possession of the tenant.
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> 16. Learned counsel for the respondents argued that since the present respondents were not party in said appeal, as such, the judgment passed in said appeal is not

binding on the present respondents. This Court is of the view that no doubt said judgment passed by Allahabad High Court does not operate as res-judicata as against present respondents but the legal interpretation of validity of Hiba (gift) in question given by Allahabad High Court has a persuasive value in interpreting the same. In the above circumstances, this Court agrees with the view expressed by the Allahabad High Court, as to the validity of the impugned gift deed

17. Assuming for a moment that gift deed dated 31.05.1949, for the want of evidence of delivery of possession of the property at the time of Hiba, does not transfer title to Zamir Ahmad, the fact cannot be ignored that after widowed Akhtari Begum died issueless, it was only Zamir Ahmad who could have inherited the property and was admittedly collecting rent from the defendant/respondent for more than ten years. As such, when Zamir Ahmad transferred the title along with right to collect rent, through sale deed dated 11.10.1965 to the plaintiffs who demanded the rent from the defendant, denial on the part of defendant of the title of the plaintiffs vide notice dated 15.10.1965 does constitute a ground for determination of tenancy under Section 111 of Transfer of Property Act, 1882. And accordingly by notice dated 21.12.1965 served on the defendants by the plaintiffs und.er Section 106 read with Section 111 of aforesaid Act, they terminated the tenancy of the defendant w.e.f. 21.01.1966. Accordingly the question of law stand answered with the finding as above that the gift deed dated 31.05.1949 was a valid document and the trial court and lower appellate court have erred in law in holding that the title was not transferred by said document from Akhtari Begum to Zamir Ahmad..”

25. In our opinion, the above view taken by the High Court is unexceptionable. The two courts below gave undue weightage to the fact that Akhtari Begum had reserved to herself the right to receive rent during her lifetime and that she did not issue attornment in favour of Zamir Ahmad in respect of the suit premises. Besides the reasons recorded by the High Court, in our opinion, on the plain language of the gift deed, it is evident that there is clear intention to handover possession to Zamir Ahmad, which is manifest from the following declaration in the gift deed:

“I therefore gift my total property valued at Rs. 32000/- (Thirty two thousand.) to Zamir Ahmad s/o Sheikh Immaud.din r/o Mohallah Banphoolpura Lane No. 4 and I agree that Zamir Ahmad has acquired title and possession like me and all rights of ownership as I had., shall vest in him.”

(emphasis supplied)

Admittedly, the tenant was in possession of the suit premises. As such, it was not possible to handover physical possession of the suit premises to Zamir Ahmad. Hence, constructive possession of the suit premises by the donor, Akhtari Begum was handed over to the donee, Zamir Ahmad upon execution of the stated gift deed. Notably, the defendant-tenant continued to offer rent to Zamir Ahmad until 1962-63 and 1963-64, even after the demise of

Akhtari Begum in 1954. Further, the mutation was recorded with the Municipal Board, Haldwani in the name of the plaintiff, in place of Zamir Ahmad in the year 1965-66. The plaintiff has been recorded as owner in respect of the suit property, after execution of the sale deed on 13.10.1965. Neither the validity of the sale deed nor of the mutation entry in favour of the respondents-plaintiffs has been challenged by the defendant-tenant. Furthermore, the validity of the gift deed was the subject matter before the High Court of Judicature at Allahabad in Second Appeal No.1639 of 1972 and has been answered in favour of the respondents vide a speaking judgment dated 15.02.1978. That judgment has been upheld by this court on 24.04.1978, by dismissing the SLP (Civil) No. 1913 of 1978 between Tikka Ram Kharkwal V. Shri S. C. Harris & Ors.

26. In a recent decision of this court, namely, *Hafeeza Bibi And Others Versus Shaikh Farid (Dead) By LRs. And Others*[6], three essential aspects for a valid gift deed in respect of an immovable property under Muslim Law have been restated in paragraphs 24, 27, 28, 29 and 30 as under:

> "24. The position is well settled, which has been stated and restated time and again, that the three essentials of a gift under Mohammadan Law are; (i) declaration of the gift by the donor;
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> (2) acceptance of the gift by the donee and (3) delivery of possession. Though, the rules of Mohammad.an Law do not make writing essential to the validity of a gift; an oral gift fulfilling all the three essentials makes the gift complete and irrevocable. However, the donor may record the transaction of gift in writing."
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> 27. In our opinion, merely because the gift is reduced to writing by a Mohammadan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be mad.e by Mohammad.an orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift und.er Mohammad.an Law is that three essential requisites must be fulfilled.. The form is immaterial. If all the three essential requisites are satisfied constituting a valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in Mohammadan Law.
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> 28. In considering what is the Mohammadan Law on the subject of gifts inter vivos, the Privy Council in Mohammad Abdul Ghani stated that when the old and authoritative texts of Mohammadan Law were promulgated there were not in contemplation of any one any Transfer of Property Acts, any Registration Acts, any Revenue Courts to record transfers of possession of land, and that could not have

been intended to lay down for all time what should alone be the evidence that titles to lands had passed

29. Section 129 of T.P. Act preserves the rule of Mohammadan Law and excludes the applicability of Section 123 of T.P. Act to a gift of an immovable property by a Mohammadan. We find ourselves in express agreement with the statement of law reproduced above from Mulla, Principles of Mahomedan Law (19th Edition), page 120. In other words, it is not the requirement that in all cases where the gift deed is contemporaneous to the making of the gift then such deed must be registered under Section 17 of the Registration Act. Each case would depend on its own facts.

30. We are unable to concur with the view of the Full Bench of Andhra Pradesh High Court in the case of Tayyaba Begum. We approve the view of the Calcutta High Court in Nasib Ali that a deed of gift executed by a Mohammadan is not the instrument effecting, creating or making the gift but a mere piece of evidence, such writing is not a document of title but is a piece of evidence. We also approve the view of the Gauhati High Court in the case of Mohd Hesabuddin. The judgments to the contrary by Andhra Pradesh High Court, Jammu and Kashmir High Court and Madras High Court do not lay down the correct law. "

27. As a matter of fact, the appellants-defendants have not questioned the validity of the sale deed in favour of the respondents-plaintiffs. The title in the property having vested in Zamir Ahmad, who, in turn, transferred it to the plaintiff (respondents) by way of a sale deed. It is not open to the appellants-defendants to question the ownership of the respondents-plaintiffs in respect of the suit premises. The factum which impressed the trial court and the first appellate court to hold that the gift deed in favour of Zamir Ahmad was invalid, namely, that donor (Akhtari Begum) did not request the tenant (defendant) to attorn to the donee (plaintiff), is also devoid of substance. For, this court in the case of Ambica Prasad Versus Mohd. Alam And Another has enunciated that it is well settled that after the transfer of the landlord's right in favour of the transferee, the latter gets all rights and liabilities of the landlord in respect of the subsisting tenancy. Section 109 of the Transfer of Property Act does not require that the transfer of the right of the landlord can take effect only if the tenant attorns to him and that attornment is not necessary to confer validity of the transfer of the landlord's rights. Strikingly, even in this case, the transferor continued to collect the rent of the suit property from the tenant with the consent of the transferee after the execution of the exchange deed, until the transferee took over the affairs of the suit property. The court held that it will not debar the owner or transferee from filing a suit for eviction against the tenant.

28. A priori, we are of the view that the judgment under appeal is a well-considered decision. It has justly relied upon another decision of the High Court (which has been upheld by this Court). That decision is between the same landlord and another tenant in respect of the selfsame gift deed. The gift deed has been held to be valid. It has also been held that the title of the property has been passed on to the respondents. Hence, it would be just and

appropriate to follow the same view. Resultantly, we uphold the decree of eviction passed by the High Court against the appellants (tenants).

29. Accordingly, we dismiss this appeal with no order as to costs.

JUDGMENT

A.M.Khanwilkar,J.,

30. In view of the judgment in the companion civil appeal bearing Civil Appeal No. 6139 of 2009 on merits of the issues dealing with the selfsame gift deed dated 31.05.1949, which is also the subject matter of the present appeal, for the same reasons even this appeal must fail and the same is, therefore, dismissed with no order as to costs.

Judgment Referred.

[1]*(1999) 6 SCC 0035*
[2]*(2009) 5 SCC 0264*
[3]*(2014) 11 SCC 0605*
[4]*(2015) 16 SCC 0763*
[5]*(2016) 10 SCC 0315*
[6]*(2011) 5 SCC 0654*