Md. HesabuddIn and ors. Vs. Md. HesaruddIn and ors.

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Court : Guwahati

Decided On : May-12-1983

Judge : S.M. Ali, J.

Acts : Muslim Law; Registration Act, 1908 - Sections 17; Transfer of Property Act, 1882 - Sections 123 and 129

Appeal No. : Second Appeal No. 113 of 1977

Appellant : Md. HesabuddIn and ors.

Respondent : Md. HesaruddIn and ors.

Advocate for Def. : K.P. Sen, Adv. (for No. 3)

Advocate for Pet/Ap. : Amjad Ali, Adv.

Disposition : Appeal dismissed

Prior history : S.M. Ali, J. 1. This appeal arises from the judgment and decree passed by the learned Assistant District Judge, Goalpara, Dhubri in Title Appeal No. 66 of 1975 dismissing the appeal and affirming the judgment and decree passed by learned Munsiff, Goalpara in Title Suit No. 160/71 dismissing the suit. The suit is for declaration of title and delivery of khas possession on partition of the suit land. 2. Gende Bibi died leaving the three plaintiffs and four defendants in the suit, own brother

Judgement :

S.M. Ali, J.

1. This appeal arises from the judgment and decree passed by the learned Assistant District Judge, Goalpara, Dhubri in Title Appeal No. 66 of 1975 dismissing the appeal and affirming the judgment and decree passed by learned Munsiff, Goalpara in Title Suit No. 160/71 dismissing the suit. The suit is for declaration of title and delivery of khas possession on partition of the suit land.

2. Gende Bibi died leaving the three plaintiffs and four defendants in the suit, own brothers and sisters as her legal heirs with respect to the suit property consisting in 7 and odd bighas of land as described in the plaint schedule. It is the case of the plaintiffs that on the death of their mother Gende Bibi. The plaintiffs and defendants made an amicable partition of the suit property and each started possessing his/her share of the property but defendant No. 3 Serajuddin surreptitiously got the entire land recorded in his name in the revenue records and has been trying to dispossess the plaintiffs from their portions of the suit land. Hence the suit for declaration of title to the suit land and partition of it in 1/7th share thereof for each of the legal heirs and for separate possession of each. The 4 defendants filed a joint written statement denying all these allegations. It is admitted that all the plaintiffs and, the defendants are legal heirs of late Gende Bibi and that the suit property belong ed to Gende Bibi. It is the defence case that prior to her death Gende Bibi gifted away the entire suit property in favour of the 3rd defendant alone in accordance with the provisions of the Mahomedan Law in that behalf. Thereafter, the third defendant got the land mutated in his own name and he has been possessing the suit land on his own account. On the pleadings of the parties learned trial Court struck the following issues for decision:

(1) Is there any cause of action for the suit?

(2) Whether the plaintiffs have right, title and interest in the suit land as inheritors and each of the plaintiffs is entitled to the share of the suit land?

(3) Whether the plaintiffs were entitled to a decree for partition as prayed for?

(4) To what relief or reliefs are the parties entitled?

The learned Munsiff came to the finding that the suit land was validly gifted by Gende Bibi during her lifetime in favour of 3rd defendant who accepted the gift and also that the delivery of possession of the gifted land was effected in favour of the third defendant. On appeal by the plaintiffs the learned appellate Court affirmed the findings and decree passed by the learned trial Court.

3. In this appeal the short question for decision is whether the alleged gift made by Gende Bibi was a valid one. Learned counsel for the appellants submitted that Ext. A (2) being the deed of gift was not registered and hence it conies under the mischief of Section 17 of the Registration Act. His argument is that this document is not a memorandum of gift but rather it is a basic document which created the gift. This being the position, according to him, the document was compulsorily registerable under the provisions of Section 17 of the Registration Act. He further pointed out that as the deed was not registered it created no right, title and interest in favour of the 3rd defendant with respect to the suit property. Admittedly the plaintiffs and the defendants are the legal heirs of Gende Bibi and after her death they un-disputedly inherited the property. Therefore, according to him, the property has to be partitioned according to the law applicable to the parties.

4. Now it is to be seen whether Ext. A (2) deed itself created any right, title and interest in favour of the 3rd defendant-respondent. Ext. A (2) was written in an unstamped sheet of ordinary paper. It is dated 15-7-65 B. S. The recitals are that by this deed executant Gende Bibi makes a gift of the land measuring 7 bighas 3 katha 19 lechas under khatian No. 49 of Mouza Bhatipata in favour of her son Serajuddin Sheikh and that her son Serajuddin was maintaining her and that no other son or daughter of hers was taking care of her and that she was living with Serajuddin. Three persons, namely, Ab-dul Hamid, Jayanuddin, and Ali Hussain attested the document as witnesses. Gende Bibi executed the deed by putting her thumb impression on the deed.

5. Learned counsel Mr. Ali appearing for the appellants referred to the provisions with regard to gift of immovable property under the Mahomedan Law and submitted that if the instrument of gift be the sole basis effecting the gift it must be

registered. In the present case, according to him, the gift was made through Ext. A

(2) document. He further submitted that it does not merely recite the fact of a prior gift in which case no registration would have been required. But when the document itself becomes the basis of the right, title and interest to be created in favour of the donee, it is compulsorily registrable under the provisions of Section 17 of the Registration Act. But it should be pointed out that, such an instrument must be a formal instrument of gift creating the gift itself. In the instant case, the alleged paper has been written in an ordinary sheet of paper and not in a stamped paper and as such it cannot be said that it is a formal instrument of gift. It is the admitted position of the law of Mahomedan gift that three essentials are required to make a gift valid which are:

(1) declaration of the gift by the donor (Ijab),

(2) acceptance of the gift by the donee (Qabul) and

(3) delivery of possession (Qabda). It is therefore found that the manifestation of the wish of the donor to make the gift, the acceptance of the donee either imphiedly or expressly and the taking possession of the subject-matter of the gift by the donee either actually or constructively are the essential re quisites to make a gift valid under the Mahomedan Law. It may be noted that no written document is required in such a case. It is also to be noted that where there is no real intention to make a gift the gift fails. There may be sham, colourable or benami transactions. These things should be distinguished from real gift so far as the Mahomedan Law is concerned.

6. Section 123 of the T. P. Act mandates that the gift of Immovable property must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Section 129 of the T. P. Act however excludes the rule of Mahomedan Law from the purview of Chapter 7, T. P. Act, which includes Section 123 of the T. P. Act.

7. But it cannot be taken as sine qua non in all cases that wherever there is a writing about a Mahomedan gift of immovable property, there must be registration

thereof. The facts and circumstances of each case have to be taken into consideration before finding whether the writing requires registration or not. The essential requirements, as said before, to make a Mahomedan gift valid are declaration by the donor, acceptance by the donee and delivery of possession to the donee. It was held in Jubeda Khatoon v. Moksed Ali, AIR 1973 Gau 105 (at p. 106)-

'Under the Mahomedan Law three things are necessary for creation of a gift. They are (i) declaration of gift by the donor, (ii) acceptance of the gift express or implied by or on behalf of the donee and (iii) delivery of possession of the subject of the gift by the donor to the donee. The deed of gift is immaterial for creation of gift under the Mahomedan Law. A gift under the Mahomedan Law is not valid if the above mentioned essentials are not fulfilled, even if there be a deed of gift or even a registered deed of gift. In other words even if there be a declaration of acceptance of the gift, there will be no valid gift under the Mahomedan Law if there be no delivery of possession, even though there may be registered deed of gift.' In that case there was a deed of gift which was not produced during trial. Still it was found in that case that had the defendants produced the deed of gift, at best it would have proved a declaration of the gift by the donor and acceptance thereof by the donee. It was further held that despite this the defendants would have to lead independent oral evidence to prove delivery of possession in order to prove a valid gift. Therefore it was found in that case that deed of gift under the Mahomedan Law does not create a disposition of property. Relying on this it cannot be said that whenever there is a writing with regard to a gift executed by the donor, it must be proved as a basic instrument of gift before deciding the gift to be valid In the for stant case a mere writing in the plain paper as aforesaid containing the declaration of gift cannot tantamount to a formal instrument of gift. Ext. A (2) has in the circumstances of the present case to be taken as a form of declaration of the donor. In every case the intention of the donor, the background of the alleged gift and the relation of the donor and the donee as well as the purpose or motive of the gift all have to be taken into consideration. In the present case, case, it is recited in the said writings that the 3rd defendant has been maintaining and looking after the donor and that the other children of the donor were neglecting her. The gift was from a mother to a son and it was based on love

and affection for the son in whose favour the gift was made. Therefore, it cannot be held that because a declaration is contained in the paper Ext. A (2) the latter must have been registered in order to render the gift valid. Admittedly, the 3rd defendant has been possessing the land and got his name mutated in the revenue records with respect to the land. It is therefore implied that there was acceptance on behalf of the donee and also that the possession of the property was delivered to the donee by the donor-It should be remembered that unless there was possession on behalf of the 3rd defendant, no mutation would have taken place with regard to the property. It may be repeated that Ext. A (2) has to be taken in the present case as a mere declaration of the donor in presence of the witnesses who are said to have attested the writing.

8. No other point was agitated on behalf of the appellants.

9. In view of the discussion made above, I hold that there is no merit , in the appeal so as to interfere with the findings of the Court below. There have been concurrent findings of facts by the two Courts below with regard to declaration of the gift, acceptance thereof and delivery of possession. I therefore, find no reason to come to a different findings and reverse the findings of the learned Courts below.

10. In the result, the appeal is dismissed. The judgment and decree passed by the learned Courts below are upheld. No order as to costs.