

Khrushed Ali Vs. Altab Ali and ors.

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Court : Guwahati

Decided On : Sep-28-2007

Judge : B.P. Katakey, J.

Appellant : Khrushed Ali

Respondent : Altab Ali and ors.

Judgement :

B.P. Katakey, J.

1. The appellant as plaintiff instituted Title Suit No. 90 of 1995 in the Court of the learned Civil Judge (Jr. Division), No. 1 at Nagaon against the present respondents as defendants praying for a decree declaring the right, title and interest in respect 'Ka' schedule land, confirmation of possession in respect of 'Kha' schedule land, which is part of the 'Ka' schedule land and recovery of khas possession in respect of 'Ga' schedule land, which is also a part of the 'Ka' schedule land, by evicting the respondents/defendants therefrom contending inter alia that his paternal grand father Osman Seikh Bepari, who was the absolute owner of the 'Ka' schedule land gifted the said land measuring 6 Bighas by executing a registered deed of gift on 20.04.1960 as his father has died. It has further been contended that at the request of the respondent/defendant No. 1, who was evicted from the Government land 10 (ten) years prior to filing of the suit, he was allowed to stay in the 'Ga' schedule land with the condition that he will vacate

the land as and when required by the appellant/plaintiff, whereon the defendants/respondents are living by constructing temporary thatched houses and as the appellant/plaintiff required the land and demanded the respondents/defendants to vacate the said land under their possession on 01.08.1995, the respondents/defendants instead of vacating the same denied the title of the appellant/plaintiff over the land, the suit has to be filed for declaration of right, title and interest as well as conformation of possession and also for recovery of possession as discussed above. The appellant/plaintiff further contended in the plaint that the respondents/defendants are the licensee under him in respect of 1 Katha of land only and has no right, title and interest over any portion of the land described in 'Ka' schedule land.

2. The respondents/defendants, on receipt of summons, entered appearance and contested the suit by filing written statement stating inter alia that there was no cause of action, that the suit is not maintainable in the present form, that the suit is barred by limitation, that the suit is bad for non-joinder of necessary parties and also taking the plea of adverse possession. It has further been contended by the respondents/defendants in the written statement that Osman Seikh Bepari, the original owner, who is the paternal grand father of the appellant/plaintiff orally gifted, in the year 1963, a plot of land measuring 15 Lechas to his sister Meherjan on the southern part of 2 Bighas 1 Katha 11 Lechas of land and delivered possession to her and since then Meherjan was occupying the land by constructing houses and growing trees along with her family members. It has further been contended that after the death of Meherjan said Osman Seikh Bepari on 05.10.1966 executed a katha gift deed in favour of the respondent/defendant No. 1, Md. Altab Ali and Yakub, the father of respondent/defendant Nos. 3 and 4, who are the sons of Meherjan. The respondents/defendants, therefore, contended that the other heirs of Osman Seikh Bepari have no title over the said piece of land measuring 15 Lechas.

3. The learned Trial Court on the basis of the pleadings, framed 6 (six) issues, namely:

1. Whether there is any cause of action or the suit?

2. Whether the suit is maintainable in this present form?
3. Whether the suit is barred by limitation?
4. Whether the suit is barred by principle of adverse possession?
5. Whether the plaintiff has right, title and interest over the suit land?
6. To what relief the plaintiff is entitled?

In course of the hearing, the appellant/plaintiff has examined 6 (six) witnesses and the respondents/defendants have also examined 3 (three) witnesses, apart from exhibiting a number of documents.

4. The learned Trial Court on appreciation of the evidences on record, vide judgment dated 11.04.1997, though has held that there was no delivery of possession of the land gifted by Osman Seikh Bepari in favour of the appellant/plaintiff, which is one of the three essentials of a valid gift under the Mohomedan Law, however, decreed the suit of the appellant/plaintiff in respect of the land described under 'Ka' schedule excluding the land measuring 15 Lechas; which is in pos session of the respondents/defendants by holding that the appellant/plaintiff has failed to prove that the said land is part of the 'Ka' schedule land, i.e. the land gifted to the appellant/plaintiff by his paternal grand father. The learned Court accordingly on 11.04.1997 passed the decree. Being aggrieved, the appellant/plaintiff filed Title Appeal No. 19/1997 in the Court of the learned Civil Judge (Sr. Division), No. 1, Nagaon, Assam, which was however, dismissed by the learned First Appellate Court affirming the judgment and decree passed by the learned Trial Court and by holding that there being no delivery of possession of the subject of the gift by the donor to the donee, such gift is not a valid gift under the Mahomedan Law, the same being an essential condition to constitute a valid gift. Hence the present appeal.

5. This Court while admitting the appeal for hearing vide order dated 24.02.1999 has framed the following substantial questions of law:

(1) Whether gift of land to minor Mohomedan and accepted by person other than natural guardian or appointed guardian invalidates the gift itself.

(2) Whether non-exclusion of oral evidence about oral gift against documentary evidence of gift through registered deed is hit by Sections 90/91 the Indian Evidence Act.

(3) Whether successive gift of same land by donor to different persons at different times gives title to the respective donee.

6. I have heard Mr. D.R. Bora, the learned Counsel for the appellant/plaintiff as well as Mr. A.C. Sharma, the learned Counsel for the respondents/defendants.

7. Mr. Bora, the learned Counsel for the appellant/plaintiff referring to the judgment passed by the learned Courts below have submitted that both the learned Courts below have misread the requirement to constitute a valid gift, in as much as, under the Mahomedan Law if the donor is the guardian of the property of the minor, the possession of the property gifted away by such guardian to a minor, when the father of the minor is not alive, need not be transferred to constitute a valid gift. According the learned counsel, the said aspect of the matter has been completely overlooked by the learned Courts below in holding that there is no delivery of possession of the property, which is the subject of the gift, to the guardian of the appellant/plaintiff, who was a minor at the time when such gift was made. It has further been contended by Mr. Bora that since the other conditions namely, the declaration of a gift by the donor and acceptance of such gift by or on behalf of the donee to constitute of valid gift under the Mahomedan Law having been proved, the learned Courts below erred in law in holding that the gift executed by the paternal grand father of the appellant/plaintiff was not a valid gift. Mr. Bora has further contended that since the gift of property made in favour of the appellant/plaintiff by way of registered deed (Exhibit-1) is a valid gift under the Mahomedan Law, the title in respect of the entire 'Ka' schedule land vest on the appellant/plaintiff and, therefore, the learned Courts below ought to have passed the decree of recovery the khas possession in respect of 'Ga' scheduled land, the same being part of the 'Ka' schedule land, as there cannot be any transfer of property by way of gift by the paternal grant father of the appellant/plaintiff in

respect of the said land in favour of either Meherjan or her sons, which is the case of the respondents/defendants. Mr. Bora, in support of his contention that under the Mahomedan Law it is not the requirement that the gift is to be accepted by the legal guardian and such gift can be accepted by any person on behalf of a minor, has placed reliance on the decision of the Madras High Court in G. Abdul Rahim Sahib v. Zeenath Bi (died) and Ors. reported in : AIR1963 Mad186 . Mr. Bora has also placed reliance on the decision of the Apex Court in Valia Peedikakkandi Katheesa Umma and Ors. v. Pathakkalan Narayanath Kunhamu (deceased) and after him his legal representatives and Ors. reported in : [1964]4SCR549 , in support of his contention that where the intention to make the gift was clear and manifest because it was made by a deed, which was registered, the acceptance by a person other than a guardian of the property of a minor on his behalf is a valid acceptance under the Mahomedan Law.

8. Both the learned Courts below have held that the gift made by the paternal grand father of the appellant/plaintiff by a registered deed dated 20.04.1960 (Exhibit-1) is not a valid gift under Mahomedan Law as there was no delivery of possession of the property, which is the subject of the gift in favour of the guardian of the property of the minor or to a person appointed as guardian by the Court, which is one of the essential condition to constitute a valid gift under the Mahomedan Law. It is not in dispute that the appellant/plaintiff was a minor when the gift was made by his paternal grand father on 20.04.1960 by Exhibit-1. It is also not in dispute that the father of the appellant/plaintiff died prior to making of such gift. Exhibit-1 gift deed reveals such factual aspect of the matter, which has been admitted into evidence without any objection from the respondents/defendants. The respondents/defendants also have not disputed such factual position either in the written statement or by adducing any evidence. On the contrary, the appellant/plaintiff by adducing evidence has proved that he was a minor at the relevant point of time and his father expired prior to making of such deed.

9. The question, therefore, requires to be decided by this Court is--whether the gift made by the paternal grand father of a minor, after the death of his father, is a valid gift when there was no delivery of possession of the property, which is the

subject matter in the gift.

10. Section 138 of the Mulla's Principles of Mahomedan Law (in short, 'Mahomedan Law') defines 'gift' as transfer of property, made immediately, and without any exchange, by one person to another, and accepted by or on behalf of the latter. Section 149 requires that to constitute a valid gift under the Mahomedan Law--(i) there must be a declaration of gift by the donor, (ii) an acceptance of the gift, express or implied, by or on behalf of the donee; (iii) delivery of possession of the subject matter of the gift by the donor to the donee, and only on fulfilment of these three conditions a gift is complete. However, writing is not essential to the validity of a gift either of movable or immovable property. Though under the Mahomedan Law the delivery of possession is an essential condition to the validity of a gift, in case of a gift to a minor by the father or other guardian, no transfer of possession to his ward is required. All that necessary is to establish bonafide intention to give the property by gift (Section 155). Section 359 of the Mahomedan Law stipulates who are the legal guardian of the property of a minor, namely (i) the father (ii) the executor appointed by the father's will; (iii) the father's father and (iv) the executor appointed by the will of the father's father.

11. In the case in hand, as discussed above, there is no dispute relating to the fact that at the time of making the gift, the appellant/plaintiff was a minor, such gift was made by his father's father, i.e. paternal grand father, and that no executor was appointed by the father by executing any will.

12. That being the position, the requirement of transfer of possession of the property made by a gift in favour of a minor by his paternal grand father is not an essential condition to constitute a valid gift under the Mahomedan Law. The learned Courts below, as discussed above, have completely ignored such provision of the Mahomedan Law and held that as there was no proper delivery of possession of the property, the gift is not valid. Since there is no requirement of transfer of possession of the property to the ward when such gift is made to a minor by the father or other guardian, it is immaterial whether the possession was given to the uncle of the appellant/plaintiff or any one else. In the instant case, the intention to make the gift was clear and manifest because such gift was made by a

register deed, which was admitted into evidence without any objection from the respondents/defendants. At the same time, the respondents/defendants have also not denied the execution of such deed by the donor in favour of the donee but what they have contended is that the land measuring 15 Lechas was gifted by an oral gift initially to Meherjan and, thereafter, to her sons in the year 1963 and 1966, respectively, and the said property is not part of the property gifted to the appellant/plaintiff.

13. As discussed above, a gift under the Mahomedan Law can be accepted by or on behalf of the donee and such acceptance may be expressed or implied. It is also not the requirement under the Mahomedan Law that such acceptance must be by the guardian to constitute a valid gift within the meaning of Section 149 of the Mahomedan Law, as the said provision does not provide for such acceptance by the guardian. Admittedly, in the instant case, after the death of the donor, i.e. of the paternal grand father of the appellant/plaintiff, the appellant/plaintiff was under the care of his paternal uncle, who has accepted the gift on behalf of the appellant/plaintiff. Such acceptance would, therefore, be a valid acceptance of gift on behalf of the minor under the Mahomedan Law, more so, when there is evidence on record that the possession of the property was handed over to the appellant/plaintiff when he attained the age of majority.

14. A Division Bench of the Madras High Court in G. Abdul Rahim Sahib (supra) has held that there is no legal impediment preventing a person other than a legal guardian, for example, a trustee or a person acting as such trustee, for accepting gift on behalf of a minor and taking possession and such an acceptance will not make the gift invalid. The Apex Court in Valia Peedikakkandi Katheesa Umma (supra) has also observed that when the intention to make the gift is clear and manifest and such gift in favour of a minor daughter is accepted by her mother in whose charge she was, it would be a valid acceptance of gift under the Mahomedan Law.

15. In view of the aforesaid discussion, I am of the view that the gift made by Osman Seikh Bepari, the paternal grand father of the appellant/plaintiff, by the register deed dated 20.04.1960 (Exhibit-1), in his favour constitute a valid gift

under the Mahomedan Law and hence right, title and interest in respect of the property gifted away by the said gift vest on the appellant/plaintiff. The finding of the learned Courts below in that regard is, therefore, set aside. The learned Court below though has held that Exhibit-1 is not a valid gift but declared the right, title and interest of the appellant/plaintiff in respect of the land, which is the subject of the gift, except the land measuring 15 Lechas, which is under the possession of the respondent/defendants. The learned Courts below having held that gift was not valid under the Mahomedan Law cannot pass a decree declaring right, tide and interest of the appellant/plaintiff in respect of the land, which is the subject matter of the gift. However, for the reasons recorded above, I have already held that the gift made in favour of the appellant/plaintiff by Exhibit-1 is a valid gift under the Mahomedan Law and hence the right, title and interest in respect of the land, which is the subject matter of gift has to be declared in his favour.

16. Having held so, the next question, which requires consideration is-whether the land measuring 15 Lechas, which according to the respondents/defendants, was gifted by Osman Seikh Bepari, the paternal grand father of the appellant/plaintiff, in favour of Meherjan by oral gift in the year 1963 and, thereafter, in favour of the respondent/defendant No. 1 and his brother Yakub, who were the sons of Meherjan, by Katcha gift deed in the year 1966, is part of the land gifted away in favour of the appellant/plainti ffbby Exhibit.

17. I have already recorded the finding that the gift deed executed in favour of the appellant/plaintiff on 20.04.1960 (Exhibit-1) is a valid gift under the Mahomedan Law and, therefore, there cannot be any subsequent gift of any land, which is the subject matter of the gift in favour of the appellant/plaintiff, to any person by the paternal grand father of the appellant/plaintiff as he had no right and title, over the said property after execution qt Exhibit-1. The question, however, remains to be decided is-Whether 15 Lechas of land, which is part of the 'Ga' schedule land under possession of the respondents/defendants was part of the land gifted away by Exhibit-1.

18. Both the learned Courts below have recorded the finding of fact that the appellant/plaintiff has failed to prove that the said 15 Lechas of land under the

possession of the respondents/defendants is a part of the land involved in Exhibit-1 gift deed. Such a concurrent finding of fact cannot be disturbed in a second appeal, unless of course the perversity is shown. The appellant/plaintiff could not demonstrate any perversity in recording such finding of fact by the learned Courts below. Moreover, PW-3, Md. Samed AH, the uncle of the appellant/plaintiff, who accepted the gift on his behalf, during cross-examination has clearly stated that during the lifetime of Osman Seikh Bepari he allowed Meherjan to possess 15 Lechas of land, over which she constructed her dwelling houses. This witness, during cross-examination has also stated that the land, which is in possession of Meherjan is not part of the 6 Bighas of land given to the appellant/plaintiff by his paternal grand father and nobody at any point of time claim such land measuring 15 Lechas under the possession of Meherjan and, thereafter, under possession of the respondents/defendants. There being such clear evidence on record, in my considered view the learned Courts below have rightly recorded the finding of fact that the land measuring 15 Lechas under possession of the respondents/defendants is not part of the land gifted away in favour of the appellant/plaintiff by Exhibit-1.

19. In view of the aforesaid discussion, while setting aside the findings recorded by me learned Courts below that the gift made vide Exhibit-1 was not a valid gift, the judgments and decrees passed by the learned Courts below have not been interfered with, as the right, title and interest of the appellant/plaintiff in respect of 'Ka' schedule land, except the land measuring 15 Lechas, which is in possession of the respondents/defendants, have been declared, so also confirmed the possession of the appellant/plaintiff in respect of 'Kha' schedule land. The appeal is accordingly disposed of. No cost.