

HayatuddIn Vs. Abdul Galn and ors.

HayatuddIn Vs. Abdul Galn and ors.

SooperKanoon Citation : sooperkanoon.com/346113

Court : Mumbai

Decided On : Dec-02-1974

Reported in : AIR1976Bom23; 1975MhLJ345

Judge : Chandurkar, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 11; Mahomedan Law

Appeal No. : Appeal No. 348 of 1964

Appellant : Hayatuddin

Respondent : Abdul Galn and ors.

Advocate for Def. : V.G. Hardas, Adv.

Advocate for Pet/Ap. : V.R. Padhye and ;S.R. Ahmad, Adv.

Judgement :

1. This is a plaintiff's appeal challenging the dismissal of his suit for a declaration and injunction that he was lawfully in possession of house property in suit in pursuance of a gift deed dated 10-6-1952 executed in his favour by one Rashidbi and Amnabi. The suit was decreed by the trial Court but was dismissed by the first appellate Court. One Lamiya had admittedly two wives, Rashidbi and Makboolbi. One Makboolbi also claimed to be Lalmiya's wife. Lalmiya had admittedly two wives, Rashidbi and Mahaboolbi also claimed to be Lalmiya's wife. Lalmiya had a

sister Amnabi. He died in 1948 leaving behind the house property in dispute. Amnabi, Rashidbi and Makboolbi admittedly succeeded to the estate of Lalmiya. Amnabi got 12 annas share and the two widows, Rashidbi and Makboolbi, got 2 annas share each. Amnabi died of Hayatuddin on 10-6-1952. The recitals in the said gift deed (Ex.P-4) show that they were gifting their house property valued at Rs. 1,000/- to Hayatuddin. The description of the property recited in the gift deed shows that according to the donors a part of this property was already separated and handed over to Makboolbi on account of her share in the estate of Lalmiya. The gift deed also recites that the property gifted was in possession of the donee and that possession was handed over to the donee and the donee being the owner was entitled to make use of the property, in any manner he liked. It was further recited in the gift deed that Makboolbi's 2 annas share had been separated, that the donors were gifting in favour of the donee were gifting in favour of the donee their interest in the property of the heirs of the donors would have any interest in the gifted property.

2. In 1955 the two donors as plaintiff No.1 and 2 and donee Hayatuddin filed Civil Suit No. 227 of 1955 for a declaration that Hayatuddin was the owner of the property and an alternative relief of the property and an alternative relief of partition and separate possession was of partition and separate possession was also claimed in the plaint. The main contestants in that suit were Makboolbi who claimed that the gift in favour of the present plaintiff was not binding on her two annas share in the property of deceased Lalmiya and Mahaboolbi who also claimed to be the widow of deceased Lalmiya. The two tenants who were in physical possession of the property in dispute. Sk. Chhote and Mohd. Gulab, were defendants Nos. 3 and 4 in the suit. The Civil Judge , Class II, Nagpur who decided that suit by this judgment dated 25-1-1956 held that there was no partition in 1950 as alleged by the plaintiff and the house property which was mentioned in the gift deed was not allotted to the plaintiffs Nos. 1 and 2. It however, found that in fact the gift had been made of the portion. A B C X Y H I J by the plaintiff Nos. 1 and 2 to the plaintiff No. 23 on 10-6-1952 but that the said gift did not bind Makboolbi who had 2 annas share in the suit property. It was also found that the plaintiff No.3 i.e. Hayatuddin was not placed in possession of the property said to have been gifted under the gift deed. The claim of Mahaboolbi that she was the

widow of Lalmiya was negatived. Mahaboolbi's share to the extent of 2 annas having been upheld in that suit. the trial Court passed a decree in favour of the plaintiffs Nos. 1 and 2 and defendant No.1 who were found entitled to get 12 annas. 2 annas and 2 annas share respectively in the suit house and the plaintiff Nos. 1 and 2 were jointly held entitled to get 7/8th share in the said house which was directed to be separated by metes and bounds subject to their payment of the proportionate amount of dower debt within three months time from the date of decree to the defendant No.1 A commissioner was appointed. It is not now in dispute that after Mahaboolbi's appeal negating her status as a widow of Lalmiya came to be dismissed, a final decree for partition was passed allotting to the share of the original plaintiffs Nos. 1 and 2.

Amnabi and Rashidbi, the same part of the house property which was gifted by them Hayatuddin. One intervening event which must be referred to is that during the pendency of the appeal filed by Mahaboolbi. Amnabi died on 18-11-1956 and the present defendants Nos. 1 to 6 were brought on record as her legal representatives in the appeal. While disposing of the civil suit, the trial Court had declined to pass a decree in favour of the plaintiff No. 3 without giving any reasons but the observation made was 'Fest of the Plff.'s claim seems to me misconceived in view of the facts pleaded by them and as made clear in my discussion above.'

3. The suit out of which appeal arises then came to be filed by Hayatuddin along with Rashidbi who was original plaintiff No. 2 in the earlier suit for a declaration that Hayatuddin was the exclusive owner of the property described in the schedule which, according to him was gifted to him on 10-6-1952 by Rashidbi and Amnabi. The plaintiff alleged that since the date of the gift he has been in possession of the said property and has also introduced tenants therein but that on the strength of the decree passed in Civil Suit No. 227-A of 1955 the defendants who were earlier suit as legal representative of Amnabi tried to dispossess him . The present defendants raised a two fold defence to the suit. They firstly relied on the fact that the claim of the present plaintiff who were plaintiff No. 3 in the earlier suit was rejected and secondly, they contended that the gift was void and the judgment in the earlier suit cooperated as res judicata. The trial Court found that the gift deed dated 10-6-1952 would operate in respect of the separate share in the suit

property which is represented by the letters A B C X Y H I J in the plaint map , and that the donors Amnabi and Rashidbi admitted to have gifted the said house property to the plaintiff. It also found that the present defendants did not inherit any property from Amnabi and Rashidbi admitted to have gifted the said house property to the defendants did not inherit any property from Amnabi and they were not entitled to possession of the suit property. It further found that the decree in Civil Suit No. 227-A of 1955 did not operate as res judicata and the suit filed by the plaintiff was competent. In view of this finding a declaration was granted to the plaintiff Hayatuddin that he was the exclusive owner of the suit house as described in the plaint map and the defendants were restrained permanently from disturbing the plaintiff's possession and enjoyment of the suit house.

4. In the appeal filed by the defendants the lower appellate Court took the view that the decision of the earlier suit operated as res judicata and there was no partition between Rashidbi and Amnabi on the other hand and Makboolbi on the other until the decree in Civil Suit No. 227-A of 1956 was passed. It held that the two principal findings in the suit were that there was no partition before the gift deed, and Hayatuddin was not placed in possession of the property mentioned in the gift deed. Even according to the lower appellate Court, there was no finding about the validity of the gift deed, and one of the question posed for consideration by the lower appellate Court was whether the gift deed in favour of Hayatuddin was valid. It , however, took the view that since delivery of possession was one of the two pre-requisites of a valid gift and properties which were enjoyed by tenants -in-common were incapable in being placed in possession and it held that the property which was gifted to Hayatuddin not having been divided at the time when the gift was made in could not be valid. The question whether the present gift could be considered as one of undivided share was disposed o by the learned judge by observing:

'A portion of an undivided property may be gifted to a co-owner also under certain circumstances but that is not the case here'.

It is, therefore, apparent from the judgment that the validity of the gift considered by the lower appellate court was property not having been partitioned prior to the

suit of 1955 there could not be delivery of possession by Rashidbi and Amnabi in favour by Hayatuddin. The present appeal has been filed by the plaintiff challenging the judgment of the lower appellate Court.

5. Now, the learned counsel appearing on behalf of the defendants was not in a position to dispute the fact that there was no finding by the Court which decided the earlier suit with regard to the validity of the gift. When it was contended on behalf of the appellant that the gift made by the two donors in favour of the present plaintiff was in respect of an undivided portion i.e. 7/8ths share owned by Rashidbi and Amnabi it was urged on behalf of the defendants that the trial Court had in the earlier suit found that there was no partition at which the property was divided into two shares, one belonging jointly to Rashidbi and Amnabi and the other to Makboolbi, and that the trial Court had also found that possession was not given and the logical inference from these two findings, therefore would be that the gift was invalid and even though expressly no finding was arrived at by the learned judge of the trial Court in the earlier suit, such a finding must be read in the judgment with the result that the validity of the gift deed could not again be adjudicated upon in the present suit. It is difficult to accept the contention that though no finding has been reached by the trial Court in the earlier suit that the gift was invalid, the judgment in that suit must be read as leading to that inference and it must be assumed that the finding was given and consequently the validity of the gift could not be put in issue in the present to the established principles under S. 11 of the Code of Civil Procedure which contemplates primarily an issue which is decided in the earlier suit and an issue on which parties have gone to trial putting certain matters directly and substantially in issue. A reference to Explanation IV to section 11 would also not be of any assistance to the defendants because Explanation IV refers to a plea which might or ought to have been taken as a ground of defence or attack in the former suit and which has not been raised. What the learned counsel, however, wants to be done is that the finding is to be read as having been given because that is the natural inference which, according to him, follows from the two findings recorded with regard to partition and session.

6. There is another difficulty which it will be difficult for the defendants to get over. The finding with regard to the validity of the gift was not a finding which was

necessary in order to give relief to any of the three plaintiffs in the earlier suit against the defendants in that suit. The present defendants were the legal representatives of one of the plaintiffs in the earlier suit. If the finding was to be res judicata between the present defendants and the plaintiffs in the earlier suit, namely Hayatuddin and Rashidbi, then it would have to be shown that there was a conflict of interests between the plaintiffs in the earlier suit and that it was necessary to decide that conflict in order to give relief against the defendants. The pleadings in the earlier suit do not leave any one in doubt that the plaintiff No. 1 Hayatuddin was wholly supported by the original plaintiffs Nos. 1 and 2. In fact, their whole object in joining as plaintiffs Nos. 1 and 2 in the earlier suit was to indicate that they have acted on the gift made in favour of the plaintiff No.3 and that they wanted to reiterate the fact that their 7/8ths joint interest in the property left by Lalmiya has been gifted by them to the plaintiff No.3. In other words, they made in 1952 and that is why they firstly prayed for a declaration with regard to the ownership of the plaintiff No.3 and alternatively, claimed a relief for partition and possession. There was therefore, no conflict of interest between the plaintiffs Nos. 1 and 2 in the earlier suit and the plaintiff No.3. The fact that the trial court did not grant a decree in favour of the first two plaintiffs was wholly immaterial. In any case, the question about the validity of the gift was a question inter se between the three plaintiffs and was not required to be decided for giving any relief to any one of them inter se because the prayer made by all the three of them was common. There was, therefore, to be no question of any finding on the validity of the gift being res judicata even assuming that there was any implied adjudication about the gift between the plaintiffs inter se. The learned Judge of the lower appellate Court was right in going into the question of the validity of the gift though it will '159. Gift of mushaa where property divisible. A valid gift may be made of an undivided share mushaa in property which is not capable of partition.

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'.

How delivery of possession of immovable property can be given is explained in paragraph 152. It contemplates three kinds of cases (1) where donor is in possession (2) where property is in the occupation of tenants, and (3) where donor and donee both reside in the property. There is evidence in this case to show that part of the property was in the occupation of tenants and plaintiff Hayatuddin was already residing in a part of the property. 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 attorney to the donee; and where the donor and the donees 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 gift and in such a case, according to Mulla, 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. We have in this case three documents Ext. P-1, P-2 and P-3 which indicate the steps taken by the two donors to divest themselves of this property after they had made a gift in favour of Hayatuddin. All these three notices have been issued by the two donors and the donee, Shri Munwarbhai has been examined as P.W.1 and he has proved these three notices. Ex P-1 is a notice given by Makboolbi and Makboolbi and it clearly stated that Amnabi and Rashidbi, vide registered gift deed dated 10-6-1952, and it is also stated therein that the donors and the donee desired 1/8th share of Mahaboolbi to be separated by metes and bounds and the remaining portion of the house to be allotted to Hayatuddin exclusively. Exhibit P-2 is a notice dated 19-2-1954. again from the donors and the donee to Makboolbi whose status was in dispute. She had been intimated about the gift deed and delivery of possession to the donee and an allegation was made that in December 1953 she had wrongfully and unauthorisedly entered the house on the western side and forcibly and illegally occupied a portion of the suit house in which she had no interest. Damages were, therefore, claimed by Hayatuddin alone, Ex P-3 is a notice dated 8-3-1954 on behalf of Hayatuddin alone to the two tenants and they have been intimated that the property which they were occupying had come to Hayatuddin by way of gift from Amnabi and Rashidbi. It appears that these two tenants were put in possession of two parts of property by Mahaboolbi. They were, therefore, asked to vacate and damages were claimed. There is then the evidence

of Yakubmaya (P.W.3) who was one of the tenants and who admitted that he had been living in the house for the last ten to eleven years. He was paying rent to plaintiff Hayatuddin and he says that Amnabi and Rashidbi had told him that they had made the plaintiff the owner of the house, and the rent was to be paid to him. According to him there were two other tenants, Chhotumiya and Gulabbhai. They were also called and told similarly . This part of the evidence does not seem to have been seriously challenged in cross-examination. The defendant No. 1 examined himself as D.W.2 and he has to admit that plaintiff Hayatuddin had been residing in the suit property since his childhood and according to him, there were tenants in the suit house. This evidence, therefore , shows that in a part of the suit property the plaintiff was living and the recitals in the gift deed also show that it was deceased Lalmiya who had brought up the plaintiff as a child and he was looking after Rashidbi. The property was thus in possession of the tenants and partly in possession of the donee himself. The declaration in the gift deed that possession was handed over to the donee and the intimations given to the tenants orally and subsequently by notices through counsel were sufficient evidence to show that the donors have done everything that was possible in the circumstances to hand over possession of the premises which they wanted to gift to the present plaintiff. In addition to this there is their conduct in joining with Hayatuddin as co-plaintiffs to have their share separated and delivered possession of . This conduct also shows that the donors had done everything possible to make the gift effective, and to divest themselves of possession and to transfer to Hayatuddin said possession of the undivided portion of the property as the donors themselves had. What was necessary to make a gift of an undivided portion capable of partition valid was discussed at some length by a Division Bench of the Allahabad High Court in Hamid Ullah v. Ahmad ullah : AIR1936 All473 . In that case the property consisted of six house and three parcels of land and the donor who was not in physical but constructive possession of the property, executed a deed of gift and got it registered. The document recited that the donor was in proprietary possession of the property and was conveying to the donee the same sort of possession which she possessed, that she had given up all proprietary rights in the subject - matter of the gift and that the donee was at liberty to make transfers of the property in any way he chose. The Division bench held that the gift was

valid as the donor had gone practically all that she was able to do in the way of divesting herself of possession and giving to the donees the same possession as she had herself. In view of the speaking conduct of the donors it is difficult to hold in this case that possession of undivided share of the donors was not transferred by them to the present plaintiff.

9. I might refer with advantage to the observations made by the Privy Council indicating how the doctrine relating to invalidity of gift of Mushaa was un-adapted to a progressive state of Society In *Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan*, (1898-1889) 16 Ind App 205 (PC) Sir Barnes Peacock, speaking on behalf of the Board, has observed:

'The authorities relating to gifts of mushaa have been collected and commented upon with great ability by Syed Ameer Ali in his Tagore Lectures of 1884. Their Lordships do not refer to those lectures as an authority , but the authorities referred to show that possession taken under an invalid gift of Mushaa transfers the property according to the doctrine of both the Shiah and Soonee Schools, see pages 79 and 85. The doctrine relating to the invalidity of gifts of mushaa is wholly un-adapted to a progressive state of society and ought to be confined within the strictest rules'.

Unless therefore, there are compelling reasons it will not be possible for me to invalidate a gift as in the instance case, a gift which has been reiterated by the donors at all possible times whenever occasion arose. In any case it is difficult to entertain a challenge to the gift deed by Amnabi and Rashidbi at the instance of the heirs of Amnabi who really had no estate to inherit as Amnabi who really had not estate to inherit as Amnabi who really had no estate to inherit as Amnabi had clearly divested herself of her 3/4th share in the estate of Lalmiya by making a gift in favour of the plaintiff. in my view, the learned Judge of the lower appellate Court was in error in dismissing the plaintiff's suit on the ground that the gift was invalid.

10. In the result, the judgment and decree of the lower appellate Court are set aside and the decree passed by the trial Court restored. The plaintiff appeal is allowed with costs.

11. Appeal allowed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com