

Mohammad Said Vs. Mohammad Hanif and ors.

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Court : Allahabad

Decided On : Apr-01-1932

Reported in : AIR1932All370

Appellant : Mohammad Said

Respondent : Mohammad Hanif and ors.

Judgement :

Bennet, J.

1. This is a second appeal by defendant 1, Mohammad Said, against a decree of the lower appellate Court which upheld a decree of the Court of first instance, granting the plaintiff Mohammad Hanif joint possession over a certain house along with defendants 1, 7 and 9. The lower appellate Court specified that the extent of the plaintiff's share in the house in dispute was 7 annas out of 16 annas, and further it was specified that of this 7 annas 4 anna came to the plaintiff by inheritance as heir of his father Niamat Ali and 3 annas came to the plaintiff by a deed of gift from defendant 8, Abdul Hakim executed on 10th January 1927. This deed of gift was of the whole house, and in the plaint the plaintiff set up the case that Niamat Ali and Wazir Ali were two-brothers, and there was a partition between them and the house in question fell to the share of Wazir Ali, and after his death his son Abdul Hakim, defendant 8, obtained sole possession of the house and repaired it and rebuilt it and became entitled to it against the other heirs of Wazir

Ali and eventually made a gift of the whole house to the plaintiff. The case for defendant 1, the appellant, who was not one of the heirs of Wazir Ali or Niarhat Ali, was that the house had been given to him by an oral gift seven years before the suit by defendants 4 to 9, and that defendants 4 to 9 had been in possession on the death of Wazir Ali and Niamat Ali. The following pedigree will be useful for understanding the case:

Sheikh Wali

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Bikanu Bua Ali

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Wazir Ali Rahmat Ali Niamat Ali |

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Amina (Def. 7) Hafizan (Def. 6) Kulsum (Def. 9) Abdul Hakim ||

(daughter.) (daughter.) widow. (Def. 8)(son.) ||

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Mt. Khuteja Abdul Hamid (son) Nabihan Bibi Md. Hanif |

(widow.) (Def. 4) (Def. 5)(widow) (Plff. (son) |

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Md. Ali (Def. 3) Qudrat Ali (died) Barkat Ali

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Md. Sayid (Def. 1)

Md. Umar (Def. 2)

2. The questions which are set forth by the lower appellate Court in its judgment as argued before it were as follows:

1. Whether the plaintiff was the son of Niamat Ali?

2. Whether Abdul Hakim and the other co-sharers had made any oral gift in favour of defendant 1; if so, what is the effect of the deed of gift executed by Abdul Hakim in favour of the plaintiff?

3. What is the extent of the share which the plaintiff gets by the decree for joint possession?

3. On these questions the finding was that the plaintiff was the son of Niamat Ali, that Abdul Hakim and the other co-sharers had not made any oral gift seven years ago in favour of defendant 1, that the deed of gift of 10th January 1927 by defendant 8, Abdul Hakim, in favour of the plaintiff, was valid be the extent of the share of Abdul Hakim only which was 3 annas, and that the plaintiff got four annas as the son of Niamat Ali and 3 annas as the donee of Abdul Hakim.

4. On second appeal the argument in ground 1 was that the gift of an undivided share was not valid under the Mahoraedan law. In para. 310, Wilson's Anglo-Mahomedan Law it is stated:

One of two or more co-sharers in any property may give his undivided share to the other or to one of the others, as the case may be.

5. Learned Counsel pointed out that in the rulings, which were quoted by Wilson and which exist on this point, the donor and donee were in possession. Reference was made to Mahomed Baksh Khan v. Hooseini Bibi [1888] 15 Cal. 684 and Emmabai v. Hajirabai [1889] 13 Bom. 352, and also to Amir Ali's Mahomedan Law, 1912 Edn, p. 76. Learned Counsel proceeded to argue the appeal on the assumption that the finding of the lower appellate Court was that the plaintiff's donor Abdul Hakim was not in possession at the time of the deed of gift, and that the plaintiff did not obtain possession. The case as set up in the written statement of defendant 1 was that that defendant had obtained possession seven years before the suit on an oral gift from defendants 4 to 9 including defendant 8. (His Lordship then discussed evidence and concluded that Abdul Hakim was in possession of the house, and that he executed a deed of gift of the house to the plaintiff, and that he transferred possession to the plaintiff). The question therefore of the alleged invalidity of the gift does not arise, but even if the facts were otherwise and the gift were by one cosharer in favour of another, and if the finding was that at the time of the deed of gift a coheir was in possession on behalf of all the coheirs then I consider that the deed of gift would be valid. I consider that for the validity of the deed of gift the principle of Gorea v. Appuhamy [1912] A.C. 230 which has been followed by this and other High Courts in India : see Ahmad Baza v. Ram Lal A.I.R. 1915 All. 30, Ram Parsan v. Kalab Hosain [1916] 36 I.C. 100 and Mobarak v. Md. Raza A.I.R. 1924 All. 384 should be applied, and that the possession of one coheir is not adverse to the other coheirs, but is on behalf of all the coheirs. Applying this to the doctrine of Mahomedan Law, it is sufficient that constructive possession can be transferred from one coheir to another. I think that the case of coheirs would be parallel to the case of husband and wife which admittedly does not require a definite transfer of physical possession. However as I have said, that question does not arise in the present case, because the findings of fact are otherwise.

6. Ground 2 of the memorandum of appeal alleged that the Courts below had failed to consider whether the gift relied upon by the plaintiff-respondent was

followed by delivery of possession. As I have pointed out, it was not the case of the appellant that Abdul Hakim retained possession after executing the deed of gift of 10th January 1927. The evidence on the record, which I have noted, of the plaintiff and of Abdul Hakim, is to the contrary, and there is no evidence on the record on behalf of the appellant to the effect that possession remained with Abdul Hakim. That indeed would be contrary to the case of the appellant, because he alleged that possession was with himself.

7. Ground 3 of appeal alleged that sufficient issues were not framed, but it appears that the issues framed covered the points in question. Ground 4 of appeal was that the plaintiff did not claim a share as an heir of his father, and therefore should not be awarded a share on that ground. The plaint asked for the remedy of a declaration that the whole house belonged to the plaintiff. It did not ask for a declaration that the whole house belonged to the plaintiff under the deed of gift, and it is only in that case that there would be anything in the argument in ground 4 of appeal. The plaint set forth the grounds on which the plaintiff considered himself entitled to the house. The Court has found the title of the plaintiff to arise as regards a share from inheritance, but I do not see any reason why the decree of the Court should be considered invalid and no authority has been shown to me for that proposition. I dismiss this appeal with costs including fees of counsel on the higher scale.

8. There is a cross-objection. Ground 1 is that Abdul Hakim had acquired title to the whole house by adverse possession against the other heirs. It is contrary to the ruling contained in *Corea v. Appuhamy* [1912] A.C. 230, where it is laid down that the possession of one coheir is also on behalf of the other coheirs. Ground 2 was that the Courts should have decreed 12 annas in the house to the plaintiff, because defendants 6, 7 and 9 did not contest the suit of the plaintiff. The plaintiff sued for possession from defendant 1 as being in possession. The plaintiff sued on the ground that he had a legal title to possession. It was therefore open to defendant 1 to contest the validity of the legal title of the plaintiff, and the Courts below have held that the legal title of the plaintiff under the deed of gift amounts only to the share held by the donor which was 3 annas, The mere fact that other persons entitled did not contest the validity of that deed of gift does not prevent

defendant 1 who is in possession from contesting the legal validity. Accordingly the finding was correct.

9. Ground 3 was that the plaintiff was entitled to proportionate costs in the trial Court. This has been granted as the decree granted one-third costs to the plaintiff. The cross-objection is also dismissed with costs including counsel's fee on the higher scale.

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