

Smt. Kabiran and Others Vs. Riyazuddin

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Court : Allahabad

Decided On : Aug-06-1997

Reported in : 1998(1)AWC553

Judge : D.C. Srivastava, J.

Acts : Mahomedan Law

Appeal No. : Second Appeal No. 231 of 1991

Appellant : Smt. Kabiran and Others

Respondent : Riyazuddin

Advocate for Def. : M. Islam, ;N. Bokhari and ;S. Khan, Advs.

Advocate for Pet/Ap. : M.A. Qadeer, ;S. G. Hasnain, ;Iqbal Ahmad, ;Vinod Sinha and ;Fareed Uddin, Advs.

Judgement :

D.C. Srivastava, J.

1. This is plaintiffs second appeal.

2. The brief facts are that Smt. Kabiran and her two sons filed a suit for recovery of possession of a disputed house No. 250 situated in Mohalla-Bunkar Nagar, Islamabad. Meerut against the defendant Riyaz Uddin on the allegation that the

plaintiffs being the owners of the house, on the request of the defendant who is related to the plaintiff and is maternal grandson of the plaintiff No. 1, granted licence to occupy the disputed house along with plaintiff No. 1 in August, 1983. The defendant promised to vacate the house as and when required by the plaintiff No. 1. But the defendant subsequently changed his mind. In February, 1987, the plaintiff No. 1 requested the defendant to vacate the house but he was evading the request. Notices were also given but with no result, Licence was ultimately revoked through notice dated 18.8.1987. Since the defendant did not vacate the house, suit for his dispossession was filed.

3. The suit was resisted on various grounds by the defendant. The main ground of contest which is relevant for the purposes of this second appeal is that the defendant claimed title in the house under oral gift from the plaintiff No. 1. On the basis of oral gift from plaintiff No. 1, the defendant got his name mutated in the Municipal record. On this plea, he wanted to defeat the suit of the plaintiffs.

4. The trial court did not accept the plea of oral gift set up by the defendant. It was found that the plaintiff No. 1 is the sole owner of the house. Further finding that the licence was granted to the defendant which was revoked through notice, the plaintiff No. 1 was held entitled to decree for possession. The suit was accordingly decreed. An appeal was preferred which was allowed and the judgment and decree of the trial court were set aside. It is, therefore, this second appeal.

5. The only substantial question of law formulated at the time of admission of appeal was whether the legal requirement of making an oral gift as permissible under Muslim Law had been fulfilled in the instant case?

6. The record was also examined and the statement of the parties and their witnesses as well as the documents were perused. Under Muslim Law, oral gift is permissible. Gift or hiba under the Mahomedan Law is a transfer of property, made immediately, and without any exchange, by one person to another, and accepted by or on behalf of the latter.

7. Three essential ingredients of a gift under Mahomedan Law have been laid down in para 149 of Mahomedan Law by Mulla in Eighteenth Edition, according to

which first condition is that there should be declaration of gift of the donor (2) acceptance of the gift, express or implied, by or on behalf of the donee and (3) delivery of possession of the subject of the gift by the donor to the donee.

8. Out of the above three essential conditions of a valid gift, it is essential that there should be delivery of possession of the subject-matter of gift. Taking of possession of the subject-matter of the gift by the donee either actually or constructively is necessary to complete a gift as was laid down by the Judicial Committee of Privy Council in *Mohammad v. Fakhr Jahan* (1922) 49 IA 195.

9. A gift of immovable property of which the donor is in actual possession is not complete unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession. Para 152 of the Mahomedan Law aforesaid lays down this condition also. It further lays down where donor and donee both reside in the property, no physical departure or formal entry is necessary in the case of a gift of immovable property. In such a case, the gift may be completed by some overt act by the donor intimating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. When a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession without any physical departure or formal entry.

10. It is now to be seen whether these essential conditions of a valid gift have been established by the defendant in his favour or not.

11. At first it may be mentioned that there is a controversy amongst the parties whether oral gift was created by Smt. Kabiran, plaintiff No. 1. The controversy that Smt. Kabiran is the sole owner of the house is now concluded by the findings of the court below. Smt. Kabiran has, however, denied creation of oral gift. The relationship between Smt. Kabiran and the defendant is that Smt. Kabiran is maternal grandmother of the defendant. The case taken by the defendant is that Smt. Kabiran was treating him as her son and being happy with the services rendered by him, she created oral gift in his favour. There is no reason why Smt. Kabiran would have subsequently denied creation of oral gift in favour of such affectionate relation, namely, defendant. The plaint, however, shows that the

defendant started to set up this plea with a view to grab the house in suit. The oral evidence of the parties was considered by the trial court as well as by the appellate court. The trial court recorded finding that since the defendant admitted in the witness box that written gift deed was prepared before the Notary and it was signed by the donor and donee and was got registered, there was no occasion for Smt. Kabiran to create oral gift. This finding was not accepted by the lower appellate court on the ground that the defendant was under some confusion and he confused the affidavit prepared for filing in the Nagar Mahapallika for mutation in favour of the defendant with written gift deed. However, the statement of the defendant was rightly considered by the trial court which observed that the defendant understands the difference between the affidavit and a gift deed. Moreover, the defendant admitted in the cross-examination that the so-called affidavit is the deed which was got registered. in law, there is no necessity for registration of an affidavit. Thus it seems that at one stage the defendant wanted to set up written gift deed. He did not file the written and registered gift deed and then he took shelter behind oral gift.

12. As observed earlier, the first necessary condition for oral gift is declaration of gift by the donor. Such declaration has been tried to be proved by the defendant. The plaintiff No. 1 Smt. Kabiran. however, denied in the plaint as well as in the evidence that any oral gift was created. The relevant and material witnesses who were present at the time of creation of so called oral gift have not been examined by the defendant. The lower appellate court committed error in drawing adverse inference against the plaintiff for non-examination of Mohd. Yasin. Unequivocal declaration of gift orally by the donor, namely. Smt. Kabiran--plaintiff No. 1 in favour of the defendant is not established from the evidence on record. The defendant being highly interested witness could not be relied upon for establishing such declaration. In examination-in-chief, the defendant tried to establish the three ingredients of a valid gift. He stated that the gift was accepted. He further stated that he also took possession over the property and applied for mutation of his name with the consent of the plaintiffs who gave affidavit in his favour. Giving of affidavit is denied by the plaintiffs. The plaintiff No. 1 is illiterate lady. She has denied to have given any affidavit for mutation purposes. She frankly alleged In the plaint that only one thumb impression was obtained by the defendant on a

paper on the pretext that an application was to be moved for reduction of tax of the house. Thus the first essential condition of gift, namely, unequivocal declaration by the donor is not established by any reliable evidence.

13. Acceptance of gift was tried to be established by the defendant. But once declaration of gift by the donor itself is not established, its acceptance by the donee becomes out of question. Likewise the plea of possession also becomes a remote possibility. It is not established that the defendant either actually or constructively took possession the entire gifted property. Since he had already occupied the house as licensee of the plaintiff, he cannot be deemed to be in occupation or possession in pursuance of alleged oral gift.

14. Since the plaintiff No. 1 and the defendant both were residing in the same house, no physical departure or formal entry of the parties was necessary. However, in such a case, 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. This condition is also not established in the instant case. It is not proved from the evidence on record that the plaintiff No. 1 made any declaration divesting herself of the ownership and control over the property. The attempt of the defendant to get his name mutated in the municipal records is no overt act of the plaintiff No. 1 indicating her intention to divest herself of all control over the subject of the gift. She never vacated the house in dispute after the alleged oral gift, nor is it the case of the defendant that the plaintiff No. 1 after the alleged oral gift was permitted to occupy the house as his licensee. Since the plaintiff No. 1 is illiterate lady from mere act of obtaining her thumb impression on some affidavit without making her aware of the contents of the affidavit, it cannot be said that mutation was effected with her consent nor such affidavit can be considered to be admission or previous admission of the plaintiff No. 1 regarding creation of oral gift.

15. Statement of the defendant Fiyazuddin (D.W. 5) on the point of oral gift or written gift is not only self-contradictory but also totally unbelievable. He stated that Smt. Kabiran liked him as her son and that the disputed house was orally gifted by Smt. Kabiran to him and Ayesha. Thus in examination-in-chief, he came out with a

new case of gift in favour of two persons, namely, himself and in favour of Ayesha and he then stated that 106 yards land was orally gifted to him and 50 yards land to Ayesha. Yasin and All Hafeez who were present at the time of oral gift were not examined by him. They were alive. His statement during cross-examination that Haider Qayum told about gift to Smt. Kabiran is a funny statement which carries no meaning. His further statement in cross-examination is, that Smt. Kabiran told him that she was going for Hajj and she had gifted the house to him. This statement further shows that the so-called oral gift was created in the absence of the defendant and consequently the defendant could not have accepted the same. He gave contradictory statement about written gift deed. At first, he pleaded ignorance and then he stated that he did not remember who prepared the written gift deed. He admitted that the deed was sent for registration. All this shows that factually neither creation of gift through a deed is established nor oral gift is established and in any event, the essential conditions of a valid gift under Mahomedan Law also could not be established by the defendant.

16. The plaintiff No. 1 has succeeded in establishing creation of licence in favour of the defendant and its revocation. The plaintiff No. 1 was entitled to a decree for possession. The suit was, therefore, rightly decreed by the trial court which was erroneously disturbed and set aside by the lower appellate court.

17. The appeal, therefore, succeeds and is allowed with cost. The judgment and decree of the lower appellate court dated 24.1.1991 are set aside and that of the trial court's judgment and decree dated 31.5.1989 are restored.