Hamid Ullah Vs. Ahmad Ullah

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Court : Allahabad

Decided On : Feb-06-1936

Reported in : AIR1936All473; 163Ind.Cas.558

Appellant : Hamid Ullah

Respondent : Ahmad Ullah

Judgement :

Collister, J.

1. This is a plaintiff's appeal which arises out of a suit for the cancellation of a deed of gift which was executed by the plaintiff's sister, Mt. Aliman, now deceased. on 3rd May 1932, in favour of her husband who is the defendant in this suit on the ground that it was void and ineffectual. The subject matter of the gift was a 7/32 share in six houses and three pieces of land. The plaintiff alleged inter alia that the deed of gift was executed at a time of Marzul-maut, that no possession was given as required under the Mahomedan law, and that the deed of gift was also invalid by reason of the doctrine of Mushaa inasmuch as it was a gift of an undivided share in property which was capable of division. The trial Court dismissed the suit and that decree has been confirmed by the lower appellate Court. Learned Counsel on behalf of the plaintiff-appellant pleads before us that the deed of gift was invalid by reason of non-delivery, and also under the doctrine of Mushaa. The rule of Mahomedan law is with certain exceptions with which we are not concerned

that a gift of an undivided share in property which is capable of partition is invalid but not void; the gift being invalid and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him, The property in this case is admittedly capable of partition, consisting as it does of six houses and three parcels of land. The plaintiff was admittedly in possession of the whole property on behalf of the co-owners; and on 17th January 1933, the defendant, in a statement which he made under Order 10, Rule 1, Civil P.C., admitted that he had not actually obtained possession under the deed of gift. In the case of Muhammad Mumtaz Ahmad v. Zubadda Jan (1889) 11 All 460 their Lordships of the Privy Council observed as follows:

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 doctrines of both the Shia and Sunni schools. The doctrine relating to the invalidity of gifts of Mushaa is wholly unadopted to a progressive state of society, and ought to be confined within the strictest rules.

2. In that case a lady had gifted to her daughter some share in revenue paying villages together with land, houses and moveables. Further on. in the judgment their Lordships observed:

The lady had merely proprietary not actual possession of the greater portion of the property that is to say, she was merely in receipt of the rents and profits. In the deed of gift she declared that she had made the donee possessor of all properties given by the deed; that she had abandoned all connections with them; and that the donee was to have complete control of every kind in respect thereof. Their Lordships have no doubt that sufficient possession was taken on behalf of the daughter to render the gift effectual.

3. It will be observed that in that case the donor had directed her daughter's husband who was the manager of the estates to carry the gift into effect, and to that extent the case for the donee was undoubtedly stronger than the case with which we are now dealing. In the case of Sheikh Gausi v. Mohammad Sharif 1930

All 793 a certain person gifted to his maternal grandson a house, a kohlu and some shares in 14 plots of a fixed-rate holding. The Subordinate Judge who heard the first appeal from the decree of the trial Court found that the donor was in constructive possession of the fixed-rate holding, and that he had done everything which he could reasonably be expected to do to enable the donee to obtain possession. A learned Single Judge of this Court after referring to the Privy Council case of which we have already made mention observed as follows:

Mulu (i. e. the donor) had a share in the fixed-rate holding jointly with the defendants. He was in constructive possession of the holding through the defendants. He did all that lay in his power to do to wipe himself off and to put his donee into the same kind of possession as he himself had over the property. This gift was therefore complete under the Mahomedan law.

4. In the case of Zahuran v. Abdus-Salam 1930 Oudh 71, certain shops and houses had belonged to a man named Abdul Rahim. On the latter's death his widow gifted her 1/16th share in the aforementioned property. A Bench of the Oudh Chief Court reviewed the various authorities, including the Privy Council case to which we have already referred and another Privy Council case of which mention will be made hereafter and at p. 73 the learned Judges observed:'

In the present case the subject matter of the gift was not capable of being delivered in any manner other than that which the donor adopted. She executed a deed of gift, evidencing her intention to make the gift. She registered the deed, thereby giving publicity. She put the donee in possession of the gifted property, the possession being of the same nature as she herself had had, and finally she authorised the donee to appropriate the profits of the gifted property and to obtain a partition thereof at any time he thought fit to do so.

5. Learned Counsel for the plaintiff appellant would distinguish that case from the case before us on the ground (1) that in the Oudh case the donor had herself for some time after her husband's death received her share of profits, and (2) that she specifically authorised the donee to obtain a partition; but it seems to us that there is little real distinction. In the case of Abdul Rahiman Nachiyal v. Miratha Yar Ammal 1915 24 IC 10, a bench of the Madras High Court held that under the

Muhammadan law there cannot be a gift of an undivided share in immoveable property, as such share is not capable of actual physical possession. In that case the donor was apparently the owner and in possession of the gifted properties, but it does not appear that he gave to the donee such possession as he had himself or in fact that he gave the donee any sort of possession at all.

6. In the case of Ibrahim Goolam Arif v. Saiboo (1908) 35 Cal 1, a gift had been made in respect of some shares in a company and some shares in freehold property in Rangoon. At page 23 their Lordships of the Privy Council observed:

Now it is said that this gift was void, as being contrary to the doctrine of Mushaa. In the first place, even if the duty of the Courts were to construct a prohibition of gifts of undivided shares of what is divisible which should be applicable to the conditions of modern life, it would seem impossible in the case of the shares and extremely difficult in the case of freehold property in a town to carry it out.

7. The first portion of the above observation seems to suggest a doubt in their Lordships' mind as to whether by reason of its unsuitability to the conditions of modern life the doctrine of Mushaa should be applied by the Court at all. A few lines further on their Lordships have quoted the remarks of the Privy Council in the case of Muhammad Mumtaz Ahmad v. Zubadda Jan (1889) 11 All 460 to which we have already made reference, namely that 'the doctrine relating to the invalidity of gifts of Mushaa is wholly un-adapted to a progressive state of society.'

8. It has to be seen in the present case what it was that Mt. Aliman did in the way of transferring her possession. She executed a deed of gift and had it registered, and in the document she stated that she was in proprietary possession and was conveying to the donee the same sort of possession as she had herself. She stated that she had given up possession and 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 might choose.;It is contended before us that she ought to have given a notice to the plaintiff to hold her share on behalf of the donee, and that she ought to have directed the tenants to pay her share of the rents to the said donee. As regards the second point it does not appear that she herself was receiving any share of the rents; and as regards the first point, we do not consider

that this omission on her part to serve a notice on the plaintiff is by itself sufficient to defeat the defendant's rights It appears that on 15th December 1931 she had served a notice on the plaintiff calling upon him to have her share partitioned; but that notice was not complied with. She admittedly had no physical possession, but was in constructive possession through the plaintiff and it seems to us that there was as complete a transfer of the gift to property as the circumstances permitted with the exception of the one fact that she did not notify the plaintiff and direct him to hold her share of the property on behalf of the donee. She however put the donee in a position to obtain possession, and it is a fact, as stated in the plaint, that the defendant donee instituted a suit for his share of the rents on the basis of this deed of gift. That suit has since been decreed, but the decree is not yet final inasmuch as an appeal is pending in this Court. In all the circumstances of this case, we are inclined to take the view that Mt. Aliman did practically all that she was able to do in the way of divesting herself of possession and giving to the donee defendant the same possession as she had herself.

9. Learned Counsel for the plaintiff appellant has given up the plea relating to Marz-ul-maut which appears in his grounds of appeal. For the reason given above this appeal fails and is dismissed with costs.