

Mohammed Bux Vs. Bashir Mohammed and ors.

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Court : Rajasthan

Decided On : Mar-18-1985

Reported in : 1985(2)WLN665

Judge : Guman Mal Lodha, J.

Appeal No. : S.B. Civil Second Appeal No. 119 of 1973

Appellant : Mohammed Bux

Respondent : Bashir Mohammed and ors.

Disposition : Appeal dismissed

Judgement :

Guman Mal Lodha, J.

1. Bashir Mohammed filed a suit on 1-2-60 pleading inter alia that he is the only son of defendant No.1 and defendant No. 2 Mst. Jenab, his step mother. The plaintiff and the defendants were always living in the suit house No. 3/267 (old) and 9/84 (new) situated in Ladpura (Kota). The defendant No. 1 is jobless and so the plaintiff has been feeding him. On 17-1-59 the defendant No. 1 gifted the above suit house to the plaintiff vide a registered gift deed and handedover the proprietary possession of this house to the plaintiff. The plaintiff is in possession of the above said house since then. The boundaries of the house have been

mentioned in para 3 of the plaint and they are not in dispute. One Mohammed Hamid Khan was a tenant of a part of this house at the time of the gift for Rs. 15/- per month. As soon as the gift was executed the defendant No. 1 told the tenant that he has gifted the property to the plaintiff and has put him in proprietary and in actual possession of it and so Shri Mohammed Hamid should pay rent to the plaintiff and execute a rent deed in his favour. The tenant has, therefore, been paying rent since the time the gift deed was executed. After execution of the gift deed, the plaintiff remained in the suit house for some time and then he went to Delhi. After that time he has been coming and going from Delhi to Kota and back. The tenant has repaired the suit house on behalf of the plaintiff and under the orders of the plaintiff. The plaintiff also fixed doors and windows in suit house as its owner. The defendant No. 2 pressurised the defendant No. 1 and under that pressure the defendant No. 1 executed one more gift deed of the same house in favour of the defendant 2 on 6-1-60 and got it registered. This gift deed dated 6-1-60 is illegal, unauthorised, null and void and ineffective so far as the plaintiff is concerned. The plaintiff has prayed for such a declaration and for cancellation of this gift deed.

2. The defendants filed their written statements on 22-3-60. Later on, on the death of Mst. Jenab Mohammed Bux, Mst. Sakina and Mst. Chhuttoo were added as parties. Mohd. Bux and Mst. Sakina filed a joint written statement, whereas Mst. Chhuttoo filed another written statement. Mst. Chhuttoo admitted the averments contained in the plaint whereas the other defendants alleged that no possession of the gifted house was ever handed over to the plaintiff. The defendant No. 1 was in possession of the suit house till it was gifted in favour of Mst. Jenab and nor Mst. Jenab is in possession of the suit house. The plaintiff got this document executed by fraud alleging that after the death of the defendant No. 1 Mst. Chhuttoo, who is the plaintiff's sister, may not create trouble. This document was executed by the defendant No. 1 as a will. The defendant has always been living in these premises. The plaintiff has never been living in these premises, Actually he has been residing at Delhi. The plaintiff, therefore, should file a suit for possession of the suit house, if he feels that the gift deed is valid.

3. The defendants Nos. 2 and 3 contended that after the death of Mst. Jenab they are in possession of this property from 21-9-1961 under a Will.

4. On the above pleadings of the parties the trial court framed six issues and after recording evidence and hearing arguments decreed the suit. The first appellate Court has confirmed the judgment of the trial Court. Therefore Mohammed Bux defendant 1 has come in second appeal to this Court.

5. Before the first appellate Court as well as this Court, the only point pressed and agitated by the appellant is that the third ingredient of a valid gift under Mohammedan Law regarding delivery of possession is not proved, and, therefore, the gift is invalid. It was conceded that the first two ingredients were proved that the gift was made and accepted.

6. The emphasis of Mr. Rathore is that there must be delivery of actual physical possession to the donee, and unless that is approved a gift under the Mohammedan Law cannot be valid.

7. The first appellate Court noticed that possession can be physical or constructive but a mere registration of a gift cannot cure want of delivery of possession.

8. Mr. Rathore has placed reliance on the judgment of the Allahabad High Court in the case Mst. Noor Jahan Begam v. Muftkar Dad Khan : AIR1970 All170 According to Mr. Rathore there is a comprehensive discussion of the principles of gift under the Mohammedan Law and the judgment of Supreme Court in Valia Peedika Kandi Kathessa Umma v. Pathakkalm Naraya-nath Kunhamu : [1964]4SCR549 , and Maqbool Alam v. Khodaija : [1966]3SCR479 and various High Courts have been noticed and discussed in details. The various texts of Mohammedan Law have also been referred to. In : [1966]3SCR479 (supra) their Lordships have observed as under:

The three pillars of a valid gift under the Mohammedan Law are declaration, acceptance and delivery of possession. There can be a valid gift of property in the possession of a lessee or a mortgagee and a gift may be sufficiently made by delivering constructive possession of the property to the donee. Some authorities

still take the view that a property in the possession of a usurper cannot be given away, but this view appears to be too rigid. The donor may lawfully make a gift of a property in the possession of a trespasser. Such a gift is valid, provided the donor gives possession of the property to the donee or does all that he can to put it within the power of the donee to obtain possession.

9. The decision of the Hon'ble Supreme Court in AIR 1964 SC 275 (supra) has been termed as a boldest departure from the strict rule of Mohammedan Law by Justice Gulati in the above cited Allahabad case. A gift was made by husband to wife in the Supreme Court case. There was no actual handing over of the property to the donee nor the gift deed was handed over. The High Court of Allahabad declared it to be invalid. Justice Hidayatullah, as he then was, observed as under:

The intention to make the gift was clear and manifest because it was made by a deed which was registered and handed over by Mammoty to his mother-in-law and accepted by her on behalf of the minor. There can be no question that there was a complete intention to divest ownership on the part of Mammoty and to transfer the property to the donee. If Mammoty had handed over the deed to his wife there would have been complete gift under Mohammendan Law and it seems impossible to hold that by handing over the deed to his mother-in-law in whose charge his wife was during his illness and afterwards Mammoty did not complete the gift. In our opinion both in texts and authorities such a gift must be accepted as valid and complete.

10. In para 49 Justice Gulati extracts the departure from strict compliance of third requirement of Mohamedan Law about physical handing over of the property and catalogues the cases of close relations like gifts between husband and wife etc. Quoting Hidayatullah from the preface of Mulla's Mohammedan Law Justice Gulati points out that Hidayatullah the author of the Supreme Court judgment in AIR 1964 SC 275 (supra) which is a radical departure from the Muslim Law text has given a warning that while liberalising the application of Islamic Law to concrete cases are commendable, but it should be done rarely and only if the Koran, Hadia and Ijmas are not contradicted and when no other course is open to avoid a failure of justice.

11. It would thus be seen that while Justice Hidayatullah tried to be liberal and made a departure in the Supreme Court decision, but while writing a preface he tried to minimise it by putting the restrictions of Koran, Hadia and Ijmas.

12. Mr. Rathore has not been able to show that in the instant case the relationship being of father and son is bound to be put in catalogue of the case of nearest kins as per Hidayatullah, J. in the Supreme Court case and Gulati, J. and Pathak, J. in the Allahabad case cannot come in that exceptional category. Mr. Rathore also could not show any Koranic, Hadia's or Ijmas scriptures where the law has prohibited Hiba by a father to a son without physical delivery of possession.

13. In my considered view, a father and son normally reside together and would be presumed so unless contrary is shown on account of the circumstances of maturity of age or a family being too prosperous or a partition having taken place and, therefore, neither Koran, nor Hadia nor Ijmas prohibits Hiba without strict delivery of possession.

14. In my Opinion what Hidayatullah, J. said in the Supreme Court case was not a case of any departure from Islamic or Koran as termed by Gulati, J. but enunciating the true scope of Islamic Law. It appears to me that the Allahabad case so strongly relied by Mr. Rathore takes the wind out of the sail of his arguments, as both Pathak, J. and Gulati, J. in their separate concurring judgments expressly recognised the validity of a Hiba in Mohammedans without insistence on physical delivery of possession in few exceptional cases of close relationship like husband and wife, father and son, mother and daughter, mother and daughter-in-law etc.

15. Thus, so far as the principle of law is concerned, I am of the opinion that both the lower Courts have not committed any error of law, as whatever principles they have followed flow from the decision of the Hon'ble Supreme Court by no less than eminent jurist Hidayatullah, J, having expertise knowledge of the Mohammedan Law.

16. Now, coming to the facts of the case, let me state at the very outset that by a series of decisions in Satish Chandra Bose v. Commissioner of Ranhi :

[1981]2SCR764 , Mst. Kharbuja Keer v. Jang Bahadur Rai : [1963]1SCR456 , V. Ramchandra Ayyar v. Ramalingam Chettiar : [1963]3SCR604 , Deity Pattabiramswamy v. S. Hanymayya and Ors. AIR 1959 SC 57 and Rasuha Singh v. Achat Singh AIR 1961 SC 1097, the High Court is not permitted to enter into the controversy of the facts by reappreciation of the evidence how so ever erroneous and unexcusable finding of fact may be. Even then the question which is not in dispute and which should be taken as the bed rock is that Bashir Mohammed and Shah Mohammed are the son and the father. Shah Mohammed father has admitted that Bashir Mohammed was brought up in this very house and is continuing to live in this very house. Shah Mohammed in not having any soft corner for Bashir Mohammed now obviously because he executed another gift deed and, therefore, his admission about the joint residence is very important. In addition to the above the witnesses examined by the plaintiff PW 3 Mohd. Hamid, PW 5 Bhagirath, PW 6 Abdul Ajj, PW 7 Ibrahim real maternal uncle, PW 10 Bashir Mohammed father-in-law of daughter of Shah Mohammed born to him by Mst. Jenab in whose favour gift deed (Ex. 1) was executed, PW 11 Habibullah and PW 12 Abdul Sattar, prove that Bashir Mohammed was living with Shah Mohammed at the time of alleged execution of the gift deed.

17. The over-whelming evidence, including the admission of the father defendant himself proves that the donor and donee were living together in the same house and, therefore, the case would come under the exception and no actual entry of the donee and actual departure of the donor are essential.

18. Moreover, some portion of the premises was in possession of the tenant Mohammed Hamid Khan, who has stated that Shah Mohammed and Bashir Mohammed told him that rent should be paid to Bashir Mohammed and later on even the rent note was executed in favour of Bashir Mohammed. A detailed discussion of the entire evidence of the tenant Mohammed Khan by the first appellate court along with other evidence shows that the finding recorded by first appellate court that the possession of the tenant also was transferred constructively by asking the tenant to pay the rent and then the tenant executed the rent note and treating the donee as landlord is very well founded on just and proper appreciation of the evidence.

19. I am, therefore, convinced that the effort to construct a Himalayan pyramid on the doctrine of strict handing over of possession and taking over of possession by physically leaving the premises and entering the premises as per the text of the Mohammedan Law, falls flat on the exceptions carved out in the case of nearest akins by the Apex Court decided by Apex Judge Hidayatullah as he then was and the donee being the son and the donor being the father, the latter's effort to appease or please the second wife by executing another gift deed, cannot be permitted to succeed under the pretext of the technicalities and orthodoxy of the doctrine, which has since been exploded by bold departure as put in by Gulati, J. and by none else than Hidayatullah, J. in the Apex Court in addition to others.

20. Therefore, there is no escape but to dismiss this appeal, and it is dismissed without any order as to costs.

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