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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No.80/2006

Date of decision: 10th November, 2008

% CAPT RAJA MOHD BILAL QURESHI Appellant
Through :Mr. K.R. Chawla, Adv.
versus

SABEENA & ORS Respondents
Through : Mr. Atul Nigam, Adv. for R-1&2.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE J.R. Midha

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

Pradeep Nandrajog, J. (Oral)

1. Admit.
2. Heard learned counsel for the parties. Trial court record has been perused.
3. The appellant who is the ex-husband of respondent No.1 has lost in his endeavour to seek a declaration that he is the owner of the subject premises, being the basement of property bearing No.M-25, Chittaranjan Park, New Delhi. His attempt to have the title documents in favour of his ex-wife

and subsequent purchasers cancelled, has resulted in a defeat. Possession of the property has obviously not been directed to be handed over to the appellant. The case of the appellant was that the entire sale consideration in sum of Rs.4,00,000/- paid to the builders flowed from his coffers in as much as the cheques by which payment was made were admittedly issued from his account and that his wife, i.e. respondent No.1, fraudulently procured the title documents of the property in question from the builders.

4. The defence of the wife was that during the subsistence of the marriage, on the 10th Wedding Anniversary, by way of an oral gift, the appellant, which he could do as the parties professed the Islamic faith, gifted the property to her and that acting as the owner of the property she sold the same to defendants 3 and 4 by a registered sale deed on 21.03.1998. The defence has been accepted.

5. The reasoning of the learned Trial judge to non suit the appellant is the fact that during the subsistence of his marriage with the respondent, prior to divorce taking place on 10.11.1997, said property which was under construction by builders was agreed to be sold by the builders to the first respondent vide Agreement to Sell dated 05.02.1996 and that

notwithstanding the funds made available by the appellant. No attempt was ever made by the appellant to get executed the title documents in his favour. As per the trial court this evidenced that the appellant consented that the wife was to be the beneficial owner of the property. The learned Trial Judge has believed the testimony of the wife and DW2, namely, Mohd. Kamil that an oral gift was made by the husband to the wife.

6. Shri K.R. Chawla, learned counsel for the appellant urges that as per Muhammadan Law, an oral gift is recognized but on proof of three essentials, namely, (1) a declaration of gift by the donor: (2) an acceptance of the gift, expressed 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. Learned counsel urges that admittedly as on the date of the 10th Wedding Anniversary of the parties, the subject property was still under construction and not in possession of the appellant i.e. the alleged donor and hence the question of delivery of possession of the subject of the gift by the donor to the donee does not arise; counsel urges that on said count alone the appeal has to succeed. Second contention urged is that the testimony of DW2 does not inspire any confidence in

as much as he falsely stated that when the alleged declaration of gift was made he was present at the residence of the parties, being the first floor of premises No. E-892, Chittaranjan Park, New Delhi. Learned counsel urges that in her testimony the respondent No.1 admitted residing at M-56 Chittaranjan Park, New Delhi at that time and that she further admitted that she shifted to E-892, Chittaranjan Park, New Delhi in the month of November, 1997.

7. Before we deal with the two contentions urged at the hearing today, we must record that learned counsel for the appellant could give no convincing explanation as to why the appellant never demanded from the builders that the title documents of the property be executed in his favour and why did the appellant not raise the dispute of title of his wife to the property in dispute during the subsistence of the marriage of the parties. It has to be noted that the agreement to sell with the builders is dated 5.2.1996. The parties were divorced on 10.11.1997. Till then, the appellant never raised any issue of title to the suit property. Not only that. The suit was filed on 18th May, 1998 when the wife had already sold the property vide sale deed dated 21.3.1998.

8. Dealings between a husband and a wife, by the very nature of their relationships, have to be unofficial for if a husband and a wife have to deal with each other in an official manner there would be no matrimonial house: the house would be nothing but an office.

9. The conduct of a party is always a relevant evidence. The fact that the appellant neither sought the execution of an agreement to sell in his favour nor insisted on getting executed the title documents in his favour and conscious of the fact that money was being paid by him allowed the wife the benefit of the property is good evidence of the truthfulness of the version of the wife.

10. It is true that the property in question was not in the possession of the parties when the alleged oral gift was made and hence physical possession thereof could not be transferred inter vivos the parties, but law has to be understood from a practical point of view. Constructive possession can always be handed over of an immovable property in possession of a third party.

11. The subject property was under construction as on date the wife alleges an oral gift in her favour. What does the wife actually say?

12. Meaningfully read, in the written statement, the wife pleads that her husband desired to gift her a property and that she accepted the intention of her husband to gift to her a property and that pursuant thereto the suit property was decided to be purchased in her name from out of the funds of her husband and that with this understanding the husband paid the sale consideration to the builders who sold the property to the wife. It is in the aforesaid manner that the wife speaks of the property being gifted to her.

13. No doubt, DW2 has wrongly mentioned the place where the declaration of the gift was made. But that by itself would not detract from the truthfulness of his version. Minor variations and discrepancies in the testimony of a witness are never fatal, if the court is otherwise satisfied that the witness is speaking the truth.

14. In our opinion, the weight of the evidence in favour of the wife i.e. the conduct of the appellant of paying money to the builders and never insisting for either the agreement to sell as also the sale documents to be executed in his favour, during the subsistence of the marriage of the parties, is enough to hold that on the test of pre-ponderance of evidence the view taken by the learned trial Judge is correct.

15. We find no merit in the appeal. The appeal is dismissed.

16. Keeping in view the relationship between the parties we refrain from imposing costs.

PRADEEP NANDRAJOG, J

J.R. MIDHA, J

NOVEMBER 10, 2008

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