

+ **CRP.No.94/2009**

% **Date of decision: 4th December, 2009**

ABUL KALAM (ADVOCATE) Petitioner

Through: Petitioner in person.

Versus

STATE OF (NCT) DELHI & ORS ... Respondents

Through: None.

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1. This revision petition under Section 115 of the CPC has been preferred by the defendant in the suit for declaration simplicitor filed by the respondents No.2 to 6 herein/plaintiffs before the trial court and against the order dated 10th November, 2008 of the Civil Judge, Delhi dismissing the application of the petitioner/defendant for passing/making a decree in terms of the judgment/order pronounced on 16th October, 2007.
2. The respondents/plaintiffs had instituted the suit from which this petition arises for declaration that they are owners in possession of House No.D-225,

Abdul Fazal Enclave, Okhla, New Delhi in pursuance to the gift of the said immovable property in their favour by the defendant. The petitioner/defendant is the father of the respondents No.2 to 6/plaintiffs. Upon notice of the suit being issued to the petitioner/defendant, an application under Order 23 Rule 3 read with Section 151 of the CPC was filed by the parties before the trial court. It was inter alia mentioned therein that owing to intervention of other members of the family, the disputes between the parties subject matter of suit had been compromised/settled; it was mentioned that the respondents/plaintiffs shall remain the owners of the said house inasmuch as the defendant/petitioner had already gifted the said house to the respondents/plaintiffs on 16th October, 2001 and had so put the plaintiffs into possession of the house and transferred all the rights in the house in favour of the respondents/plaintiffs; the petitioner/defendant declared that he had no right, title or interest in the house. In the application it was requested to the court to pass a compromise decree in favour of the respondents/plaintiffs. The said application was signed by the petitioner/defendant as well as the respondents/plaintiffs as well as by the advocates and also accompanied with the affidavits of all of them. It may be mentioned that even prior to the filing of the said application, the petitioner/defendant had appeared before the court and made a statement on 3rd August, 2006 to the same effect, i.e. of gift of the house to the respondents/plaintiffs; the only difference being that in the said statement he had also specified the shares gifted to each of the respondents/plaintiffs. It was also mentioned in the statement that the gift was oral.

3. The trial court also recorded the statement of the respondent/plaintiff No.2 and the defendant in pursuance to the compromise application. The statement of the defendant is relevant inasmuch as on the basis thereof the trial court has made the impugned order. The said statement is as under:

“I am defendant in the present suit. The matter has been compromised amicably with the plaintiffs and now, there is no

dispute. In future, I will not claim any right or interest in the said house i.e., suit property. I have no objection if the plaintiffs are allowed to withdraw the present suit if the suit is disposed of as compromised in terms of the application U/O 23 Rule 3 CPC supported with affidavits of both the parties.”

4. The aforesaid application for compromise came up before the trial court on 16th October, 2007 and the trial court disposed of the suit as compromised in terms of the application under Order 23 Rule 3 CPC and also directed that the parties shall remain bound by their respective statements.

5. The petitioner/defendant thereafter in or about October, 2008 filed an application under Order 23 Rules 6, 6A, 7, 8 and 9 read with Section 151 of the CPC averring that on obtaining the certified copy he realized that no decree had been drawn up in the suit and requested the trial court for the decree to be drawn up.

6. The trial court vide order impugned in this petition dismissed the application for the reason of the petitioner/defendant in the statement aforesaid having stated that he has no objection if the plaintiffs are allowed to withdraw the suit. It was further observed that since no judgment was passed by the court and the order disposing of the suit as compromised was passed in view of the statement of the plaintiff No.2 and the defendant, no decree could be passed in the suit. Aggrieved therefrom this petition has been preferred. The notice of the petition was issued to the respondents/plaintiffs. As expected, they did not appear in spite of service. Though a petition under Section 115 of the CPC against the order of the nature aforesaid would not lie but the same is treated as one under Article 227 of the Constitution of India.

7. The reason given by the trial court for dismissing the application of the petitioner/defendant is not found to be correct. The prayer in the compromise application was for the suit to be decreed in terms of the compromise. The same

was the statement made by the petitioner/defendant prior to the filing of the compromise application, as aforesaid on 3rd August, 2006. Even the statement recorded on 16th October, 2007 of the petitioner/defendant besides talking of the plaintiffs being ready to withdraw the suit also spoke of the suit being disposed of as compromised in terms of the application under Order 23 Rule 3 of the CPC. The plaintiff No.2 whose statement was also recorded, also did not withdraw the suit but only sought its disposal as compromised.

8. Ordinarily the court should be cautious in accepting the compromise applications as aforesaid. As per the compromise application and the statement made by the parties, the gift of the property by the petitioner/defendant to the respondents/plaintiffs is stated to be oral. There can be no gift of immovable property without a registered document. It is often found that collusive suits are filed where title in the property is sought to be transferred by seeking a decree of declaration and without payment of stamp duty. The courts should not allow the same to be done. However here the position is different. The court accepted the compromise and disposed of the suit as compromised. Once having done that, the court cannot refuse to pass a compromise decree and if it does so would be failing in its duty. In the facts of the present case however no error can be found in the order of the court accepting the compromise application and which can be accepted only on finding the compromise to be lawful. The reason therefor is that the parties are Mohammedans. Under the Mohammedan law an oral gift is permissible. The Supreme Court in *Mahboob Sahab Vs. Syed Ismail* AIR 1995 SC 1205 has reiterated the principle of Mohammedan law that writing is not essential to a gift either of movable or of immovable property. It has further been held in *K.M. Kahdir Ahmed Vs. Suriya Parveen* MANU/KA/0069/2009 that when oral gift is permissible as per Mohammedan law, the court cannot refuse to recognize the same on the ground of required stamp duty having not been paid even. Thus, it cannot be said that the order accepting the compromise and

disposing of the suit as compromised is illegal in any manner whatsoever. It is also significant that the court on 16th October, 2007 did not dismiss the suit as withdrawn but disposed of the suit as compromised. That having been done, the grievance of the petitioner is justified. A compromise decree and of which the application under Order 23 Rule 3 of the CPC filed by the parties shall form a part is liable to be drawn up. The petition therefore succeeds. The trial court is directed to draw up a compromise decree in pursuance to the judgment/order dated 16th October, 2007 in the suit. It is clarified that in such cases the decree is not to be of declaration and for which relief the suit was filed but the decree is to be a compromise decree in terms of the application under Order 23 Rule 3 CPC which as aforesaid shall form part of the decree. This petition is disposed of.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**December 4 , 2009
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