



A.S.No.157 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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ORDER RESERVED ON : 07.11.2022

ORDER PRONOUNCED ON : 12.01.2023

CORAM

**HON'BLE JUSTICE MR.JUSTICE S.S.SUNDAR
AND
HON'BLE JUSTICE MRS.JUSTICE.N.MALA**

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1.A.K.Hafasha

2.K.Mohammed Jalaludeen

3.K.Mohammed Riyasudeen

4.Mishaktul Janna

5.Sirajum Muneera

... Appellants

Vs.

1.Noorjahan

2.Nazeer Ahmed

3.Mohammed Mazood

4.Ahamedulla

... Respondents

Prayer: Appeal Suit is filed under Section 96 of the Code of Civil Procedure, against

<https://www.mhc.tn.gov.in/judis>



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the Judgment and Decree dated 19.10.2012 made in O.S.No.159 of 2009 on the file of the V Additional District & Sessions Judge, (FTC – 3), Coimbatore.

For Appellants : Mr.I.Abrar Md.Abdullah

For Respondents : Mr.Abdul Mubeen for
Mr.S.B.Faziuddin

* * * * *

JUDGMENT

[Order of the Court was delivered by N.MALA,J.]

The plaintiffs in the suit are the appellants in the appeal. The appeal is filed against the Judgment and Decree of the trial Court in O.S.No.159 of 2009 dated 19.10.2012.

2.For the sake of convenience the parties herein will be referred to as per their rank in the trial court.

3.The brief facts necessary for the purpose of the appeal are as follows:

The first plaintiff and the plaintiffs 2 to 5 are the second wife and the children of the deceased Kaja Moideen. The first defendant is the first wife of the deceased



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Kaja Moideen and the defendants 2 to 4 are the children of the deceased Kaja Moideen through the first defendant. The deceased Kaja Moideen was the absolute owner of the suit property, having purchased the same under the Sale Deed dated 31.03.1975 vide document No.889/1975 before the Sub Registrar of Gandhipuram, Coimbatore.

4.According to the plaintiffs', the late Kaja Moideen was a businessman and earned good income from his business. After the purchase of the suit property late Kaja Moideen transferred half of the property to one A.Abdul Rawoof and in the remaining half of the suit property of 7 cents and 168 sq.ft., he constructed a commercial complex by name “Alif Complex” with 20 shops. The plaintiffs were residing separately at Door No.19/34, 2nd street, Salamath Nagar, Karumbukkadai, Coimbatore. At the time of the death of their father on 20.06.2001 the second and third plaintiffs were studying and the fourth and fifth plaintiffs were minors and hence the commercial complex as also the business of their father was maintained by the defendants who were older to the plaintiffs. According to the plaintiffs under the



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Mohammedian Law the marriage of the first plaintiff with the deceased Kaja

Moideen was valid and as such as per the Mohammedian law the plaintiffs 2 to 5 and the defendants 2 to 4 together were entitled to $7/8^{\text{th}}$ share in the ratio of 1 : 2, according to the relationship to the deceased as son or daughter and out of the remaining $1/8^{\text{th}}$ share the first plaintiff and the first defendant were entitled to 50% each. After the completion of the second plaintiff's B.E. Graduation and on the plaintiffs 3 to 5 attaining majority the plaintiffs approached the defendants for partition of the suit property and for allotment of their respective shares therein. As the defendants did not come forward to partition the property as requested by the plaintiffs, the plaintiffs approached the local Muslim Jamath of Masjidul Munavara Hanafi Sunnath Jamath, Ilahi Nagar, Karumbukkadaai for amicable partition. The said jamath advised the defendants to agree for amicable partition of the property of their father, but the defendants refused to heed to the same. The plaintiffs having failed in their attempt for an amicable partition caused a legal notice dated 10.11.2008, to which the defendants replied on 02.12.2008 raising untenable objections that their deceased father had given a hiba of the suit property to them. According to the



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plaintiffs the oral Hiba given to the defendants excluding the plaintiffs was improbable and unsustainable for their father never discriminated against them nor disclosed any such intention to deprive them of the suit property.

5.The plaintiffs therefore pleaded that the defendants had fabricated the oral gift with a dishonest intention to have wrongful gain and usurp the property by taking advantage of the young age of the plaintiffs 2 to 5. The plaintiffs further stated that the oral gift was never published and it was only through the defendants reply notice dated 02.12.2008 that the plaintiffs came to know of the oral gift. The plaintiffs contended that the declaration dated 28.07.2000 in favour of the defendants 2 to 4 was also unbelievable, because their father never intended to give the property to defendants 2 to 4, exclusively. The plaintiffs objected to the declaration deed and stated that if the intention was to give only to the defendants then their father could have straight away executed the gift deed without the Hiba.

6.According to the plaintiffs there were other properties which were purchased



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by their father through the business in button house and one such property, a shopping complex at Sanamath Nagar was bequeathed to the second defendant and therefore their father never intended to bequeath the only remaining property i.e. the suit property to the defendants. The plaintiffs hence stated that the gift was a bogus and fabricated document and as such invalid in law. For the foregoing and other reasons stated in the plaint the plaintiff's filed the suit for a preliminary decree for partition of suit schedule property, for allotment of half share in the suit property and for permanent injunction.

7.The defendants contested the suit and in the written statement they submitted that their father had taken loan of about Rs.5,00,000/- lakh from the private financiers for the marriage of the plaintiffs 4 and 5 and it was the defendants who had repaid the same. The defendants further stated that when the commercial complex was built the fourth defendant started the button house shop along with the third defendant and it was the defendants 3 and 4 who had repaid the loans raised by the late Kaja Moideen for construction of the commercial complex. The defendants further stated that the



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defendants were residing behind the commercial complex right from the date of purchase of the property. The defendants denied the contentions of the plaintiffs that there was a demand for partition of the suit property before the Jamath. It was further stated by the defendants that as an absolute owner of the suit property their father Kaja Moideen had gifted the suit property to the defendants 2 to 4 by way of an oral gift on 15.06.2000 by dividing the property into three portions in the presence of his well wishers O.K.V.Ibrahim and H.A.Rahman and the said gift was accepted by the defendants 2 to 4. According to the defendants in pursuance of the oral gift possession was also taken by them. As per the said oral gift the tiled house situated behind the complex was allotted to 2nd defendant and the Alif Complex was allotted to defendants 3 and 4. Thereafter their father had directed the tenants of Alif Complex to pay the rents for the respective portions to the defendants 3 and 4. It was the further case of the defendants that confirming the oral gift, their father executed a declaration on 28.07.2000, in order to avoid future disputes between the legal heirs after his demise. Even the revenue records were mutated in the name of the defendants 2 to 4 in pursuance of the oral gift.



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8.The defendants denied the statement of the plaintiffs that the plaintiffs did not have knowledge of the oral gift prior to the reply notice and further stated it was the defendants who were asked to repay the loans taken by the father for the marriage expenses of plaintiffs 4 and 5. It was stated by the defendants that the intention of their father is spelt out by the gift deed in their favour. The defendants denied that they had fabricated the records and the declaration.

9.The defendants further denied that their father had bequeathed the shopping complex at Sanamath Nagar to the second defendant. According to the defendants it was the second defendant who had built the complex with his own money and with the funds from his father in law. The defendants denied that their father had purchased the property in the 5th street and bequeathed the same to the defendants. The defendants stated that the button house business was all along carried on by defendants 3 and 4 and whenever their father raised loans from the private financiers it was the defendants 3 and 4 who repaid the same on instructions from their father.



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For these and other reasons the defendants prayed for dismissal of the suit.

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10.On the aforesaid pleading, the trial Court framed the following issues:

- 1.வாதிகளுக்கு வழக்குரையில் கோரியபடி தாவா சொத்துக்களில் பாகம் கிடைக்க கூடியதா?
- 2.வாதியின் வழக்கு சட்டப்படிக்கு நிலைக்ககூடியதா?
- 3.1ம் பிரதிவாதி தாவா சொத்துக்களை நன்கொடை கொடுத்து விட்டாரா?
- 4.வழக்கு சரியாக மதிப்பீடு செய்யப்பட்டு கட்டணம் செலுத்தப்பட்டுள்ளதா?
- 5.வாதிக்கு கிடைக்க கூடிய பரிகாரம் என்ன?

11.Before the Trial Court, the second plaintiff examined himself as P.W.1 and two other witnesses as P.W.2 and P.W.3 and the third defendant examined himself as D.W.1 and examined O.K.V.Ibrahim as D.W.2. The Trial Court on an analysis of the entire evidence on record both oral and documentary, dismissed the suit. The plaintiffs have therefore filed the above appeal.



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12.The learned counsel for the plaintiffs submitted that the lower Court had failed to appreciate that the hiba was not proved by the defendants in a manner known to law. The learned counsel further submitted that the lower Court had completely lost sight of the fact that the defence witness DW2, who was an alleged witness to the hiba stated that his father died on 14.06.2000 at 06.00 p.m. and the oral hiba was made on 15.06.2000 between 11.00 am and 02.00 p.m. And hence his evidence was unbelievable. The learned counsel further submitted that DW2 was very closely related to the second and the fourth defendants and as such he was an interested witness.

13.The learned counsel further submitted that there was absolutely no evidence on the essential requirements of hiba under the Mohammedian law. He further submitted that on the facts of the case and on the legal aspects of a Mohammedan gift the trial Court ought to have decreed the suit as prayed for.



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14.The learned counsel appearing for the defendants on the other hand submitted that the hiba was proved by the defendants by examining DW2 who was a witness to the hiba. The learned counsel submitted that the Declaration Deed of late Kaja Moideen before the Notary Public confirming the hiba supported the case of the defendants that late Kaja Moideen gave a hiba of the suit property. On these and other grounds raised in the written statement the counsel pleaded for the dismissal of the appeal.

15.Both the learned counsel elaborately argued on the facts by referring to the relevant portions of the evidence of the witness on both sides and also relied on number of judgments in support of their respective case.

16.On the submissions of the respective learned counsel the following points arise for consideration in the appeal:

- 1.Whether the Hiba in favour of the defendants is true and valid?
- 2.Whether the plaintiffs are entitled to the relief of partition and permanent



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injunction?

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3.As to what other relief are the plaintiffs entitled to?

FACTS:

17.The admitted facts are that the first plaintiff and the first defendant are the first and second wives and the plaintiffs 2 to 5 and defendants 2 to 4 are the children of the late Kaja Moideen through the said wives. The said late Kaja Moideen was the owner of the suit property having purchased the same under the sale deed dated 31.03.1975, registered as Document No.889/1975. It is also admitted that the said Kaja Moideen constructed the shopping complex by name “Alif Complex” in the property purchased by him as stated above.

18.From the narration of the facts as borne out by the plaint and the written statement, it is seen that the late Kaja Moideen was a business man earning good income from his business. The late Kaja Moideen had purchased several other properties, but the suit property was the only property standing in his name. It is the case of the plaintiffs that the plaintiffs 2 to 5 were very young at the time of the demise of their father late Kaja Moideen on 20.06.2001 and therefore after the demise



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of their father the business was carried on by the defendants. After the completion of the second plaintiff's B.E. graduation and on the plaintiffs 3 to 5 attaining majority the plaintiffs approached the defendants for amicable partition of the suit property but the defendants denied the same. The plaintiffs therefore issued a notice dated 10.11.2008 to the defendants which was replied by them on 02.12.2008 and as the defendants failed to partition the property and give the plaintiffs their share, the plaintiffs filed the suit. The defendants on the other hand contended that their father late Kaja Moideen had made an oral gift of the suit property to the defendants 2 to 4 by dividing the suit property into three portions of which the "A" portion being the vacant land and the house was allotted to the second defendant, "B" portion consisting of shops a, b, e, f and g in Door No.292/a was allotted to the third defendant and "C" portion consisting of shops c, d, h, i and j in Door No.292/c was allotted to the fourth defendant. The said oral gift was confirmed by a Notarised Declaration deed dated 28.07.2000. The defendants therefore pleaded that the plaintiffs were not entitled to the reliefs claimed in the suit.

19.The learned counsel for the appellants relied on the following Judgments:

1.***Rasheeda Khatoon Vs. Ashiq Ali*** reported in (2014)



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10 SCC 459;

2.Maimuna Bibi and Another Vs.Rasool Mian and

Others reported in 1990 SCC Online Pat 109 : (1990) 38 (2)

BLJR 1037;

3.Jamila Begum Vs. Shami Mohd. reported in (2019)

2 SCC 727;

4.Maqbool Alam Khan Vs. MST Khodaija and others

reported in (1966) 3 SCR 479 : AIR 1966 SC 1194;

5.Valia Peedikakkandi Katheesa Umma and others

Vs.Pathakkalan Narayanath Kunhamu reported in (1964) 4

SCR 549 : AIR 1964 SC 275;

6.Sultan Miya vs. Ajibakhatoon Bibi reported in

[VOL.LIX.] CALCUTTA SERIES 557.

20.The learned counsel for the respondents relied on the following Judgments:

1.Muhammad Abdul Ghani and others Vs. Fakhr Jahan

Begam and Others reported in AIR 1922 PC 281;



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2.Mohammad Sadiq Ali Khan Vs. Fakhr Jahan Begam and

Others reported in ***AIR 1932 PC 13;***

3.S.V.S. Muhammad Yusuf Rowther And another Vs. Muhammad

Yusuf Rowther And Ors. reported in ***(1957) 7- LW 995;***

4.Valia Peedikakkandi Katheessa Umma and Others reported in

(1964) 4 SCR 549 : AIR 1964 SC 275;

5.Thakkadi Syed Mohamed Vs. Ahmed Fathummal and others

reported in ***1972 SCC Online Mad 55 : (1973) 86 LW 527 : (1972) 2***

Mad LJ 630 : AIR 1973 Mad 302;

6.Union of India Vs. M/s. Chaturbhai M. Patel & co. reported

in ***(1976) 1 SCC 747;***

7.Moosa Sulaiman and 6 others Vs. Abdul Khader Yunus

reported in ***(2002) 3 L.W. 525;***

8.Abdul Rahim and Others Vs. Sk.Abdul Zabar and others

reported in ***(2009) 6 SCC 160;***

9.Hafeeza Bibi and others Vs. Shaikh Farid and others



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reported in *(2011) 5 SCC 654*;

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10.*Khursida Begum Vs. Mohammad Farooq* reported in *(2016)*

4 SCC 549;

11.*Md.Mehmood and others Vs. Nargis Begum and others*

reported in *(2019) SCC Online Cal 1119*.

The said Judgments will be discussed in the course of the discussion.

POINTS FOR DETERMINATION:

POINT NO.1:

21.The learned counsel for the appellants on the strength of the said Judgments filed by him submitted that the essential ingredients of Mohammedan gift are not satisfied in this case and therefore the oral gift set up by the defendants has to be rejected. The learned counsel further submitted that the above said Judgments also supported his case that unless proof of delivery of possession is established, the oral gift cannot be held to be valid. On the aspect of the declaration deed confirming the oral gift the learned counsel submitted that no written instrument is required for an



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oral gift and further submitted that the declaration deed can be taken only as a piece of evidence for making of the gift, but the same by itself cannot form a document of title. The learned counsel for the appellants further submitted that in the present case the defendants had not proved the oral gift and the only witness examined by the defendants to prove the oral gift is DW2, whose evidence is unreliable.

22.The defendants have examined DW2 who is the witness to the oral gift. DW2 in his evidence states that he visited his sister's home at Sunnambukalvai on 15.06.2000 between 11.00 a.m. and 02.00 p.m. and he stayed there in her house for 3 to 4 hours on the day of oral gift. He also stated that Factory Inspector Rahman was there at that time. So according to DW2, the gift was made on 15.06.2000 between 11.00 a.m. and 02.00 p.m. in the presence of Rahman and himself. But strangely DW2 in his evidence further states that his father died on 14.06.2000 and in Ex.A17, the date and time of the death is given as 14.06.2000 at 06.00 p.m. The said fact is also recorded in Ex.A18 and the same is admitted by DW1 in his cross examination. When DW2 father's burial was conducted on 15.06.2000 at 04.00 p.m. it is highly



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improbable that DW2 would have spent 3 to 4 hours i.e. from 11.00 a.m. to 02.00 p.m. in his sister's house i.e. the wife of Kaja Moideen. The trial Court without discussing the facts of the case and by wrongly placing the burden on the plaintiffs has held that the oral gift was proved. One more important aspect which was lost sight by the trial Court was that in the reply notice dated 02.12.2008 marked as Ex.A16, the defendants who had first opportunity to publish the oral gift as also the declaration deed miserably failed to give the details of the witnesses who were present at the time of the oral gift and also the date of declaration deed. These facts coupled with the fact that DW2 was the own brother of the first defendant and the fourth defendant was the son-in-law of DW2 raises serious doubts on the reliability of DW2's evidence. To prove the Hiba D3 examined himself as DW1. DW1 in his cross examination deposed as follows:

என் தந்தை சிறப்பதற்கு ஒரு ஆண்டுக்கு
முன்பாகத்தால் சொத்தை வாய்மொழி தானமாக
கொடுத்தார் என்பதை சொல்லியிருக்கிறேன். இந்த
வாய்மொழி தானத்தை எந்த நேரத்தில் இந்த இடத்தை
வைத்து சொன்னார் என்பதை என் முதல் விசாரணை



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ஆணையிறுதி ஆவணத்தில் குறிப்பிடவில்லை. நான்
சொல்வதுபோல் வாய்மொழி தானம் உண்மையாக
இருந்திருந்தால் இந்த விவரத்தை குறிப்பிட்டிருப்பேன்
என்றும் அவ்வாறு நடக்காததால் தான் அவ்வாறு
சொல்லவில்லை என்றால் தவறு. வாய்மொழி தானம்
என்பது சுண்ணாம்பு கால்வாய் உள்ள வீட்டில் வைத்து
கொடுத்தார்."

The above evidence coupled with the fact that even in the reply notice dated 02.12.2008, the defendants did not give details of the gift and also the date of the declaration deed raises a doubt on the genuineness of the gift.

23.The defendants relied on the declaration deed to support the oral gift. At the outset, it is seen that the declaration deed is not attested by any witness. It is only signed before the Notary Public and no reasons are forth coming as to why DW2 who was closely related to defendants did not attest the declaration deed. No doubt declaration deed does not need registration, but the above is referred to only for the purpose of establishing that the defendants version is highly improbable. The



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defendants relied on the declaration deed and submitted that all the ingredients of valid Hiba are proved in this case.

24. That under the Mohammedan Law to validate an oral gift three essential ingredients viz. declaration of intention of the donor to make a gift; acceptance of the gift express or implied on the part of the donee and delivery of possession have to be proved is settled law.

25. Useful reference in this regard is made to the Judgments in the case of Valia Peedikakkandi Katheessa Umma and others reported in (1964) 4 SCR 549 : AIR 1964 SC 275 and the relevant paragraph is extracted as follows:

5. A gift (Hiba) is the conferring of a right of property in something specific without an exchange (ewaz). The word (Hiba) literally means the donation of a thing from which the donee may derive a benefit. The transfer must be immediate and complete, (tamlik-ul-ain) for the most essential ingredient of Hiba is the declaration "I have given". Since Muhammedan



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law views the law of gifts as a part of the law of contract there must be a tender (ijab) and an acceptance (qabul) and delivery of possession (qabza). There is, however, no consideration and this fact coupled with the necessity to transfer possession immediately distinguishes gifts from sales.

26.In the case of Maqbool Alam Khan Vs. MST Khodaija and others reported in (1966) 3 SCR 479 : AIR 1966 SC 1194 it was held as follows:

“5.....The three pillars of a valid gift under the Mahomedan law are declaration, acceptance and delivery of possession. In Mohammad Abdul Ghani v. Fakhr Jahan Begam Sir John Edge said :

"For a valid gift inter vivos under the Mahomedan law applicable in this case, three conditions are necessary, which, their Lordships consider have been correctly stated thus (a) manifestation of the wish to give



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on the part of the donor; (b) the acceptance of the donee either impliedly or expressly; and (c) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively' (Mahomedan Law, by Syed Ameer Ali, 4th ed. vol. i, p.41)."

6.The Prophet has said : "A gift is not valid without seisin."

The rule of law is :

"Gifts are rendered valid by tender, acceptance and' seisin.-Tender and acceptance are necessary because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts; and seisin is necessary in order to establish a right of property in the gift, because a right of property, according to our doctors, is not established in the thing given merely by means of the contract, without seisin."
[See Hamilton's Hedaya (Grady's Edn), p. 482]"

27.In the case of Rasheeda Khatoon Vs. Ashiq Ali reported in (2014) 10 SCC

459, the Hon'ble Supreme Court observed as follows:



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“11.In Nasib Ali (supra) Suhrawardy, J. referred to Kamar-un-Nissa Bibi v. Hussaini Bibi⁶ and Karam Ilahi¹ and came to hold that the essentials of a gift under the Muhammadan Law are a declaration of “hiba” by the donor, an acceptance, express or implied, of the gift by the donee, and delivery of possession of the property, the subject- matter of the gift, according to its nature. A simple gift can only be made by going through the above formalities and no written instrument is required. In fact no writing is necessary to validate a gift and if a gift is made by a written instrument without delivery of possession, it is invalid, in law.”

28.In the case of Jamila Begum Vs. Shami Mohd., reported in (2019) 2 SCC

727 it is held in paragraph 24 as follows:

“24.In the light of the above principles, let us consider whether the oral gift pleaded by the respondent-plaintiff satisfies the essential conditions of oral gift and in particular, whether possession has been established by respondent No.1-plaintiff. The respondent No.1-plaintiff



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claims through oral gift followed by the Will dated 30.09.1970. As discussed earlier, tenants were in occupation of the suit house. Respondent-plaintiff has not proved as to how at the time of oral gift, the possession was delivered to him. Nothing is brought on record to show that respondent No.1-Shami Mohd. has taken any steps to get the property mutated in his name. Likewise, nothing is brought on record to show that pursuant to the oral gift, the respondent-plaintiff collected rent from the tenants or paid house tax, water tax, etc. The essential conditions to make a valid gift under the Mohammedan law have not been established by the respondent-plaintiff to prove the oral gift in his favour. In the absence of any proof to show that the possession of the suit property was delivered to him, the oral gift relied upon by the respondent-plaintiff ought not to have been accepted by the courts below.”



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29.From the facts, it is to be seen whether the defendants have proved the Hiba by leading evidence on the said three aspects. On the aspect of intention it is seen that it is the specific case of the plaintiffs that they were all very young at the time of their father's death and it was only the defendants as elder members of the family, who were looking after the business of their father and deriving rental income from the suit property.

30.It was the further case of the plaintiffs that their father never intended to disinherit them and it was the defendants, who taking advantage of the plaintiffs young age, created the oral gift with a view to deprive them of their valuable rights in the suit property. It is also the case of the plaintiffs that the defendants have not proved the delivery of possession of the suit property which is one of the essential ingredient of a hiba. On the other hand it is the case of the defendants that their father late Kaja Moideen raised loans for the marriage of the fourth and fifth plaintiffs and the responsibility of discharging the loans was cast on the defendants 3 and 4 and



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therefore it was natural for their father to gift the property to the defendants only.

According to the defendants late Kaja Moideen raised loans for constructing the “Alif Complex” and for the marriage expenses of the 4th and 5th plaintiffs. The said loans were said to have been discharged by the 3rd and 4th defendants. It is to be noted here that absolutely no documentary evidence is filed in support of the said contention. The defendants have not filed an iota of paper to show the amount of loan raised by their father and for discharge of the same by them. Even the oral evidence of DW1 is not satisfactory. DW1 stated as follows:

“அலீப் காம்ப்ளீக்ஸ் என் தகப்பனார் கட்டும்போது வாங்கிய கடனை நானும் 4ம் பிரதிவாதியும் சேர்ந்து கட்டுவதாக தான் சொல்லியுள்ளேன். அதேபோல் யார் யார் எவ்வளவு கடன் வாங்கினார் என்பதை என் முதல் விசாரணை அளையுறுத் ஆவணத்திர் சொல்லவில்லை அதேபோல் யார் யார் எவ்வளவு தொகை திருப்பிச்சொலுத்தினார் என்பதையும் சொல்லவில்லை. அவ்வாறு கடனை திருப்பிச்செலுத்தியதற்கான ஆவணத்தை நான் தாக்கல் செய்யவில்லை.”

31. In the absence of any corroborative evidence in proof of the defendant's



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plea that they discharged the loans of their father, the contention of the defendant that their father intended to give the suit property to them as they discharged his loans raised for constructing the commercial complex and for plaintiffs 4 and 5's marriage expenses is unbelievable.

32.It is seen that though the defendants state that the delivery of possession of the suit property was made over to them at the time of the Hiba, no documents were filed nor any of the tenants were examined to establish that late Kaja Moideen directed the tenants to pay the rents to the defendants pursuant to the oral gift. DW1 in this regard deposed as follows:

"தாவா சொத்தில் இருக்கும் பல கடைகளை நானும் மற்ற சகோதரர்களும் வாடகைக்கு விட்டோம் என்றால் சரிதான். யார் யாருக்கு எந்த எத்தனை கடைகள் வாடகைக்கு விடப்பட்டிருக்கிறது என்பதை என்னால் சொல்ல முடியும். எனக்கு மட்டும் 3 கடைகள் இருந்து 12 ஆயிரம் ரூபாய் வாடகை வருகிறது. 2ம் மற்றும் 4ம் பிரதிவாதிக்கும் மொத்தமாக வாடகை எவ்வளவு வருகிறது என்பது தெரியாது."

33.Though the defendants admitted that there are several tenants in the suit



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property and that they are receiving the rents from them, they have not examined even a single tenant nor a single rent receipt was filed to show that they took delivery of possession of the suit property and that late Kaja Moideen divested himself completely of all ownership and dominion over the suit property. The non examination of the tenants and failure to file the rent receipts is a vital indicator that possession was not delivered.

34. With respect to the mutation the evidence of DW1 is note worthy. DW1 states as follows:

“தாவா சொத்தை பெயர் மாற்றம் செய்வதற்கு எந்த தேதியில் கொடுத்தேன் என்பது எனக்கு நினைவில்லை. பி5ல் 3,12,01 தேதியில் என் சகோதரர் பெயர் மாற்றம் செய்ததாக கண்டுள்ளது. அதாவது வாய்மொழி தானம் கொடுத்த தேதியில் இருந்து சுமார் 1+1/2 வருடகாலம் கழித்து இந்த மனு கொடுக்கப்பட்டுள்ளது என்றால் சரிதான். என் பெயரிலோ அல்லது 4ம் பிரதிவாதி பெயரிலோ சொத்து பெயர் மாற்றம் செய்வதற்கான



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உத்தரவு நான் தாக்கல் செய்யவில்லை என்றால்
சரிதான். நானும் 4ம் பிரதிவாதியும் செப்டம்பர் 2002ல்
பெயர் மாற்றம் செய்வதற்காக விண்ணப்பம்
கொடுத்தோம் என்றால் சரிதான். அதாவது என்
தந்தை வாய்மொழிதானம் கொடுத்த தேதியில் இருந்து
24 மாதங்கள் கழித்து விண்ணப்பம் கொடுத்தோம்
என்றால் சரிதான்."

From the evidence it is clear that even the mutation of revenue records was done long after the oral gift and the Declaration deed.

35. In the light of the above discussions, it is clear that the defendants have failed to prove the essential elements of Hiba and hence the Hiba is invalid in law.

36. We will now refer to the judgments relied by the learned counsel for the respondents. In the judgment in the case of *Muhammad Abdul Ghani and others Vs. Fakhr Jahan Begam and Others* reported in *AIR 1922 PC 281* and the judgment in *Mohammad Sadiq Ali Khan Vs. Fakhr Jahan Begam and Others* reported in *AIR*



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1932 PC 13 it is seen that the facts of the above said cases are completely different from this case and hence not applicable to this case. We have also gone through the Judgment in the case of *S.V.S. Muhammad Yusuf Rowther And another Vs. Muhammad Yusuf Rowther And Ors.* reported in **(1957) 70 LW 995** and we are of the view that in the said Judgment the issue was as regards the burden of proof when there was a specific recital in the gift deed for having delivered the possession. Therefore, this Hon'ble Court invoking Order 41 Rule 25 C.P.C called for a finding on the question of plaintiff's possession. We are of the opinion that the above said judgment does not apply to the facts of the case.

37.The learned counsel for the respondents referred to the Judgment in the case of *Union of India Vs. M/s. Chaturbhai M. Patel & co.* reported in **(1976) 1 SCC 747** in support of his submission that mere suspicion cannot take the place of proof. In our view the said Judgment has no relevance. The learned counsel further referred to the Judgment in the case of *Moosa Sulaiman and 6 others Vs. Abdul Khader Yunus* reported in **(2002) 3 L.W. 525** to show that there was constructive possession. On the



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facts of that case the Court held that the constructive possession was made out and the gift had become conclusive. He further referred to the Judgment in the case of **Abdul**

Rahim and Others Vs. Sk.Abdul Zabbar and others reported in **(2009) 6 SCC 160**.

The said Judgment related to the registered gift deed and the challenge to the same.

The said Judgment is also not applicable to the facts of the present case as the present case deals with the oral gift and an un-registered declaration deed. In the Judgment in the case of **Hafeeza Bibi and others Vs. Shaikh Farid and others** reported in **(2011)**

5 SCC 654, it was stated that under Section 123 and 129 of the Transfer of Property

Act, the deeds contemporaneous with the making of the gift do not need registration

under Section 17 of the Registration Act and that each case would depend on its own

fact. In fact the observation that each case should be decided on its own facts goes

against the defendants. He further referred to the Judgment in the case of **Khursida**

Begum Vs. Mohammad Farooq reported in **(2016) 4 SCC 549 and Md.Mehmood**

and others Vs. Nargis Begum and others reported in **(2019) SCC Online Cal 1119**.

In the said Judgment it was found as a fact that the gift deed therein was a registered

one, that there was no infirmity in the said gift deed and further the requirement of



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possession was also met under the gift deed itself, hence it was held that the genuineness of the gift deed was found to be proved, but in the present case it is held that the Hiba is not proved and therefore the said Judgments have no application. We are therefore of the view that on the facts of the present case the Judgments referred to cannot aid the defendants.

38.In fine, on a conspectus of the evidence on record, we are of the view that the oral gift is not proved in accordance with the principles of Mohammedan law and therefore the same is held to be invalid and issue No.1 is accordingly answered in favour of the appellants.

POINT NO.2:

39.As it is found on the first issue that the oral gift set up by the defendants is invalid, we hold that the plaintiffs 2 to 5 and the defendants 2 to 4 are each entitled to a share in the ratio 1 : 2 in 7/8th Share of the suit property and in the remaining 1/8th share, the 1st plaintiff and the 1st defendant are entitled to 50% share each in plaintiff schedule property. As we have held that the oral gift is invalid, the plaintiffs become



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cosharers in the suit property and hence not entitled to the relief of permanent injunction.

40.The appeal is accordingly allowed and the Judgment and decree dated 19.10.2012 passed by the V Additional District & Sessions Judge, (FTC – 3), Coimbatore made in O.S.No.159 of 2009 is set aside. There shall be no order as to costs.

[S.S.S.R,J.] [N.M.,J.]
12.01.2023

Index : Yes/No
Internet : Yes/No
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To

The V Additional District & Sessions Judge, (FTC – 3),
Coimbatore.



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S.S.SUNDAR,J.

and

N.MALA,J.

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PRE-DELIVERY JUDGMENT

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12.01.2023



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