

Court No. - 1

Case :- MATTERS UNDER ARTICLE 227 No. - 4607 of 2021

Petitioner :- Smt.Rukhsana @ Ruksana

Respondent :- Joginder Mavi

Counsel for Petitioner :- Amit Saxena

Counsel for Respondent :- Harish Chandra

Hon'ble Jayant Banerji,J.

1. Heard Shri Amit Saxena, learned counsel for the petitioner and Shri Rajiv Gupta along with Shri Harish Chandra, learned counsel appearing for the respondent.

2. By means of this petition the order dated 9.4.2021 passed by the Additional District Judge/F.T.C.-II, Ghaziabad has been challenged whereby the Application Paper No. 162C2 filed by the petitioner-defendant under Order 41 Rule 25 read with Section 151 CPC in Civil Appeal No.6 of 2017 (Smt. Rukhsana @ Ruksana Vs. Joginder Mavi) has been rejected.

3. The contention of the learned counsel for the petitioner is that respondent instituted a suit for permanent injunction and eviction of the petitioner from the suit premises on the ground that he had purchased the same from the recorded owner by means of a registered sale-deed dated 15.1.2009. It is stated that in the written statement a categorical statement was made that there was a dispute between the petitioner-defendant and her husband which led to serious altercations and her husband stopped giving her any expenses for her maintenance and they separated on 15.12.2007. It is stated

that an arrangement dated 15.12.2007 was made in the presence of respectable persons of the society in which it was agreed that in lieu of the amount of Mehr (dower-debt) to be paid by her husband to the petitioner, the House No. 63 having an area of 52.67 sq. yards, situated on Khasara No.1784 at village- Behata Hajipur, Rahul Garden, Loni, Ghaziabad, would be in the ownership of the petitioner-defendant and she would have all rights to deal with it.

4. Learned counsel further states that in the written statement it is stated that since the petitioner's husband was not in a position to pay the amount of Mehr of Rs. 10,000/-, therefore, in lieu of Mehr and for the maintenance of six children, the aforesaid house has been given to the petitioner-defendant by her husband. It is stated by the learned counsel for the petitioner that in the suit, the following issues were framed:

“1- क्या वादी प्रश्नगत भवन खसरा सं०-1784 राहुल गार्डन ग्राम बेहटा हाजीपुर, परगना लोनी, तहसील व जिला गाजियाबाद का वास्तविक कब्जा पाने का अधिकारी है?

2- क्या वादी को प्रतिवादी के विरुद्ध वाद कारण प्राप्त है?

3- क्या वादी ने वाद का मूल्यांकन कम किया है?

4- क्या वादी द्वारा अदा किया गया न्यायशुल्क अपर्याप्त है?

5- वादी किस अनुतोष को पाने का अधिकारी है?”

5. It is stated that the suit was decreed pursuant to a judgment and order dated 18.10.2016, the petitioner then instituted Civil Appeal No. 6 of 2017 being aggrieved against the aforesaid judgment and order dated 18.10.2016. The petitioner then moved an application No. 162C2 dated 18.3.2021 under Order 41 Rule 25 CPC read with Section 151 CPC seeking the addition of the following issues:

“1. क्या दिनांक 15.12.2007 को प्रश्नगत भवन खसरा संख्या 1784, राहुल गार्डन, ग्राम बेहटा हाजीपुर, परगना लोनी, तहसील व जिला गाजियाबाद का पूर्ण स्वामित्व प्रतिवादिनी को मेहर की अदायगी के बदले सौंप दिया गया था? यदि हाँ तो उसका प्रभाव।

2. क्या आपसी फैसलानामा दिनांकित 15.12.2007 के निष्पादन के पश्चात प्रतिवादिनी के शौहर मौहम्मद सफीक को प्रश्नगत भवन किसी दीगर व्यक्ति को विक्रय करने का अधिकार नहीं रह गया था? यदि हाँ तो उसका प्रभाव।

3. क्या आपसी फैसलानामा दिनांकित 15.12.2007 के आधार पर प्रतिवाददिनी, प्रश्नगत भवन की तन्हा स्वामिनी है, अथवा प्रश्नगत भवन पर प्रतिवादिनी बतौर प्रथम प्रभार (Charge) अध्यासी है? यदि स्वामिनी है, अथवा अध्यासी है, तो उसका प्रभाव।

4. क्या वादी को वाद योजित किये जाने से पूर्व आपसी फैसलानामा दिनांकित 15.12.2007 की जानकारी रही है? यदि हाँ तो क्या वाद वादी विबन्धन के सिद्धान्त से बाधित है?

5. क्या प्रश्नगत भवन के कथित विक्रेता मौहम्मद सफीक को पक्षकार वाद न बनाये जाने के कारण वाद वादी आवश्यक पक्षकार न बनाये जाने के दोष से ग्रसित है।”

6. It is contended that by means of the impugned order, the aforesaid application No.162C2 has been rejected. The contention is that the appellate court has not applied its mind while rejecting the aforesaid application inasmuch as:-

(i) The issues were not framed by the trial court at the initial stage, which issues ought to have been framed given the specific averments made in the written statement. It is stated that the issues could have been framed even at the appellate stage given the mandate of Order 41 Rule 25.

(ii) It is stated that the house was transferred by an arrangement in the name of the petitioner in lieu of Mehr which is a family settlement and as held by the Supreme Court in the case of **Kale & Others vs Deputy Director Of Consolidation**¹, as affirmed by the judgment of the Supreme

¹ (1976) 3 SCC 119

Court in case of **Ravinder Kaur Grewal and Others Vs. Manjit Kaur and Others**², it would be a memorandum of family settlement which does not effect transfer and, therefore, no registration of the deed is required.

(iii) The written statement itself reflected that apart from the ownership of the suit property being vested with the petitioner, it was also in lieu of the amount of maintenance for the six children of the petitioner. It is, therefore, stated that it could not be said that the transaction effected transfer of the suit property and that it was only in lieu of the amount of Mehr and, therefore, the trial court was not justified in relying upon the Full Bench decision in case of **Ghulam Abbas vs. Mt. Razia Begum and Others**³.

7. Learned counsel for the respondent has strongly opposed the petition and has referred to the decision of the trial court with regard to issue No.1 in which, it is contended, that the issue with regard to the suit property being given to the petitioner in lieu of Mehr was duly considered, and the trial court was justified in relying upon the judgment in the case of **Ghulam Abbas** (supra) while answering the issue No.1 in favour of the respondent. Learned counsel has referred at length to the judgment of the Full Bench of this Court in **Ghulam Abbas** (supra) in support of his contention.

8. I have perused the record of this petition and judgments relied upon by the learned counsel for the parties. Issue No.1 framed by the trial court was whether the plaintiff-respondent is entitled to the actual physical possession of the suit property. While considering the issue, the trial court has

² (2020) 9 SCC 706

³ AIR 1951 ALL 86

delved at length on the documentary evidence filed by the petitioner-defendant, particularly Paper No. 39C, which was a true copy of the compromise dated 15.12.2007. It is stated to have been executed between the petitioner and her husband. It was noted that in lieu of the amount of Mehr of Rs. 10,000/- her husband had given the suit property to the petitioner, in respect of which he would have no concern thereafter. The trial court then considered the judgment of the Full Bench of this Court in **Ghulam Abbas** (supra) and held that the aforesaid unregistered settlement/compromise would confer no legal right on the petitioner. The aforesaid judgment of the trial court is under challenge before the appellate court.

9. In the case of **Ghulam Abbas** (supra), the question before the Full Bench that arose was whether an oral transfer of immovable property worth more than Rs. 100 can be made by a Muslim husband to his wife by way of gift in lieu of dower debt which also exceeds Rs. 100 is a gift (hiba), pure and simple, which could be made orally under the Mahommedan Law, or a combination of such gifts, or a gift for consideration (hiba-bil-ewaz) of the nature contemplated by the Mahommedan Law, which amounts to a "sale" as defined in S. 54, T. P. Act, 1882. If the transfer is a gift of the nature contemplated by the Mahommedan Law, unaffected by the provisions of the Transfer of Property Act, the parties being Muslims, it will be governed by the rules of the Mahommedan Law.

The Full Bench observed as follows:

“13. Admittedly, the transfer in the presents case was made bil-ewaz-den-mehr (in lieu of dower); consequently, it cannot be regarded as a voluntary

gift without consideration, such as has been defined above. It has, however, been argued on behalf of the plaintiff-respondent that the transfer is a combination of gifts, viz., a gift of immoveable property by the husband in favour of his wife and another gift of dower-debt by the wife to the husband, either of which could be made orally.

14. It is, however, not possible to treat the transaction as a combination of gifts. Obviously, it was a single transaction-a transfer of property by the husband in favour of the wife in consideration of the latter relinquishing an ascertained amount-Rs. 2500 to be exact: - out of the amount of dower-debt due to her. As owner of the property, the husband was entitled to transfer, and admittedly transferred, the same to his wife. Such a transfer in whole or in part satisfaction of a debt is recognised by law and is not uncommon. The transfer as well as the liquidation of dower debt to the extent of Rs. 2,500 took place simultaneously in one and the same transaction; the two things were so interconnected that one could not stand without the other. Consequently, the argument that the husband made a gift of property and the wife made a gift of a portion of dower-debt is unsound. The transfer in question is, therefore, not a combination of gifts.

15. Under the Mahomedan Law, writing is not essential to the validity of a gift, either of movable property or of immovable property, which is complete and valid on proof of a declaration of gift by the donor; an acceptance of the gift, express or implied, by or on behalf of the donee, and delivery of possession over the subject of the gift by the donor to the donee; but whether a gift for considerations (hiba-bil-ewaz) can be made orally depends upon the answer to the question whether it does or does not amount to a sale, as defined in S. 54, T. P. Act.

....

....

20. "Sale," as defined in S. 54, T. P. Act, "is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised." It is true that in some cases the word "price" has been interpreted to mean "money;" but in Saiful Bibi v. Abdul Aziz Khan, 1931 A. L. J. 951 : (133 I. C. 901) it has been held that "a transfer of property in lieu of an existing debt in cash would be a transfer for a price so as to bring it within S. 54, T. P. Act." The use of the word "price" instead of "money" in the section signifies that the word is wide enough to include any amount which can be definitely ascertained and worked out in terms of money, such

as outstanding debts. An owner of property may transfer the same in lieu of outstanding debts - and there is no legal bar against his doing so. Although debts are not "money" in the ordinary sense of the term, yet they can be worked out in terms of "money." The dower is a debt - it has been so regarded even under the Mahomedan law; consequently, if the amount of dower is ascertained and the transfer is made in lieu thereof the transfer would be for a price. The transfer in question which is a hiba-bil-ewaz, under the Mahomedan law, having all the legal incidents of a sale, falls within the purview of S. 54, T. P. Act.

21. It follows, therefore, that the transfer in the present case is a hiba-bil-ewaz, a gift for consideration, having all the legal characteristics of a sale; and, inasmuch as the provisions of S. 54, T. P. Act, apply even to a sale transaction between Muslims, the transfer must be deemed to be a sale within the meaning of the said section."

Finally, the Full Bench concluded:

"49. By the Court. - The question referred to the Full Bench is answered as follows: An oral transfer of immovable property worth more than Rs. 100 cannot be validly made by a Muslim husband to his wife by way of gift in lieu of dower-debt which also exceeds Rs. 100. Such a transaction is neither a gift nor a combination of gifts which can be made orally; it is a sale which can be effected by means of a registered instrument only."

10. Learned counsel for the petitioner has based his submissions on a judgment of the Supreme Court in **Ravinder Kaur Grewal** (supra) which has been relied upon in its previous judgment in case of **Kale** (supra). The aspect of a family partition and a memorandum of family settlement was gone into by the Supreme Court, which, in the facts and circumstances of the present petition, this Court restrains from entering into, inasmuch as it would be open for the petitioner to raise the same before the appellate court during his arguments and submissions in support of the appeal filed by the petitioner under Section 96 of the CPC.

11. As far as the impugned order of the appellate court is concerned with regard to the framing of additional issues, a perusal of the same and the observation and consideration of Issue No. 1 made by the trial court in passing the judgment dated 18.10.2016, evince that the matter was argued at length before the trial court and the issues that are sought to be agitated at the appellate stage have themselves being dealt with, in a substantial measure, by the trial court itself.

12. Accordingly, it cannot be said that issues that are sought to be framed by the petitioner would be essential to the right decision of the suit on the merits inasmuch as the relevant arguments can always be advanced by the petitioner through her counsel at the appropriate stage in the appeal.

13. Under the circumstances, no interference is called for in the order impugned and this petition is, therefore, **dismissed**.

14. It is made clear that any observation made herein are only for purpose of adjudication of this petition and shall not be taken by the courts as an expression of opinion of this Court on merits of the case of either of the parties.

Order Date :- 26.10.2023

K.K.Tiwari

(Jayant Banerji, J.)