

Court No. - 5

Case :- SECOND APPEAL No. - 73 of 2024

Appellant :- Nanakana Devi

Respondent :- Kanhaiya Lal And Others

Counsel for Appellant :- Dhananjai Kumar Tripathi,Devendra Verma,Kajol,Tanupriya

Counsel for Respondent :- Anil Kumar Shukla

Hon'ble Rajnish Kumar,J.

1. Heard Shri Dhananjai Kumar Tripathi, learned counsel for the appellant and Shri Anil Kumar Shukla, learned counsel for the respondent no.1.
2. This second appeal has been filed against the judgment and decree dated 30.03.2024 passed by District Judge- Bahraich in Civil Appeal No.06 of 2023 (Mst. Nankana Vs. Kanhaiya Lal and Others) filed by the appellant Nanakana Devi and the judgment and decree date 20.01.2023 passed in Regular Suit No.689 of 1994 (Shiv Prasad Vs. Mst. Nankana and Others) by Additional Civil Judge (J.D.), Court No.1, Bahraich.
3. Learned counsel for the appellant submits that the land in dispute was ancestral property of the father-in-law of the appellant, which was with late Musharraf Hussain and was purchased by the father-in-law of the appellant and given by him and since then the appellant is the owner and in possession of the land in dispute, which is in northern side of the house of the appellant and a door of the appellant is also on the said side. The respondents are claiming on the basis of 'Hibanama' written by Mohd. Musharraf Hussain, whereas it is not mentioned in the written document and registered on the basis which the respondents are claiming the land in dispute but the trial court as well as the appellate court wrongly, illegally and without considering the pleadings, evidence and material on record have

allowed the suit and dismissed the appeal filed by the appellant. Hence the present second appeal has been filed.

4. Per contra, learned counsel for the respondent no.1 submits that the father of the appellant Ram Lakhan was the servant of Mohd. Musharraf Hussain and being pleased with his services Musharraf Hussain had written the 'Hibanama' in favour of him on 07.04.1972 and had also handed over the possession to him and since then the appellant is the owner and in possession of the land in dispute. The son of Musharraf Hussain was witness to the 'Hibanama' and he has also proved the 'Hibanama' before the trial court, therefore the trial court has rightly and in accordance with law allowed the suit for injunction filed by the respondents. The appeal filed by the respondents has rightly and in accordance with law been dismissed. This second appeal is misconceived and liable to be dismissed as no substantial question of law arises in this appeal.

5. Having considered the submissions of learned counsel for the parties, I have perused the documents placed on record of this appeal.

6. The suit for permanent injunction was filed by the predecessor-in-interest of respondent nos.1 to 3, who had been substituted after his death, against the appellant, her husband and the respondent nos.4 to 7 alleging therein that the predecessor-in-interest of the respondent nos.1 to 3 Ram Lakhan was a servant of Musharraf Hussain and served him for a long time. Being pleased with his services, he had made 'Hibanama' dated 07.04.1972 of his Kothar and land appurtenant thereto to him. He also handed over the possession to him and since then he was in possession being the owner of the land in dispute and after his death the respondents have become the owner and they are using the same for various

purposes and their trees of Ber, Sheesam and Babool are on the land in dispute. The appellant is not the owner of the land in dispute.

7. The suit was contested by the appellant by filing a written statement. The appellant set up three cases; first of which was that the land in dispute is her ancestral property, second that it was purchased by her father-in-law from Musharraf Hussain and the third that the father-in-law of the appellant Ram Sundar was Seervar of Musharraf Hussain and in lieu of his salary the Kothar was given by him to her father-in-law about 25 years back. After exchange of pleadings, the trial court framed five issues.

8. The learned trial court after considering the pleadings of the parties, evidence and material placed on records found that the Musharraf Hussain made the 'Hibanama' dated 07.04.1972 in favour of the predecessor-in-interest of the respondents no.1 to 3 with his signatures, which were also proved by the hand writing expert. The son of Musharraf Hussain, who was witness to the 'Hibanama' has also appeared as witness and proved the 'Hibanama' and stated that the 'Hibanama' was made before him. Thus, the trial court found that the respondent nos.1 to 3 proved their possession and ownership on the land in dispute, whereas the appellant though set up three cases but has failed to produce any sale deed as she claimed that the land in dispute was purchased by her father-in-law from Musharraf Hussain or any cogent evidence in support of any case set up by her.

9. Under the Mohamdan law 'Hibanama' i.e. the gift, can be oral and it is not essential that it should be in writing. The three conditions for the validity of the gift under the Mohamdan law are that there should be a declaration of gift by the donor and its acceptance express or implied by or on behalf of the donee, and

delivery of possession of the subject of the gift by the donor to the donee and if all the three conditions are fulfilled then it is a valid gift and since the 'Hibanama' can be oral also, therefore it may not be required to be registered.

10. The Honble Supreme Court, in the case of **Mahboob Sahab Vs. Syed Ismail & Others; (1995) 3 SCC 693**, has held that though a gift by Mohamdan is not required to be in writing and consequently need not be registered under the Registration Act; a gift to be complete, there should be a declaration of the gift by the donor; acceptance of the gift, express or implied, by or on behalf of the donee, and delivery of possession of the property, the subject matter of the gift by the donor to the donee and on fulfilling of these essential conditions the gift becomes complete and valid. The relevant paragraph-5 is extracted here-in-below:-

"5. Under s. 147 of the Principles of Mahomedan Law by Mulla, 19th Ed., Edited by Chief Justice M. Hidayatullah, visages that writing is not essential to the validity of a gift either of movable or of immovable property. Section 148 requires that it is essential to the validity of a gift.

that the donor should divest himself completely of all ownership and dominion over the subject of the gift. Under s. 149, three essentials to the validity of the gift should be, (i) a declaration of gift by the donor, (ii) acceptance of the gift, express or implied, by or on behalf of the donee, and (iii) delivery of possession of the subject of the gift by the donor to the donee as mentioned in s.150. If these conditions are complied with, the gift is complete. Section 150 specifically mentions that for a valid gift there should be delivery of possession of the subject of the gift and taking of possession of the gift by the donee, actually or constructively. Then only gift is complete. Section 152 envisages that where donor is in possession, a gift of immovable property of which the donor is in actual possession is not complete unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession. It would, thus, be clear that though gift by a Mohammadan is not required to be in writing and consequently need not be registered under the Registration Act; a gift to be complete, there should be a declaration of the gift by the donor, acceptance of the gift, expressed or implied, by or on behalf of the donee, and delivery of possession of the property, the subject-matter of the gift by the donor to the donee. The donee should take delivery of the possession of that property either actually or

constructively. On proof of these essential conditions, the gift becomes complete and valid. In case of immovable property in the possession of the donor, he should completely divest himself physically of the subject of the gift. No evidence has been adduced to establish declaration of the gift, acceptance of the gift by or on behalf of the minor or delivery of possession or taking possession or who had accepted the gift actually or constructively. Admittedly he was in possession and enjoyment of the property till it was sold to the appellant. Equally, in Mohammadan Law mother cannot act nor be appointed as property guardian of the minor. She equally cannot act as legal guardian."

11. In the present case the gift dated 07.04.1972 is in writing in which there is a declaration that doner has given his Kothar in Pure Maina and land appurtenant thereto on the western side to Ram Lakhan, predecessor-in-interest of the respondent no.1 to 3 and handed over the possession also to him and he accepted the same and he was in possession and after his death respondent nos.1 to 3 are in possession, thus it indicates that all the three conditions of 'Hibanama' are fulfilled and proved also. Thus the contention of the learned counsel for the appellant that the written document dated 07.02.1972 is not a valid 'Hibanama' is totally misconceived and not tenable in the eyes of law and accordingly repelled.

12. The trial court also found that the appellant appeared as DW-1 and could not tell the area of the Kothar, which she claimed and stated that the Kothar was given to her father-in-law being Seervar. On the other hand she stated that Kothar in dispute is ancestral property of her father-in-law, which had come from his father and has possession on the land in dispute as such on the one hand, the appellant claimed that the land in dispute was purchased by his father-in-law on the other hand she claims that it was given to him and it is her ancestral property, which all are contrary to each other, therefore her evidence is not believable and no material has also been placed on record to prove the claims of the appellant. Thus, the suit filed by the predecessor-in-interest of the respondent nos.1 to 3

was decreed by means of the judgment and decree dated 20.01.2023.

13. Being aggrieved by the judgment and decree passed by the trial court, the civil appeal was filed by the appellant, which has also been dismissed by the appellate court after considering the pleadings, evidence and material on records confirming the judgment and decree dated 20.01.2023 passed by the trial court by means of the judgment and decree dated 30.03.2024 passed by the appellate court.

14. This Court, after considering the judgments and decrees passed by the trial court and first appellate court and material placed on record, does not find any illegality, error or perversity in the impugned judgment and decrees, which have been passed by reasoned and speaking orders considering the pleadings, evidence and material on record. It is settled law that the concurrent findings recorded by the trial court and the first appellate court can not be interfered in second appeal unless the findings are totally illegal and perverse.

15. The Hon'ble Supreme Court, in the case of **Kapil Kumar Vs. Raj Kumar; (2022) 10 SCC 281**, has held that unless the concurrent findings recorded by the courts below were found to be perverse, the same were not required to be interfered with by the High Court in exercise of powers under Section 100 C.P.C.

16. In view of above and considering the over all facts and circumstances of the case, this Court is of the view that no substantial question of law arises in this appeal. The appeal is misconceived and lacks merit. It is liable to be dismissed.

17. The second appeal is, accordingly, **dismissed**.

(Rajnish Kumar, J.)

Order Date :- 24.5.2024

Haseen U.