

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

WEDNESDAY, THE 7TH DAY OF JANUARY 2015/17TH POUSHA, 1936

RSA.No. 68 of 2007

A.S.NO.17/2004 OF PRINCIPAL SUBORDINATE COURT, THIRUVANANTHAPURAM

O.S.NO.2047/1998 OF PRINCIPAL MUNSIF COURT, THIRUVANANTHAPURAM

APPELLANT(S)/APPELLANTS/DEFENDANTS :

- * 1. MOHAMMED KASIM, S/O.MOHAMMED KANNU,
AGED 83 YEARS, T.C.22/629, KAVUVILAKATHU VEEDU,
(K.V.HOUSE), KANJIPURA LANE, MANACAUD VILLAGE,
THIRUVANANTHAPURAM.(DIED)
- * 1ST APPELLANT DIED AND APPELLANTS 2 & 3 AND 1ST RESPONDENT ARE
RECORDED AS THE LEGAL REPRESENTATIVES OF DECEASED 1ST APPELLANT AS
PER ORDER DATED 30.07.2008 IN I.A.NO.1615/08.

- 2. PEERUMUHAMMED, S/O.MOHAMMED KASIM,
RESIDING AT DO. DO.
- 3. NAZEER, S/O.MOHAMMED KASIM,
RESIDING AT DO. DO.
- 4. SHAHUBAN BEEVI @ SHAHUBANTH,
AGED 35 YEARS, D/O.MOHAMED IBRAHIM, M.T.HOUSE,
AMBALATHUMoola, CHOVARA P.O, KOTTUKAL,
NEYYATTINKARA TALUK.
- 5. MOHAMMED ISMAIL, S/O.MOHAMED IBRAHIM,
RESIDING AT DO. DO.

BY SRI.N.NANDAKUMARA MENON (SENIOR ADVOCATE)
ADV. SRI.P.K.MANOJKUMAR

RESPONDENT(S)/RESPONDENTS/PLAINTIFFS :

- 1. SEENATH, D/O.SOU DA BEEVI,
AGED 42 YEARS, RESIDING AT T.C.22/629,
KAVUVILAKATHU VEEDU (K.V.HOUSE), KANJIPURA LANE,
MANACAUDU VILLAGE, THIRUVANANTHAPURAM.
- 2. SHIBIN, D/O.NAZIRUDEEN,
AGED 17 YEARS, RESIDING AT DO.

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**3. SUMIYA, D/O.SEENATH, AGED 15 YEARS,
RESIDING AT DO. DO.**

**** ADDITIONAL R4 IMPEADED**

**4. NABEESA BEEVI.S,
M.A.MANDIRAM, PERUMA THURA P.O.,
THIRUVANANTHAPURAM.**

**** ADDITIONAL 4TH RESPONDENT IS IMPEADED AS ONE OF THE LEGAL
REPRESENTATIVES OF THE DECEASED 1ST APPELLANT AS PER ORDER
DATED 30.07.2008 IN I.A.NO.1614 OF 2008**

R1 TO R3 BY ADV. SMT.K.KUSUMAM

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 24-11-2014, THE COURT ON 07-01-2015 DELIVERED THE FOLLOWING:**

Msd.

A.V.RAMAKRISHNA PILLAI, J

RSA No.68 of 2007

Dated this the 7th day of January, 2014

JUDGMENT

The defendants are in appeal.

2. The suit was laid by the respondents for a declaration that Ext.A12 document executed by the first defendant, the father of the first respondent, cancelling Ext.A1 gift deed and Ext.A13 sale deed executed by the first defendant in favour of defendants 2 to 4 are null and void as well as for a decree of mandatory injunction directing defendants 1 to 5 to vacate the plaint schedule building and of prohibitory injunction restraining defendants 1 to 5 from interfering with the peaceful possession and enjoyment of the property by the first plaintiff.

3. The plaintiffs allege that the plaint schedule property originally belonged to the first defendant and his brother Bather as per Ext.P2 partition deed dated 25.5.1989 and the first defendant, after having obtained absolute possession and title over the plaint

schedule property, executed Ext.A1 gift deed dated 25.5.1989 in favour of the first plaintiff and on the basis of the said gift deed, the first plaintiff had obtained title and possession over the plaint schedule property and that the first plaintiff has been enjoying the plaint schedule property absolutely. They further allege that defendants 2 and 3, who are her brothers, interfered with her possession and on 26.9.1998, the first defendant executed Ext.A12 deed cancelling Ext.A1 gift deed and thereafter he executed Ext.A13 sale deed in favour of defendants 2 and 3. According to the plaintiffs, the first defendant had no right to cancel Ext.A1 gift deed since the gift deed has been accepted by the first defendant and the same has become complete. They further allege that the first defendant had no legal right to execute Ext.A13 sale deed covering the suit property in favour of defendants 2 and 3.

4. Defendants 1 to 5, who resisted the suit, contended that defendants 1 to 4 are residing in the

building situated in the suit property. According to them, Ext.A1 gift deed was executed by the first defendant in favour of the first plaintiff only for avoiding a crisis during the marriage of the first plaintiff. According to them, the gift deed had never come into effect and that the gift is not complete as per the provisions of the Mohammedan law. It was contended by the defendants that the physical possession in the plaint schedule property was never transferred to the first plaintiff and the first plaintiff went to the residence of her husband at Navaikulam after her marriage and occasionally she used to reside with the first defendant in the plaint schedule building. It was further contended that the first respondent took away the documents relating to the plaint schedule property from the building situated in the plaint schedule without the knowledge of anybody and they asserted that the gift deed has never come into force.

5. In the written statement, the defendants have

incorporated a counter claim for permanent prohibitory injunction against the plaintiffs from disturbing the possession and enjoyment of the defendants of the plaint schedule property. The plaintiffs have filed a written statement to the said counter claim.

6. The trial court, after raising proper issues for trial, permitted both sides to adduce their evidence and at the trial PW1 and DW1 were examined. Exts.A1 to A13 and B1 to B4 were marked. The trial court, after considering the evidence, granted a decree as prayed for. The defendants, who are the appellants herein, took the matter in appeal before the lower appellate court. However, without success. It is with this background, the present appeal has been preferred.

7. The material question to be considered in this appeal is whether Ext.A1 gift deed has come into force on a valid acceptance. The parties being Muslims are governed by the Mahomedan law. A gift

or '*hiba*' which literally means 'giving away of such a thing from which the person in whose favour the gift deed is made may draw benefit'. '*Hiba*' has been defined in *Kanz al Daqui* in the following words: "*Hiba* is the making of another person owner of the corpus of property without taking its consideration from him". Therefore, gift is the transfer of movable or immovable property with immediate effect and without consideration by one person called the donor to another person called the donee and the acceptance of the same by one himself or by some one authorised on his behalf, provided that the person making the gift must totally renounce all his title and rights in the property gifted away of his independent free will." Every Mahomedan of sound mind and not a minor may dispose of his property by gift. The donee must be a person in existence. A Mahomedan gift as distinguished from a Will may be made of the whole of the donor's property and it may be made even to a heir. Here, there is no allegation

that the donor was not having a sound mind. The donee was a person in existence. Though writing is not essential to validate the gift, here, the gift was on the basis of Ext.A1 deed.

8. The three essentials of a Mahomedan gift are as follows:

- 1) a declaration of gift by the donor
- 2) an acceptance of the gift, express or implied, by or on behalf of the donee
- 3) delivery of possession of the subject of the gift by the donor to the donee. If these conditions are complied with, the gift is complete. Therefore, the three essential requisites for a valid gift are (1) the offer of the gift (2) acceptance there of and (3) delivery of possession. It is settled law that the taking of possession of the subject matter of the gift by the donee either actually or constructively is necessary to complete a gift. It is also settled law that the registration of a deed does not cure the want of delivery of possession. If it is proved by oral

evidence that a gift was completed as required by law, it is immaterial that the donor has also executed a deed of gift. A declaration in a deed of gift that possession has been given binds the heirs of the donor. Where a donor is in possession of the immovable property gifted, physical possession would be complete only when the donor physically departs from the premises with all his goods and chattels and the donee formally enters into possession. However, no physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such cases, the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. Here, the subject matter of the gift is the property where the donor and donee were residing.

9. Therefore, the material question is whether

there is any evidence to show that the gift has been completed by some overt act on the part of the donor indicating a clear intention. In the instant case, all the documents including the original of Ext.A1 are in possession of the plaintiffs. Though the defendants have taken up a contention that these documents have been stolen away by the plaintiffs, they could not substantiate the same. Ext.A1 was cancelled after a gap of 8 years, i.e. on 16.9.1998. The reason shown in Ext.A12 cancellation deed is that the first plaintiff was not looking after the first defendant properly and she was not showing any affection towards him. It is further stated in Ext.A12 that the first plaintiff has other properties purchased by her and the first defendant had no other property for his livelihood. Therefore, he cancelled the gift deed. These recitals lead the courts below to the conclusion that the first defendant was earnest in executing a gift deed in favour of the first plaintiff.

10. Though it was strenuously contended by the

defendants that Ext.A1 was executed in lieu of dowry and hit by the provisions of Dowry Prohibition Act, it cannot succeed as there is no whisper in Ext.A1 to that effect.

11. On a careful analysis of the entire materials now placed on record, this Court is of the definite view that both the courts below have appreciated the evidence in the correct perspective and have arrived at the correct conclusion which does not call for an interference by this Court in second appeal.

In the result, the appeal fails and accordingly dismissed.

sd/-A.V.RAMAKRISHNA PILLAI
JUDGE

css/

true copy

P.S.TO JUDGE