THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

C.C.C.A.No.60 of 1993

ORDER:

This appeal is preferred against the judgment and decree dt.26-04-1993 in O.S.No.735 of 1985 of the Additional Chief Judge-cum-Principal Special Judge for SPE & ACB Cases, City Civil Court, Hyderabad.

2. The appellant herein is the plaintiff in the suit. He filed the said suit for partition of the plaint schedule properties and for possession of 10/21 share therein and for costs.

3. The plaintiff, defendant Nos.1 and 2, Mirza Sultanuddin Khan, Mirza Salahuddin Khan, Mirza Takiuddin Khan, Mirza Moinuddin Khan, Smt.Basheer Sultana, Smt.Sakeena Sultana, Smt.Ifath Sultana and Smt.Hameeda Sultana are the children of Mirza Nasrullah Khan who died on 08-09-1968.

4. The plaint schedule consists of two items. A schedule is an extent of Ac.6.25 gts in Sy. Nos.10, 11, 14/1 and 14/2, Saidabad Colony, Hyderabad within the boundaries specified therein. B schedule property is a house bearing No.16-1-18 with a compound consisting of 1400 square yards situated in Saidabad Colony, Hyderabad, and is situated adjacent to A schedule property.

5. Mirza Sultanuddin Khan died in 1979. It is also an admitted fact that Mirza Salahuddin Khan and Smt.Basheer Sultana migrated to Pakistan and that Smt.Ifath Sultana died.

6. Pending suit, the 1st defendant died leaving behind defendant Nos.15 and 16, who claimed to be his son and wife.

They were impleaded as legal representatives of the deceased 1st defendant in the suit.

THE PLAINT

7. Alleging that the plaint schedule properties are the *matruka* property of Nasrullah Khan and contending that defendant Nos.1, 2 and 3 to 11 are other sharers in the suit schedule property, the plaintiff filed the above suit. He contended that the 1st defendant was the elder brother of the family and was living in the

B schedule property; that he was unmarried and issueless; and that 1st defendant was wrongly claiming that the plaint schedule properties belong to him exclusively on the basis of a gift to him by Nasrullah Khan. He disputed that 1st defendant is the absolute owner of the plaint schedule property and filed the suit.

THE WRITTEN STATEMENT OF 1ST DEFENDANT

8. During his lifetime, the 1st defendant filed a Written Statement disputing the plaint averments. He pleaded that he had got married and had son and the allegation that he was unmarried was false. He asserted that the plaint schedule properties were gifted to him. He denied that plaintiff or the other children of Nasrullah Khan and are entitled to any share therein. He claimed that the plaint schedule properties exclusively belonged to him since 1960 and contended that when Nasrullah Khan was alive and in a sound mind with proper sense, he (Nasrullah Khan) had gifted the entire plaint schedule property by way of oral gift followed by a written acknowledgment with gift exclusively in his favour. He contended that since then, he (the

1st defendant) had been in exclusive possession and enjoyment of the plaint schedule property. He alleged that plaint schedule properties are his absolute property and that he was paying taxes for them as well as land revenue for the open land. He also pleaded that the suit, not having been filed within 12 years from the date of death of Nasrullah Khan, was barred by limitation and contended that there is no question of joint ownership or common tenancy. He asserted that since he is in possession of the gifted property in his own right, the principle of ouster of the other defendants inclusive of the plaintiff, has to be applied. He also pleaded that in the declaration filed under Section 6 (1) of the Urban Land (Ceiling and Regulation) Act, 1976 by him before the Competent Authority under the Act, the latter had given a finding in an order passed in June 1982 his favour and accepted that the plaint schedule properties were gifted to him and are his exclusive properties.

WRITTEN STATEMENT OF DEFENDANTS 15 AND 16

9. After the 1st defendant died, defendant Nos.15 and 16 who were brought on record as his legal representatives, filed another written statement adopting the written statement of the 1st defendant. They took an additional plea that since the plaintiff is seeking partition, he ought to have impleaded Smt.Basheer Sultana and Mirza Sultanuddin Khan, who are children of Nasrullah Khan who had migrated to Pakistan, since they are necessary parties. They alleged that all the heirs of the Nasrullah Khan should be present in the Court for effective adjudication of the suit for partition and so the suit should be dismissed for non-joinder of necessary parties.

ISSUES

10. On the basis of the above pleadings, the following issues and additional issues were framed:

> *"1. Whether the suit property was gifted to the 1st defendant by the father during his life time?*
>
> *2. Whether the suit claim is within time?*
>
> *3. To what relief?*
>
> *The following additional items are framed:*

1. *Whether the suit is a bad for non-joinder for necessary parties?*
2. *Whether the Court fee paid is correct?"*

11. The plaintiff examined himself as P.W.1 and marked Exs.A-1 to A-5. The defendants examined D.Ws.1 and 2 and marked Exs.B-1 to B-66. Exs.X-1 to X-4 were also marked.

THE JUDGMENT OF THE TRIAL COURT

12. By judgment dt.26-04-1993, the Court below dismissed the suit. It held that Nasrullah Khan, the father of 1st defendant, had executed Ex.B-12 gift deed dt. 16.10.1961 confirming the oral gift deed dt.07-11-1960 of the plaint schedule properties, that the said gift was accepted by 1st defendant and it was followed by delivery of possession. It further held that 1st defendant was enjoying the property exclusively and openly and his brothers never objected for the same and therefore, he even perfected his right by adverse possession. It held that the plaintiff did not exercise any right over the suit schedule property at any point of time and that Exs.X-1 and X-2 documents marked through D.W.2 prove that Nasrullah Khan never intended to convey any property to the plaintiff since the plaintiff was giving him trouble. It

further held that defendant Nos.15 and 16 are the legal heirs of the deceased 1st defendant and defendant Nos.15 was the son and defendant Nos.16 was the wife of the deceased 1st defendant. It held that the question of non-joinder of the other children of Nasrullah Khan who migrated the Pakistan would not arise since there is no question of joint possession, once the gift of the property by Nasrullah Khan to the 1st defendant, was upheld.

THE APPEAL IN THIS COURT

13. Challenging the same, this appeal is filed by the plaintiff.

14. Pending appeal, the plaintiff died and his legal representatives were brought on record as appellant Nos.2 to 7. One of the legal representatives of the appellant i.e. the third appellant also died and his legal representatives were impleaded as appellant Nos.8 to 13 in the appeal.

THE INTERIM ORDER PENDING APPEAL

15. Pending appeal, the appellant/plaintiff filed CMP.No.13834 of 1993 seeking an interim injunction pending appeal restraining the respondents/defendants from alienating the suit schedule property which is subject matter of O.S.No.735 of 1989 and also not to interfere with the plaintiffs' peaceful possession of the main building and the land in the schedule property. On 17.09.1993 there was an interim order granted in the said application.

16. Defendant nos.15 and 16 filed CMP.No.14687 of 1993 to vacate the said order.

17. On 30.09.1993, after hearing both the applications, this Court vacated the interim injunction granted on 17.09.1993, but directed that pending disposal of the appeal the Main building bearing Municipal No.16-1-18 situated at Saidabad shall not be alienated or demolished without the permission of this Court.

OTHER EVENTS PENDING APPEAL

18. Pending appeal, the respondent no.17 purchased from the defendant no.15 under a registered sale deed dt.05.06.2004 premises bearing No.16-1-18 [dwelling unit No.V] which forms part of the plaint schedule property. This was preceded by an agreement of sale on 06.08.1995.

19. Basing on this document, the respondent no.17 filed CCCAMP.No.134 of 2011 to implead him as a respondent in the appeal. It was allowed on 14.11.2014 and he was impleaded as respondent no.17 in the appeal.

20. Initially on 24.02.1997, this appeal was allowed by a learned Judge of this Court and the matter was again remitted back to the trial court to decide an additional issue "*whether the plaintiff proved that the suit property is 'Matruka' property*?".

21. This was challenged in LPA.No.97 of 1997 before a Division Bench of this Court by respondent nos.1 and 2 in this appeal, i.e., defendant nos.15 and 16.

22. By judgment and decree dt.12.12.2000, the said LPA was allowed; the judgment of the learned single Judge dt.24.02.1997 was set aside; and the case was remitted back to the single Judge to hear the appeal on merits observing that all questions raised before the trial court are left open subject to the findings of

the learned single Judge.

23. Heard Sri A. Satya Prasad, Senior Counsel for Ms.Pratyusha Appari, counsel for appellants, Sri T. Srikanth Reddy for respondent nos.1 and 2/defendant nos.15 and 16 and Sri N.Subba Reddy , Counsel for 17th respondent. The 3rd respondent in the appeal/1st defendant in the suit died, pending suit. Respondent nos.4 to 16 are shown as not necessary parties in the appeal.

THE CONTENTIONS OF COUNSEL FOR APPELLANT/PLAINTIFF

24. Sri A. Satya Prasad, counsel for appellant/plaintiff contended that the gift allegedly made by Nasrullah Khan in favour of 1st defendant evidenced by Ex.B.12 is not valid. According to him, Ex.B.12, being the acknowledgment of oral gift by Nasrullah Khan in favour of 1st defendant, is not witnessed by any person and DW.1, who was examined by defendant nos.15 and 16, was not a witness to it. He contended that according to Mohammedan Law, for a gift/Hiba to be valid there has to be a declaration of the gift in public and since in the present case, there is neither a public declaration nor declaration in the presence of witnesses, the gift of Nasrullah Khan to 1st defendant is not valid. He therefore contended that the plaint schedule properties continue to be the Matruka property of 1st defendant and they are liable for partition. In this regard he relied upon the decision in **Hafeeza Bibi and others v. Shaikh Farid (Dead) by LRS and others**. He further contended that the donor has to divest himself of the property and vacate it and since, even after the alleged gift, Nasrullah Khan continued to reside in

the suit schedule property, he had not so divested himself of the property on this count also the alleged gift is not valid. He contended that there must be some overt act by donor other than mere signature on the gift deed by the donor and there were no such overt acts. He relied upon the decision in **Hafeeza Bibi** (1 supra), **Ratan Lal Bora and others v. Mohd. Nabiuddin**, **Jamil Ahmad and others v. V Addl. Distt. Judge, Moradabad and others**, and **Mir Taher Ali Khan v. Chairman, Housing Board through Competent Authority and Others** in support of his submissions. He also contended that in order to seek partition of the *Matruka* property of Nasrullah Khan there is no necessity to implead all the family members including the two children of Nasrullah Khan, who had migrated to Pakistan. He relied on the decision in **Sewa Ram and others v. Union of India and others** in this regard. He further contended that defendant nos.15 and 16 are not the wife and son of 1st defendant and that 1st defendant was a bachelor and was unmarried. He lastly contended that the sale in favour of 17th respondent is contrary to the order dt.30.09.1993 in CMP.No.13834 of 1993 and CMP.No.14687 of 1993 passed by this Court, since the property bearing Municipal No.16-1-18 was directed not to be alienated without the permission of the Court, but in violation of the said order, it was alienated to 17th respondent by Defendant no.15. He therefore contended that 17th respondent had no *locus* to contest the appeal and that the sale in his favour is liable to be ignored as null and avoid.

CONTENTIONS OF COUNSEL FOR 17TH RESPONDENT

25. Sri N. Subba Reddy, counsel for 17th respondent, refuted the above contentions and stated that the gift by Nasrullah Khan to 1st defendant was valid and in accordance with Mohammedan Law. According to him, no public declaration is necessary and it is sufficient if it is reduced into writing which itself indicates the declaration by the donor Nasrullah Khan and the acceptance by the donee, the 1st defendant. He also stated that it is not necessary for the donor to leave/vacate the gifted premises and even if Nasrullah Khan resided in the house along with the 1st defendant after the gift was made, as long as the control of the property was with 1st defendant and not with Nasrullah Khan, the gift would be valid. He relied upon the decisions in **Rasheeda Khatoon (dead) through Legal Representatives v. Ashiq Ali** and **Hafeeza Bibi** (1 supra), apart from *Commentary on Mohammedan Law (20th Edition)*. He also contended that 1st defendant had filed a declaration before the Urban Land Ceiling Authority declaring the gift in his favour by 1st defendant and the Special Officer acting under Section 8 (4) of the Urban Land (Ceiling and Regulation) Act, 1976 had passed Ex.B.66 order on 23.06.1982 accepting the gift, and that the said decision is binding on the plaintiff and he cannot question it. He also contended that the evidence on record amply establishes that defendant nos.15 and 16 are the son and wife of 1st defendant and it is not open to plaintiff to dispute the same. He contended that even assuming for the sake of argument without conceding that the gift was invalid, since all the children of Nasrullah Khan, who would have a share in his *Matruka* property, are not impleaded in the suit by the plaintiff, the suit should be dismissed

on ground of non-joinder of necessary party. He relied on the decisions in **Nalla Venkateshwarlu v. Porise Pullamma and another** and **Kanakarathanammal v. V.S. Loganatha Mudaliar and another** in this regard. He also contended that what was prohibited to be alienated in the order dt.30.09.1993 in CMP.No.13834 of 1993 and CMP.No.14687 of 1993 was the *Main building* with Municipal No.16-1-18, but what was purchased by 17th respondent was not the Main building, but it was *dwelling unit No.V* ,which also has the same Municipal number, and therefore, it cannot be said that the sale in 17th respondent's favour is void and liable to be ignored and that he had no *locus* to contest the appeal.

26. Smt. Hemalatha, counsel appearing for Sri T. Srikanth Reddy, adopted the submissions of Sri N. Subba Reddy, and supported the judgment of the Court below.

THE POINTS FOR CONSIDERATION:

27. In view of the above submissions of the learned counsel of the parties, the following points for consideration arise in this appeal:

ab. Whether the alleged gift of the plaint schedule property by Nasrullah Khan in favour of the 1st defendant is true, valid and binding on the plaintiff?

a. Whether the defendant Nos.15 and 16 are the son and wife of 1st defendant?

b. Whether the sale in favour of respondent No.17 by the 15th defendant of a portion of the plaint schedule property is in violation of the interim order passed by this Court in the appeal?

c. Whether the non-joinder of Salahuddin and Smt. Basheer Sultana, who had migrated to Pakistan, is fatal to the suit?

d. To what relief?

Point (a)

28. From the pleadings of the appellant/plaintiff in the plaint it is clear that the plaintiff asserts that the plaint schedule property is the “Matruka” property of late Nasrullah Khan. He asserts that himself and defendant Nos.1 to 11 are the sharers and tenants-in-common of this property left by Nasrullah Khan, their father.

29. The 1st defendant and defendant Nos.15 and 16 however allege that late Nasrullah Khan had gifted the plaint schedule property on 07-11-1960 under an oral gift to the 1st defendant and that on 16-10-1961 this was reduced into writing (Ex.B-12).

30. According to the recitals in Ex.B-12 dt.16-10-1961, the gift of the plaint schedule properties had been made on 07-11-1960 by Nasrulla Khan in favour of his son, the 1st defendant. The said document further recites that the donor had already given physical possession of the property to the donee and the donee was in actual possession and enjoyment of the same since 07-11-1960 when it was gifted to the donee orally. It also recites that since the date of the oral gift, the donee had been paying municipal taxes, water taxes and enjoying possession. It also contains a specific recital that it was executed to show the past

transaction of oral gift of the properties in favour of the 1st defendant.

31. Before I consider the contentions of the parties, I will refer to some of the fundamental principles of Mohammedan Law.

32. In **Jamil Ahmad** (3 supra), the Supreme Court held that the property (both moveable as well as immoveable) left by a deceased Muslim is called "Matruka".

33. According to Mulla's Principles of Mohammedan Law (20th edition) (for short 'Mulla'), which is the accepted authority in India on the subject of Mohammedan Law, there is no distinction in Mohammedan Law of inheritance between moveable and immoveable property or between ancestral and self-acquired property (para 51).

34. It is also settled law that the heirs of a deceased Mohammedan who died intestate would succeed to the estate as tenants-in-common in specific shares and there is no joint tenancy (**Mahomedally Tyebally Vs. Safia Bai)**. Therefore a heir can claim partition in respect of one of the properties held in common without seeking partition of all the properties.

35. In Mohammedan law, a gift or a Hiba is "a transfer of property, made immediately, and without any exchange," by one person to another, and accepted by or on behalf of the latter (para-138 of Mulla). Every Mohammedan of sound mind and not a minor may dispose of his property by gift (para-139 of Mulla). Also, a gift as distinguished from a Will, may be made of the whole of the donor's property, and it may be made even to an heir (para-142 of Mulla). Writing is not essential to the validity of a

gift either of moveable or immoveable property (para-147 of Mulla). It is essential to the validity of the gift that the donor should divest himself completely of all ownership and dominion over the subject of the gift (para-148 of Mulla). It is essential to the validity of a gift that there should be (i) a declaration of gift by the donor, (ii) an 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 (para-149 of Mulla). A gift of immoveable 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 (para-152 (1) of Mulla). But no physical departure or formal entry is necessary in the case of a gift of immoveable property in which the donor and the donee are both residing at the time of the gift. In such a case, 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 (para-152(3) of Mulla).

36. The essentials of a gift/ Hiba under Mohammedan Law have been considered in several decisions by the Supreme Court of India some of which are discussed below.

37. In **Mahboob Sahab Vs. Syed Ismail and others**, two sons of a Mohammedan filed a suit impleading their parents and a purchaser from them, for possession of the suit land and for mesne profits from the purchaser. They claimed that there was a gift deed executed by their father in their favor and an oral gift by their mother in favour of one of the sons; and since they were minors, their father, who was cultivating the lands on their behalf,

colluded with the Patwari and sold the land to the appellant/purchaser. They contended that their father had no right, title or interest to alienate the lands and that the sales in favour of the appellant were invalid, inoperative and did not bind them. The appellant denied that there was any gift in favour of the plaintiffs. The trial Court held that the gift deed allegedly executed by the father in their favour was not filed, and that the oral gift from their mother was also false as neither acceptance of the gift nor delivery of possession of the lands either by the father or the mother, was proved. It held that there was no proof that the father or any one had acted as guardian when the mother gifted her undivided share to one of the sons and there was no proof of taking possession from her under the oral gift. The High Court reversed the said judgment on a different ground in Second Appeal. The Supreme Court, after referring to the above paragraphs/passages in Mulla, held that there was no evidence to establish the 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. It held that the sons were minors at the time of the alleged gifts; no guardian had been appointed for their property under the provisions of the Guardians and Wards Act, 1890; their father was not shown to have acted as their legal guardian; and the mother cannot act or be appointed as property guardian of a minor under Mohammedan Law. It therefore set aside the judgment of the High Court holding that the father was in possession and enjoyment of the property till it was sold to the appellant and had not physically departed from the premises and therefore the alienation was valid. In this context the Court observed:

> *"5. Under Section 147 of the Principles of Mahomedan Law by Mulla, 19th Edn., edited by Chief Justice M. Hidayatullah, envisages that writing is not essential to the validity of a gift either of moveable 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 Section 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 Section 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 the gift is complete. Section 152 envisages that where the 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 Mohammedan is not required to be in writing and consequently need not be registered under the Registration Act; for 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 Mohammedan law mother cannot act nor be appointed as property guardian of the minor. Equally, she cannot act as legal guardian."(emphasis supplied)*

38. This judgment was followed in **Hafeeza Bibi** (1 supra). In this case, a gift of immoveable property was made by one Shaik

Dawood by a written deed dt.05-02-1968 in favour of his son Mohammed Yakub in respect of the properties in A & B schedules. The gift deed recited that it was based on love and affection for the son as after the death of the donor's wife, he had been looking after and helping him. The Court held that the acceptance of the gift by the son was evidenced since he signed the gift deed and was also residing in the B schedule property consisting of a house and a kitchen room appurtenant thereto and thus was in physical possession of the residential house with the donor. It held that the gift deed dt.05-02-1968 is itself a form of declaration by the donor and all the three essential requisites of a valid gift under Mohammedan Law are satisfied and the gift became complete and irrevocable. The Court held that merely because a gift is reduced to writing by a Mohammedan instead of it having been made orally, such writing does not become a formal document or instrument of gift. It held that when a gift could be made by a Mohammedan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammedan Law is that three essential requisites must be fulfilled. The form of immaterial. If all the three essential requisites are satisfied constituting a valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. It was pointed out that if a written deed of gift recites the factum of prior gift, then such deed is not required to be registered and even when the writing is contemporaneous with the making of the gift, it need not be registered in all cases. In this view of the matter Ex.B-12 does not require registration since it contains a recital of a prior oral gift.

39. In **Rasheeda Khatoon** (6 supra) the Court considered para-152 (3) of Mulla's Commentary on Mohammedan Law which states:

> *"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 gift. In such a case the gift may be completed <u>by some overt act</u> 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."*

The Court held, referring to commentary in "Muslim Law" by Tyabji, that a person is said to be in possession of a thing or of a immovable property, when he is so placed with reference to it that he can exercise exclusive control over it for the purpose of deriving from it such benefit as it is capable of rendering, or as is usually derived from it. It held that possession can be shown not only by enjoyment of the land or premises in question but also by asserting who has the actual control over the property.

40. Although Sri A.Satya Prasad, Senior Counsel, appearing for the appellants, sought to contend that a valid gift under Mohammedan Law is required to be witnessed by third parties and that there should be a public statement/declaration of the gift and relied upon the decision of learned Single Judges of this Court in **Ratanlal Bora and others** (2 supra) and **Mir Taher Ali Khan** (4 supra), the said view cannot be accepted since the Supreme Court of India in **Mahboob Sahab** (10 supra), **Hafeeza Bibi** (1 supra) or **Rasheeda Khatoon** (6 supra), having considered several decisions of the High Courts, has not held that a gift is required to be witnessed by third parties and that there should be a public statement/declaration of the gift. Therefore the said decisions of this Court, being not in conformity with the above decisions of the Supreme Court, cannot be said to be good law.

41. Coming to the present case, in the written statement filed by the 1st defendant, he had specifically pleaded that there was a gift in his favour by his father Nasrullah Khan orally which was followed by a written acknowledgment of the same. Ex.B-12 is signed by both the 1st defendant and his father Nasrullah Khan and it mentions the circumstances of the gift of the plaint schedule property in favour of 1st defendant, it records the acceptance of the gift by the donee and the fact that he was already in possession of the gifted property. In the plaint itself the plaintiff had admitted that the 1st defendant was living in the plaint 'A' schedule property. Even as PW.1, the plaintiff admitted that it was the 1st defendant who was in possession of the suit schedule property.

42. The 1st defendant had also filed Exs.B-14 to B-34 issued by the Municipal Corporation of India showing payment of municipal tax by him from 30-03-1963 till 21-12-1979 for the plaint-A schedule property. Exs.B-41 to 45 are Municipal tax receipts for the period from 01-10-1983 till 31-03-1987 in the name of the 1st defendant. Ex.B-40 is the temporary receipt for the land tax issued for the period of 1352 Fasli to 1980-81 for plaint-B schedule property in the name of 1st defendant. These were marked through DW.1. All these doumnts corroborate the fact that possession of the property was delivered to 1st defendant by Late Nasrullah Khan.

43. The plaintiff admitted that he did not pay municipal property tax for the A schedule house or current consumption charges or

water charges. He admitted that he paid land revenue only two months' prior to his giving evidence in November 1992 for the B schedule land. So he has not been able to prove his possession of the plaint schedule property at all.

44. The 1st defendant had also specifically contended that he had filed a declaration under Section 6(1) of the Urban Land Ceiling and Regulation Act, 1976 before the competent authority about the gift of the property in his favour and asserted that there was a finding given by the said authority in his favour accepting the gift by an order passed in June, 1982 disallowing the claim of the Housing Board and other claimants.

45. Ex.B-66 is the order dt.23-06-1982 in proceedings D1/2235/76 of the Special Officer and Competent Authority, Urban Land Ceiling, Hyderabad in relation to the declaration filed by the 1st defendant under Section 6 of the said Act. It discloses that in his declaration filed before the Competent Authority, 1st defendant specifically claimed that the property was gifted to him by his father and copy of the gift deed was also filed. The Competent Authority under the said Act accepted the gift and found that the donor had already given physical possession and actual possession of the property since 07-11-1960 to the donee and that since then, the donee was paying water tax and other taxes after accepting the oral declaration of gift on 07-11-1960 itself. He also recorded that the 1st defendant/declarant had filed municipal receipts dating from 30-03-1963 and also land revenue receipts. He therefore computed the plaint schedule properties to the holding of the 1st defendant. No material is placed by plaintiff to show that this was set aside in appeal and

he merely states that the appeal filed by him against the said order was kept in abeyance. This document is a strong piece of evidence in support of the gift in 1st defendant's favor.

46. The fact that the 1st defendant had paid municipal tax as well as land tax in respect of the plaint schedule properties and also filed a declaration under the Urban Land (Ceiling and Regulation) Act, 1976 shows that he was in control over the property by these overt acts. So even if Late Nasrullah Khan was residing in the plaint 'A' schedule house along with the 1st defendant, after he gifted it to him, the control of the property was not with Late Nasrullah Khan but with the 1st defendant. So the contention of counsel for the appellant that Late Nasrullah Khan, not having departed from the gifted properties after gifting them to 1st defendant, the gift becomes invalid, cannot be accepted.

47. Therefore all the requisites of a valid gift as laid down in Mohammedan Law, in my opinion, are satisfied and therefore Ex.B-12 is valid in law.

48. I therefore hold on Point (a) against the appellant and declare that Ex.B.12 the alleged gift of the plaint schedule property by Nasrullah Khan in favour of the 1st defendant, is true and valid and binding on the plaintiff.

Point (b) :

49. It is the case of the plaintiff that defendant no.15 and defendant no.16 are not the son and wife of the 1st defendant. He alleged in the plaint that the 1st defendant was unmarried and

issueless.

50. In the written statement filed by 1st defendant these allegations were denied and it was specifically asserted that he was married and he also had a son.

51. In the written statement filed by defendant nos.15 and 16 they asserted that defendant no.16 is the wife of 1st defendant and the 15th defendant is his son.

52. The 15th defendant who is examined as DW.1 asserted that the 1st defendant is his father and the 16th defendant is his mother. DW.2, who was a friend of 1st defendant, also stated that the 15th defendant is the son of the 1st defendant and the 16th defendant is the wife of the 1st defendant. To rebut this oral evidence, the plaintiff did not examine any other family member to speak to the contrary.

53. That apart, the 15th defendant filed his Secondary School Certificate (Ex.B.1) dt.17.07.1984 showing that the 1st defendant was his father. He also filed progress reports issued by Methodist Boys' High School, Hyderabad for Kindergarten (Ex.B.2), II Class (Ex.B.3), III Class (Ex.B.4), IV Class (Ex.B.5), V Class (Ex.B.6), VI Class (Ex.B.7), Bona Fide Certificate dt.13.12.1982 (Ex.B.8) issued by the said school, all of which indicated that the 1st defendant is his father. More importantly, he filed Ex.B.9, certified copy of the counter-affidavit dt.27.04.1988 by the 1st defendant in I.A.No.271 of 1988 in O.S.No.1339 of 1988 on the file of VI Assistant Judge, City Civil Court,

Hyderabad wherein he categorically asserted that 15th defendant is his son.

54. In the light of this overwhelming evidence, there is no doubt that the 15th defendant is the son and the 16th defendant is the wife of the 1st defendant. Point (b) is answered accordingly against the appellant.

<u>Point (c)</u> :

55. There is no dispute that when the appeal was filed by the appellant, he had filed CMP.No.13834 of 1993 seeking an injunction restraining the respondents in the appeal from alienating the suit schedule property in O.S.No.735 of 1989. On 17.09.1993, an interim injunction pending appeal was granted in his favour. The defendant nos.15 and 16 / respondent nos.1 and 2 in the appeal filed CMP.No.14687 of 1993 to vacate the said order. On 30.09.1993, the following order was passed in both the applications :

> "*Interim injunction granted on 17.09.1993 is vacated. However, pending disposal of the appeal, the main building bearing Municipal No.16-1-18, situate at Saidabad, shall not be alienated or demolished, without the permission of the Court.*"

56. The 17th defendant had purchased under a registered sale deed dt.05.06.2004 the following property from 15th defendant pending appeal :

> "*All that schedule premises bearing MCH No.16-1-18/Dwelling Unit No.V comprising of an area of 1199 Sq. Yards (1000 Sq.Mtrs) situated at Sayeedabad, Hyderabad as demarcated and delineated in the Red Colour on the map annexed hereto and bounded as follows :*
>
> *On the North by : 80' wide Saidabad Road*

On the East by : Land belonging to Plot No.16-1-18/15/10

On the South by :Land and building belonging to the Vendor and

his mother premises No.16-1-18.

On the West by : 20' passage to the main Building No.16-1-18

of the vendor."

57. Thus, what was prohibited to be alienated or demolished by this Court in the order dt.30.09.1993 was the *Main building* bearing Municipal No.16-1-18 which was the western boundary to *Dwelling unit no.V* purchased by the 17th respondent as can be seen from the above boundaries. Merely, because this Dwelling unit No.V also had the same municipal No.16-1-18, it is not open to the appellant to contend that what was purchased by the 17th respondent was the Main building bearing the same Municipal number and that the sale of the same by the 15th defendant was in violation of the order passed by this Court on 30.09.1993.

58. The fact that there were more than one dwelling unit in the 'A' schedule property apart from the main building is also corroborated by Ex.B.66 dt.23.06.1982, the order passed under Section 8(4) of the Urban Land Ceiling and Regulation Act, 1976 by the Special Officer and Competent Authority in regard to the declaration filed by the 1st defendant under the said Act before him.

59. I therefore hold on point (c) that what was purchased by the 17th respondent under the sale deed dt.05.06.2004 was not the Main building bearing Municipal No.16-1-18 (which was prohibited to the sold by the order dt.30.09.1993 in CMP.Nos.13834 of 1993 and 14687 of 1993) but a different

structure (dwelling Unit No.V) and the said purchase is therefore not in violation of the above order, passed by this Court in the appeal. Point (c) is answered accordingly against the appellant.

Point (d) :

60. This point would have had relevance if the Gift Deed Ex.B.12 had not been accepted as valid and binding on the plaintiff under Point (a). Only if the Gift is invalid, then the question of partitioning the plaint schedule properties would have arisen. Only then would the question of non-joinder of Sultanuddin, the plaintiff's brother and Smt. Basheer Sultana, the sister of the plaintiff who admittedly migrated to Pakistan, as parties to the suit would arise.

61. In view of the finding of this Court under Point (a), I am of the opinion that this issue does not require to be decided in the appeal.

Conclusion :

62. In view of the findings on point Nos.(a) to (c), I find no merit in the appeal. The same is accordingly dismissed with costs.

63. As a sequel, the miscellaneous petitions pending, if any, shall stands closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 03-12-2015

Kvr/Ndr/Vsv/*