

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

C.C.C.A. No.94 of 1993

and

Cross-Objections (SR) No.46380 of 1994

C.C.C.A.No.94 of 1993

Between:

Mohd. Ayub Ismail

Rep. by GPA—B.Rizwan Baig

and another.

.... Appellants/Defendants

And

Mrs. Fouzia Mohiuddin

and another.

... Respondents/Plaintiffs

DATE OF JUDGMENT PRONOUNCED: **18.11.2016**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers
may be allowed to see the judgments? Yes / No
2. Whether the copies of judgment may be
marked to Law Reporters / Journals? Yes / No
3. Whether Their Lordship wish to
see the fair copy of the Judgment? Yes / No

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! Counsel for Appellants : Sri T.S.Anand

^ Counsel for Respondents : Sri Fazal Yousufuddin

< Gist:

> Head Note:

? Cases referred:

- 1) AIR 2011 Supreme Court 1695
- 2) (2014) Supreme (SC) 738 = (2015) 3 Supreme 595
- 3) 2016 (2) ALD 610
- 4) AIR 2005 SC 439
- 5) 1999 (3) ALT 428 (AP)
- 6) 2005(3) ALD 545 (DB)
- 7) 2003 (4) ALD 302 (DB)
- 8) 2004(1) ALD 241 (2) (DB)
- 9) AIR 2006 Karnataka 231
- 10) (2013) 12 SCC 64

HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

C.C.C.A.No.94 of 1993
and
Cross objections (SR) No.46380 of 1994

COMMON JUDGMENT:

This appeal is filed by the defendants aggrieved by the judgment and decree dated 09.11.1993 in O.S.No.761 of 1984 on the file of I Additional Judge, City Civil Court, Hyderabad whereunder the trial Court decreed the suit of the plaintiffs for declaration of their title and vacation of defendants from suit schedule property and mesne profits.

- a) It should be noted, the plaintiffs in their turn filed Cross objections (SR) No.46380 of 1994 claiming mesne profits @ Rs.3,000/- p.m as against the trial Court awarding @ Rs.1,000/- p.m.
- 2) For convenience sake, the parties in the appeal are referred as they were arrayed before the trial Court.
- 3) This is a remand appeal. A learned Single Judge of this Court earlier heard arguments in this appeal and framed the following points for consideration:

"1. Whether failure to frame an issue regarding limitation vitiates the entire decree and judgment, if not, whether the question of limitation in this suit is a pure question of law, if so, is this Court competent to frame an additional issue and record finding?

2. Whether the gift executed in favour of the plaintiffs is in accordance with Sections 149 and 150 of Muslim Law, if so, is the gift in favour of the plaintiffs valid?

3. Whether the plaintiffs are entitled to claim declaration of their title on the strength of Ex.A3 gift deed dated 28-04-1979?

4. Whether the plaintiffs are entitled to recovery of possession of the property from the defendants?

5. Whether possession of the defendants is unauthorised or illegal, if so, are they liable for payment of past and future mesne profits, if so, at what rate?"

With reference to point No.1, learned Single Judge, in his judgment dated 24.04.2015, having felt that the trial Court failed to frame an issue touching the limitation, framed an additional issue, "Whether the suit is barred by limitation?" and remanded the Appeal under Order 41 Rule 25 C.P.C. to the trial Court, i.e., I Additional Judge, City Civil Court, Hyderabad, to give a finding on the issue of limitation framed by him by giving an opportunity to both parties to adduce evidence only on the point of limitation and to send the finding to this Court for deciding the appeal. In view of the remand, the learned Single Judge has not decided point Nos.2 to 5 framed as above. After remand, the learned trial Judge afforded an opportunity to both sides to adduce evidence. It appears, P.W.3 (1st plaintiff) produced a chief-affidavit and she was cross-examined. Thereafter, the trial Judge gave his finding on the additional issue in his judgment 26.10.2015 to the effect that the suit claims are not barred by limitation and the reliefs sought for are within the period of limitation in view of Article 65 of the Limitation Act and submitted his judgment to this Court and, that is how, the appeal heard again.

4) The factual matrix of the case is thus:

a) The plaintiffs initially filed the suit for the relief of recovery of possession after evicting the defendants from the suit schedule premises bearing No. 4-1-864 (2nd floor above shop Nos. 4-1-869, 869/1 and 869/2), Abids Road, Hyderabad, and for recovery of past mesne profits of Rs.16,500/- from 01-12-1982 to 01-04-1984 and future mesne profits @ Rs.1,000/- p.m. from the date of suit till the date of vacating the premises. Subsequently, the plaint was amended converting the suit for recovery of possession into suit for declaration of title and recovery of possession and other consequential reliefs vide order in I.A.No. 1243 of 1993 dated 06-10-1993. Thus, the claim of the plaintiffs by the date of disposal of the suit was declaration of title, recovery of possession and other consequential reliefs.

b) Originally, suit schedule property and other property bearing municipal door Nos.4-1-862 to 872 consisting of four bungalows, nine mulgies, one function hall, open land, garages etc. and three storeyed building, which is popularly known as "Moosa Building" situated at Abid Road, Hyderabad, belong to J.Moosa who died on 28-09-1967 leaving behind his four sons Hashim Moosa, Ismail Moosa, Ibrahim Moosa and Alla Rakha Moosa. After the death of J.Moosa, his four sons partitioned the property on 18-12-1971 under registered partition deed. In the said partition, some properties including portion of Moosa Building on the second floor was allotted to the share of Alla Rakha Moosa. In the same partition, building bearing door Nos.4-1-864 to 868 was allotted to the joint share of Ismail Moosa and Ibrahim Moosa. Ismail Moosa died on 27-10-1977 leaving behind his two sons namely Younus and Ayub Ismail, three daughters and a widow to succeed his estate. After the death of Ismail Moosa, partition took

place among the legal-heirs of Ismail Moosa and Ibrahim Moosa and registered partition deed dated 12-08-1978 was executed and, in the said partition, Ayub Ismail, the 1st defendant herein was allotted first and second floors of Moosa Building bearing No.4-1-864 excluding the share of Alla Rakha Moosa, as Alla Rakha Moosa intended to gift the property bearing No.4-1-864 (second floor above shop Nos.4-1-869, 869/1 and 869/2), which was allotted to his share, in favour of the plaintiffs, who were the daughters of his brother Ibrahim Moosa. Alla Rakha Moosa acquired American Citizenship and came down to India on 02-05-1978. Alla Rakha Moosa orally gifted the said property to the plaintiffs while informing the tenants by letters to pay rent to the plaintiffs attorning tenancy. The plaintiffs' father Ibrahim Moosa used to manage the property on behalf of the plaintiffs, collect rent and pay income from the property to the plaintiffs.

c) Alla Rakha Moosa appointed Sri Mukerramuddin, Advocate, as his attorney to do all that was required for effectual completion of gift. Mukerramuddin, as attorney for Alla Rakha Moosa, obtained permission from the Reserve Bank of India to hold and gift schedule property in favour of the plaintiffs. The Reserve Bank of India, by letter No.1374/M-320-79 dated 13-01-1979, accorded permission. Alla Rakha Moosa also obtained necessary permission from the Urban Land Ceiling Authorities to effect gift vide proceedings No.C/894/ULC/79. After obtaining necessary permission, Alla Rakha Moosa completed the gift, the same was accepted by the plaintiffs and took possession formally. Thus, execution of gift was lawfully completed. Alla Rakha Moosa executed gift deed dated 28-04-1979 in favour of the plaintiffs.

d) Ram Mohan Rai Verma, along with his family members, was running business under the name and style of Metro Lodge in the first and second floors of Moosa Building bearing No. 4-1-864 on payment of license fee of Rs.50/- per day and the license was terminated thereafter. After vacating the first and second floors, possession of schedule property was handed over to Ayub Moosa and Ibrahim Moosa, the father of the plaintiffs. On behalf of the plaintiffs, father of the plaintiffs Ibrahim Moosa took possession of the property from Ram Mohan Rai Verma and the floor was kept vacant for sometime.

e) Due to differences between the plaintiffs' father and the 1st defendant regarding the property, suits were filed and they are pending by the date of filing the suit. While so, sometime in December, 1982, the 1st defendant let out the entire first floor and second floor, including the property allotted to the plaintiffs, to the 2nd defendant on lease without the consent of the plaintiffs, collecting entire rent and appropriating the same for himself. Thus, there is no legal relationship of tenant and landlord between the plaintiffs and the 2nd defendant and his occupation of schedule property is unauthorized. Therefore, the 1st defendant is liable to pay past mesne profits of Rs.16,500/- from 01-12-1982 to 15-04-1984 and future mesne profits @ Rs.1,000/- p.m. from the date of suit till the date of delivery of vacant possession.

f) The 1st defendant filed written statement denying material allegations of the plaint *inter alia* contending that J.Moosa, grandfather of the 1st defendant, was one of the leading businessmen of Hyderabad, carried on

business in the name and style of J.Moosa & Sons and, later, it became a reputed business in the field of auctioneers. The said J.Moosa acquired both movable and immovable property, died on 28-09- 1967 leaving behind his vast movable and immovable properties and the auction business of J.Moosa & Sons. After the death of J.Moosa, his four sons Hashim Moosa, Ismail Moosa, Ibrahim Moosa and Alla Rakha Moosa succeeded the property. Ismail Moosa, the second son of late J.Moosa and father of the 1st defendant, died at Hyderabad on 27-10-1977 leaving behind his widow Ayesha Begum, two sons Younus and the 1st defendant herein and three daughters namely Zarina Dada, Sultana Nazir and Amina Quaiser. The 1st defendant admitted partition of the property under registered partition deed dated 18-12-1971 among the sons of J.Moosa. After the death of father of the 1st defendant on 27-10-1977, the 1st defendant and other family members suffered great mental anguish. Ibrahim Moosa, the father of the plaintiffs, used to look after the entire estate being the head of the family. During the said period, the 1st defendant and other members of his family were mentally disturbed. The father of the plaintiffs, prevailing upon the heirs of Ismail Moosa including the 1st defendant, executed a partition deed dividing the property amongst them and the said partition is unconscionable, unfair and unjust. The partition is the subject matter of the suit O.S.No.541 of 1983 on the file of the Court of Additional Chief Judge (Temporary), City Civil Court, Hyderabad.

g) It is further contended that Alla Rakha Moosa, who migrated to United States of America about three decades ago, executed General Power of Attorney in favour of Hashim Moosa on 03-03-1972 and gifted a portion

of the second floor of Moosa Building bearing No.4-1-864 to his brother Ismail Moosa by way of Hiba. The said Ismail Moosa accepted the same and the gift was duly completed in favour of Ismail Moosa, possession of the same was delivered to him and the tenancy with Ram Mohan Rai Verma was attorned in favour of Ismail Moosa. The said Ismail Moosa used to collect rent from Ram Mohan Rai Verma. Since then, the 1st defendant alone is in possession and enjoyment of the property. While the matter stood thus, on 01-01-1977, father of the 1st defendant gifted portion of the second floor of Moosa Building bearing No.4-1-864 to Smt.Ayesha Ismail, the mother of the 1st defendant, by way of Hiba attorning the tenancy in her favour and the same was accepted by her. The said Ayesha Ismail became the sole owner of the property, in turn, gifted a portion of the second floor of Moosa Building to the 1st defendant on 01-12-1982 by way of Hiba and delivered symbolic possession of the property attorning the tenancy in his favour. The 1st defendant accepted the gift and the same was duly completed, collecting rent from the tenant in occupation since 01-12-1982 being the absolute owner of the property and paying property tax to the concerned department.

h) The 1st defendant denied execution of gift deed in favour of the plaintiffs by Alla Rakha Moosa on 28-04-1979 or on any other date and attorning tenancy in favour of the plaintiffs, the plaintiffs were never in possession and enjoyment of the property either actual or symbolic and the letters issued by the R.B.I. and the proceedings issued by the Urban Land Ceiling Authorities are brought into existence as an afterthought. Therefore, the plaintiffs are not entitled to claim any right under the said gift deed since the property was already gifted to Ismail Moosa on 03-03-1972 and ceased

to be the owner of the property. Therefore, the alleged gift in favour of the plaintiffs by Alla Rakha Moosa through his power of attorney is invalid and not acted upon. The 1st defendant further contended that he let out first and second floors to the 2nd defendant under registered lease deed dated 18-12-1982 bearing document No. 8276/82. Therefore, the plaintiffs are not entitled to claim relief of declaration as well as recovery of possession and prayed for dismissal of the suit.

i) The 2nd defendant filed written statement denying material allegations while contending that she is not aware of partition effected among the sons of late J.Moosa; allotment of schedule property to the share of Alla Rakha Moosa and, in turn, gifting the property to the plaintiffs through attornment of Alla Rakha Moosa. It is specifically contended that the entire portion was leased out to her by the 1st defendant on monthly rent of Rs.1,500/- and she is continuing in possession and enjoyment of the property as a lawful tenant. Thereby, her possession cannot be termed as unlawful and prayed to dismiss the suit against her.

j) After amending the plaint converting the suit into declaratory suit, which is comprehensive in nature, the 2nd defendant filed additional written statement almost reiterating the allegations made in the written statement while contending that the 1st defendant is the owner of the property; the claim of the plaintiffs for declaration of title is barred by limitation; on this ground, the suit is liable for dismissal; the plaintiffs are not entitled to claim declaration; and prayed for dismissal of the suit in toto.

k) Basing on the above pleadings, the trial Court framed the following issues and additional issues:

Issues:

- 1) *Whether the valuation of the suit and court fee paid are not correct?*
- 2) *Whether this court has no jurisdiction?*
- 3) *Whether the lease and possession of the 2nd defendant is valid and binding on the plaintiffs?*
- 4) *Whether the plaintiffs are entitled to possession after evicting the defendants?*
- 5) *Whether the plaintiffs are entitled to past and future mesne profits and if so, at what rate?*
- 6) *To what relief?*

Additional Issues:

- 1) *Whether plaintiff is entitled for declaration sought for and the claim is in time?*
- 2) *To what relief?*

l) During trial, PWs.1 and 2 were examined and Exs.A1 to A9 were marked on behalf of the plaintiffs, D.Ws.1 and 2 were examined and Exs.B1 to B7 were marked on behalf of defendants.

m) The judgment of the trial Court would show that having regard to the oral and documentary evidence placed by the plaintiffs, the trial Court believed the gift made in favour of plaintiffs by Alla Rakha. Sofaras the successive oral gifts propounded by 1st defendant are concerned, the trial Court observed that under Ex.B.3—GPA deed, Alla Rakha only permitted

his GPA to manage his property but he did not permit him to gift away his property to anybody and therefore, 1st defendant cannot claim that the GPA holder of Alla Rakha orally gifted the suit property to his father. Consequently, the father of D.1 cannot make oral gift in favour of D.1's mother and so also his mother cannot gift away the suit property orally in favour of D.1 as alleged. Thus the trial Court gave preference to the gift deed put-forth by the plaintiffs to the oral gifts claimed by the defendants. The trial Court incidentally held that the suit is within time and the suit claims are not barred by limitation and accordingly decreed the suit in favour of plaintiffs.

Hence the appeal.

5) As already stated supra, a learned Single Judge of this Court earlier heard arguments and framed five points for consideration and with reference to point No.1 framed an additional issue whether suit is barred by limitation and remanded the appeal to trial Court for giving its finding. The trial Court submitted its finding to the effect that suit claims are not barred by limitation and the relief sought for are within the period of limitation in view of Article 65 of Limitation Act and submitted its judgment. Thereafter, this Court again heard arguments.

6) So far as point No.1 touching the aspect bar of the suit by limitation is concerned, learned counsel for appellant Sri T.S.Anand, fairly conceded that he was not going to argue on the finding given by the trial Court after remand. He thus argued on the remaining points 2 to 5. Learned counsel for appellants would argue that the trial Court grossly erred in decreeing the suit

on misconception of the gifts (Hiba) under Muslim personal law and on improper appreciation of the evidence. Under Muslim personal law a gift can be validly made even orally and for that purpose no written gift much less registration is required. The prerequisites for a valid gift under Mohammedan law are: i) declaration of the donor, ii) acceptance of the gift by donee and iii) handing over and taking over of the possession of the property and if the aforesaid are established, gift can be validated whether it is oral or written. To buttress his point, he relied upon the following decisions:

i) ***Hafeeza Bibi and others vs. Shaikh Farid (dead) by LRs and others***¹

ii) ***Rasheeda Khatoon vs. Ashiq Ali***²

iii) ***Maimoona Begum vs. G. Sarat Babu and another***³

a) In the instant case, he contended, the plaintiffs relied on an earlier oral gift and a subsequent written gift under Ex.A.3 to claim the suit properties. However, except filing the gift deed. The plaintiffs have not entered witness box to prove their case but they only examined their power of attorney. He argued that a power of attorney cannot replace his principal in respect of the facts which are to the knowledge of principal and acts done by him. He placed reliance on the following decisions:

i) ***Janki Vashdeo Bhojwani and another vs. Indusind Bank Ltd., and others***⁴.

ii) ***Kanakapudi Bharathi and another vs. Authority under Section 50 of A.P. Shops and Establishments Act-cum-Labour Officer, Machilipatnam and another***⁵.

¹ AIR 2011 Supreme Court 1695

² (2014) Supreme (SC) 738 = (2015) 3 Supreme 595

³ 2016 (2) ALD 610

⁴ AIR 2005 SC 439

⁵ 1999 (3) ALT 428 (AP)

b) He further argued that the plaintiffs have not proved the prerequisites of a valid gift as mentioned supra. Therefore, the oral and written gifts propounded by them cannot be believed. Learned counsel forcibly argued that the burden of proving the gift heavily rests on the plaintiffs but they miserably failed in this regard.

c) Oral gift is concerned, according to plaintiffs, Alla Rakha orally gifted the suit property to the plaintiffs on 02.05.1978. However, they did not produce any cogent evidence in proof of the said oral gift. On the other hand, the alleged oral gift is belied by Ex.A.5 itself. In expatiation, he would argue that according to plaintiffs Alla Rakha executed a letter dated 01.05.1978 stating that he was gifting his properties in favour of the plaintiffs and some others and the tenants continuing in those properties should attorn to the respective donees and pay rents to them thereafter. He argued that if the oral gift was made only on 02.05.1978 as alleged, how could it be possible for him to write Ex.A.5—letter even on the prior date. That would show that the oral gift is a myth. Written gift is concerned, he argued that the plaintiffs have not examined the G.P.A of Alla Rakha, who allegedly executed Ex.A.3—gift deed in their favour. They also failed to produce any iota of evidence showing their acceptance of the gift and their possession of the suit property. Thus the plaintiffs failed to establish both the oral and written gifts.

d) He vehemently argued that for another reason also, the gifts propounded by them can be disbelieved. As per Ex.A.2—partition deed, the Alla Rakha got mulgies bearing Nos.4-1-869/1 and 4-1-869/2 in first and

second floors and it was stipulated that to reach his allotted portions in the first and second floors, passage shall be provided from the mulgies allotted to Hashim Moosa but no such passage was provided till now and therefore, it is not possible to reach the portions allotted to Alla Rakha. In that view, it is highly unbelievable and improbable that Alla Rakha's GPA could gift away his share to the plaintiffs without providing any passage. On the other hand, since the shares which were jointly allotted to D.1's father Ismail Moosa and his uncle Ibrahim Moosa are adjacent to the share allotted to Alla Rakha, it was quite possible that if Alla Rakha gifted his share to Ismail Moosa, he can enjoy the gifted property along with his share which lie contiguously. Therefore, topographically, the oral gift in favour of defendants' father is more probable than the gift in favour of plaintiffs. He would thus contend, the plaintiffs failed to prove the requisites of valid gift to discharge their burden. Therefore, they cannot succeed on the weakness of the defence if any. On the aspect of burden of proof, he relied on the decision reported in *Syed Fahim Arif and another vs. Rahmatunnisa Begum and another*⁶.

e) Learned counsel further argued that the defendants are concerned, they established the successive oral gifts made in favour of 1st defendant's father, mother and lastly on him and moreover he proved his possession of the suit property also. Further, the oral gift in favour of D.1's father was quite earlier to the Ex.A.3—gift in favour of the plaintiffs and considering all these, the trial Court ought to have dismissed the suit by disbelieving the gift put-forth by the plaintiffs. However, the trial Court committed a grave

⁶ 2005(3) ALD 545 (DB)

blunder holding that under Ex.B3—Alla Rakha, instructed his GPA—Dr.Hashim Moosa only to manage the property but did not empower him to gift. Learned counsel vehemently argued that the trial Court did not appreciate Ex.B3 correctly, for, under Ex.B3, Alla Rakha not only instructed his brother-cum-GPA to manage his properties but also empowered him to alienate the property by sale or gift. Therefore, the oral gift made by his GPA in favour of D.1's father namely Ismail Moosa was perfectly valid and consequently the subsequent oral gifts i.e, gift made by Ismail in favour of his wife and later the gift made by her in favour of D.1 are legally valid. He thus prayed to allow the appeal and set aside the judgment of the trial Court.

7) Per contra, learned counsel for respondents/plaintiffs, while admitting the legal position on the gifts under Mohammedan law, would argue that in the instant case, the plaintiffs trace their title to the suit property firstly, under oral gift deed 02.05.1978 and nextly under registered gift deed dated 29.04.1979. The suit property was admittedly belonged to Alla Rakha and he orally gifted the same to the plaintiffs who are the daughters of his brother—Ibrahim Moosa on 02.05.1978. Explaining the discrepancy regarding the date of oral gift, learned counsel submitted that Ex.A.5—letter was no doubt written by Alla Rakha on 01.05.1978 whereunder he stated that he was gifting his properties to his nephew and nieces and instructed his tenants to attorn to the respective donees. Though the letter was executed on 01.05.1978, he got the letter attested through a notary at United States on 02.05.1978 and therefore, the plaintiffs accepted the date of gift as 02.05.1978 and hence, mere difference in the date of gift will not effect its genuinity. Later Alla Rakha appointed Mohd. Mukerramuddin, an Advocate

as his power of attorney under Ex.A.4 to execute registered gift deed in favour of nephew and nieces pursuant to the oral gift already made by Alla Rakha. Accordingly, Mukerramuddin executed Ex.A.3—gift deed dated 29.04.1979 in favour of the plaintiffs. He thus argued that the plaintiffs became the absolute owners of the suit schedule property by virtue of the oral gift followed by Ex.A.3—registered gift deed. Learned counsel vehemently argued that the ingredients of the gift i.e, declaration of the intention of the donor, acceptance of the gift and taking possession of the property were all amply established by the plaintiffs inasmuch as Exs.A.4 and A.5 would clearly indicate the declaration of intention of the donor and Ex.A.3—gift deed would indicate the acceptance of the gift by the donees and possession is concerned, the suit schedule rooms in the second floor were vacant at the time of gift and the plaintiffs enjoyed the same and the properties were managed by their father and later the D.1 illegally leased out the suit schedule property along with other rooms to D.2 and therefore, plaintiffs were constrained to file suit for declaration of title and recovery of possession. He submitted that the argument of the appellants that the plaintiffs have failed to prove the oral and written gifts and they failed to give evidence and the evidence given on their behalf by their GPA is not valid is quite untenable. He argued that the title of the plaintiffs is based on the documentary evidence but not on their exclusive personal knowledge and therefore, their GPA can speak on their behalf and there is no legal bar for it. He placed reliance on the following decisions:

i) *Secretary to Government of India, Ministry of Defence, New Delhi and another vs. Indira Devi and another*⁷

ii) *Podelly Chinna Chinnanna vs. Bandari Pedda Bhumanna and others*⁸

iii) *Bhimappa and others vs. Allisab and others*⁹

a) He further argued that the claim of 1st defendant that the previous GPA of Alla Rakha orally gifted the properties of Alla Rakha to the father of D.1 is an utter lie. Under Ex.B.3, no doubt Alla Rakha empowered his previous GPA i.e, Hashim Moosa to alienate his share by way of sale, mortgage or gift but he specifically instructed him to alienate by way of a registered document only. Therefore, it is preposterous to contend that GPA could orally gift away the properties of Alla Rakha to the father of D.1 against the wish of Alla Rakha. Therefore, the successive oral gifts setup by D.1 is only an attempt to usurp the rights of the plaintiffs in the suit property.

b) He further argued that the contention of the defendants that since no passage was created to the share of Alla Rakha through the allotted portion of Hashim Moosa the gift in favour of plaintiffs shall be disbelieved is quite untenable. He argued that creation of passage is a matter between Hashim Moosa and Alla Rakha and on that ground, the gift in favour of plaintiffs cannot be negated. He thus prayed to dismiss the appeal.

8) **POINT Nos.2, 3 and 4:** Since all the three points are interconnected, they can be decided together. Gift under Muslim personal law is the bone of

⁷ 2003 (4) ALD 302 (DB)

⁸ 2004(1) ALD 241 (2) (DB)

⁹ AIR 2006 Karnataka 231

contention in this case. Hence the jurisprudence relating to gifts under Mohammedan law need to be detailed.

a) Chapter XI of Mohammedan law deals with “GIFTS”.

i) As per Section 138, a Hiba or Gift 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.

ii) Section 139 says that every Mahomedan of sound mind and not a minor may dispose of his property by gift.

iii) Then, Section 147 lays down that writing is not essential to the validity of a gift either of movable or of immovable property.

iv) Then Section 149 speaks of the three essentials of a gift. It says, “the essentials for the validity of a gift are”: (a) a declaration of gift by the donor, (b) an acceptance of the gift, express or implied, by or on behalf of the donee, and (c) 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.

v) Section 150 (1) lays down that:

“(1) It is essential to the validity of a gift that there should be a delivery of such possession as the subject of the gift is susceptible of. As observed by the Judicial Committee, “the taking of possession of the subject-matter of the gift by the donee, either actually or constructively,” is necessary to complete a gift.”

vi) Then Section 152 (2) says that when the gifted property is in the occupation of tenants, the gift may be completed by a request by the donor to the tenants to attorn to the donee, or by delivery of the title deed or by mutation in the Revenue Register or the landlord’s *sherista*.

The above are the relevant provisions relating to the gift under Mohammadan law.

9 a) Coming to the precedential jurisprudence on gifts under Mohammadan law, in **Hafeeza Bibi**'s case (1 supra), the Apex Court was engaged with the question whether High Court was right in holding that an unregistered gift deed was not a valid gift. In that context, while quoting the Mulla's Principles of Mahomedan Law (19th Edition), Page 120, as below, the Apex Court noted its express agreement with the same:

“Under the Mahomedan law the three essential requisites to make a gift valid: (1) declaration of the gift by the donor, (2) acceptance of the gift by the donee expressly or impliedly and (3) delivery of possession to and taking possession thereof by the donee actually or constructively. No written document is required in such a case. Section 129 of Transfer of Property Act, excludes the rule of Mahomedan law from the purview of Section 123 which mandates that the gift of immovable property must be effected by a registered instrument as stated therein. But it cannot be taken as a sine qua non in all cases that whenever there is a writing about a Mahomedan gift of immovable property there must be registration thereof. Whether the writing requires registration or not depends on the facts and circumstances of each case.”

b) In **Rasheeda Khatoon**'s case (2 supra) also the Apex Court once again reiterated the three essential requisites of a valid gift under Mahomedan law.

It was held thus:

Para 16: *From the aforesaid discussion of the propositions of law it is discernible that a gift under the Muhammadan Law can be an oral gift and need not be registered; that a written instrument does not, under all circumstances require registration; that to be a valid gift under the Muhammadan Law three essential features namely, (i) declaration of the gift by the donor, (ii) acceptance of the gift by*

the donee expressly or impliedly, and (iii) delivery of possession either actually or constructively to the donee, are to be satisfied; that solely because the writing is contemporaneous of the making of the gift deed, it does not warrant registration Under Section [17](#) of the Registration Act.

c) In ***Maimoona Begum***'s case (3 supra), a learned Judge of this Court also reiterated about the three prerequisites of a valid gift.

d) So the provisions of law and precedential jurisprudence would tell us that:

- (i) a gift under Mahomedan law can be either oral or written but a written gift is not a must for its validity;
- (ii) the three essential requisites of a valid gift are: a) declaration of the intention to gift by the donor, (b) acceptance of the gift by the donee expressly or impliedly and (c) delivery of possession to and taking possession thereof by the donee actually or constructively; and
- (iii) solely because writing is contemporaneous of making of gift deed, it does not warrant registration under Sec.17 of Indian Registration Act.

In this legal backdrop, the respective claims of the parties have to be scanned.

10) Admittedly, in a partition among Alla Rakha and his three brothers under Ex.A.2—partition deed, Alla Rakha got his share of Mulgies bearing Nos.4-1-869/1 and 869/2 in first and second floors. It was stipulated in Ex.A.2 that a passage for the first and second floors shall be provided from the mulgies allotted to Alla Rakha or from premises bearing No.4-1-870 with the consent of Hashim Moosa. Be that it may, both plaintiffs and 1st

defendant now adversely claim that Alla Rakha gifted his share of properties to them. Plaintiffs claim is that Alla Rakha orally gifted the suit property on 02.05.1978 and later executed Ex.A.3—gift deed dated 28.04.1979 through his GPA whereas D.1's claim is that Alla Rakha's GPA namely Hashim Moosa orally gifted the suit properties in favour of D.1's father in 1972 and later D.1's father orally gifted the said property in favour of D.1's mother in 1977 and thereafter his mother orally gifted the said property to D.1 in 1982. Hence it has to be seen whose gift is genuine and valid. As rightly contended by the defendants and also as laid down in *Syed Fahim Arif's* case (6 supra), the burden of proof rests on the plaintiffs to establish their case without depending on the weakness of defendants case, if any. If the plaintiffs succeed to establish their case, then the evidentiary burden shifts on the defendants to establish their case since they adversely claim the suit property under oral gift.

a) The plaintiffs in order to prove their case, examined PW.1, who is their brother-cum-power of attorney under Ex.A.1. In this context, it must be mentioned that the defendants vehemently argued that the plaintiffs have not examined themselves to establish their case and they only examined their GPA and under law a GPA cannot depose for principal in respect of the facts which are in the exclusive personal knowledge of the principal and since the alleged gift in favour of plaintiffs is within their personal knowledge, the GPA could not have deposed about the gift and therefore, the plaintiffs failed to prove the gift. Per contra, the contention on behalf of plaintiffs is that plaintiffs were minors by the time of oral and written gifts and their case is mainly based on written documents and since they authorized their GPA

(PW1) to file suits and do all necessary actions and take up proceedings etc., PW.1 was authorized to produce the documentary evidence on behalf of plaintiffs which he did and the gift was established through PW.2—one of the attestors of the gift and therefore, the gift was amply established. I gave anxious consideration to the above divergent arguments. In ***Janki Vashdeo Bhojwani***'s case (4 supra), the Apex Court categorically held that a power of attorney holder cannot speak of the facts which are to the exclusive knowledge of the principal, except the facts relating to the acts done by him pursuant to the power of attorney executed in his favour. The Apex Court held thus:

“Para 13: Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

In ***S.Kesari Hanuman Goud vs. Anjum Jehan and others***¹⁰ also the Apex Court reiterated the same principle and held as follows:

“Para 13: It is a settled legal proposition that the power of attorney holder cannot depose in place of the principal. Provisions of Order III, Rules 1 and 2 Code of Civil Procedure empower the holder of

¹⁰ (2013) 12 SCC 64

*the power of attorney to "act" on behalf of the principal. The word "acts" employed therein is confined only to "acts" done by the power-of-attorney holder, in exercise of the power granted to him by virtue of the instrument. The term "acts", would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has preferred any "acts" in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for acts done by the principal, and not by him. Similarly, he cannot depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled to be cross-examined. (See: **Vidhyadhar v. Manikrao and another** [MANU/SC/0172/1999](#): AIR 1999 SC 1441; **Janki Vashdeo Bhojwani v. Indusind Bank Ltd.** [MANU/SC/1030/2004](#) : (2005) 2 SCC 217; **M/S Shankar Finance and Investment v. State of A.P and Ors.** AIR 2009 SC 422; and **Man Kaur v. Hartar Singh Sangha** [MANU/SC/0789/2010](#) : (2010) 10 SCC 512).*

b) In view of the above citations of the Apex Court, the decisions of different High Courts cited by the respondents/plaintiffs cannot be acceded to. Thus it is clear that PW.1, who is the GPA of plaintiffs can only speak of the acts done by him pursuant to the Ex.A.1 and nothing more. As per Ex.A.1, he was authorized to file the suit and do other acts which may generally include giving evidence. However, by that count alone, he cannot depose the factum of oral and written gifts said to be made in favour of the plaintiffs as those facts were within the knowledge of the plaintiffs but not him. Since he was authorized to file the suit and do all actions which includes filing of the documents and giving evidence, in my considered view, his evidence can be confined to the general aspects such as the plaintiffs appointing him as GPA and his filing suit on their behalf; the nature of the reliefs claimed and the nature of documents filed. Except that,

he cannot give evidence in proof of the gift as stated earlier. Therefore, I consider it not necessary to dwell at length the evidence of PW.1 to decide the authenticity of oral and written gifts propounded by plaintiffs.

c) Excluding PW.1, it is to be seen whether, still plaintiffs could prove their case by any other cogent evidence. They claim that Alla Rakha at first made an oral gift on 02.05.1978 and for this purpose they relied on Ex.A.5, which is a letter said to be written by Alla Rakha declaring his intention that he was gifting his properties to his nephew and nieces (plaintiffs) and he instructed his tenants who were then occupying the gifted properties to attorn to the respective donees. Ex.A.5—letter was written on 01.05.1978 and was got attested through notary public on 02.05.1978. Ex.A.5 was filed through PW.1. Plaintiffs have not entered witness box either to prove the gifts or the documentary evidence including Ex.A.5. They have not examined the original donor i.e, Alla Rakha and it is not found in the evidence whether he was alive or not by the time of trial. In those circumstances, the oral gift dated 02.05.1978 pleaded by the plaintiffs cannot be accepted.

d) Coming to Ex.A.8—gift deed, no doubt the plaintiffs examined PW.2 who is an attester of gift deed. However, the plaintiffs have not examined either Alla Rakha or his power of attorney i.e, Mohd. Mukerramuddin in proof of the gift. As stated supra, under Mahomedan law, the three prerequisites of a gift need to be established for proving a gift. They are: the declaration of the gift by the donor; the acceptance of the gift by the donee and most importantly, the delivery of gifted property. PW.2 only deposed

about his attesting the gift deed. Except that he has not stated anything about the aforesaid prerequisites. Therefore, though Ex.A.8 is a registered gift deed, the same cannot be accepted for proving the prerequisites. Consequently, Ex.A.6—letter which is said to be addressed by Reserve Bank of India to the G.P.A of Alla Rakha, even if accepted to be true, cannot help in proving the prerequisites of the gift.

11) So on a conspectus of the facts and evidence, it must be held that plaintiffs have miserably failed to prove the oral and written gift allegedly made in their favour by Alla Rakha through his GPA. As rightly argued by the learned counsel for appellants/defendants, the trial Court has not properly appreciated the facts and evidence and came to a wrong conclusion. So far as D.1 is concerned, he too does not stand on a better footing than plaintiffs. Though D.1 claims title to the suit property on the basis of successive oral gifts, he too did not examine either the original donor—Alla Rakha or his GPA—Hashim Moosa in proof of the gifts. It has not emerged in the evidence of the defendants whether Alla Rakha and Hashim Moosa were alive or not at the time of trial. In fact D.1 and his father—Ismail Moosa were also not examined. D.1 examined his GPA who is none other than the husband of D.2. As already held, a GPA cannot speak of the matters which are to the exclusive personal knowledge of the principal. Of course the mother of D.1 was examined as DW.2 who claimed that her husband obtained gift from Ayesha Moosa on 03.03.1972 and gifted the same to her on 01.01.1977. However, her evidence is only an interested one. In the absence of examination of either the original owner or his GPA, the evidence of DW.2 will not help in proving the alleged oral gifts. For another

reason also the oral gifts proposed by D.1 can be disbelieved. As per Clause 10 of Ex.B.3, no doubt Alla Rakha has empowered his GPA i.e, Hashim Moosa to alienate his share of property but what he instructed him was that, he was authorised to sell, mortgage or create a charge or gift his share of property to his brother or any member of the family by executing a sale deed or gift deed and get the document registered. Therefore, as rightly contended by the plaintiffs, Alla Rakha instructed his GPA to alienate the property by way of a registered document. In that view of the matter, it cannot be presumed that his GPA would orally gift away the properties in favour of D.1's father. Therefore, the oral gifts pleaded by D.1 cannot be accepted though he was admittedly in possession of the suit property. So at the outset, plaintiffs due to their failure to establish their case, cannot succeed on the weakness of the defendants case and therefore they do not deserve the reliefs claimed in the suit. Accordingly, points 2 to 4 are answered against the respondents/plaintiffs.

12) **POINT No.5:** In view of the findings in points 2 to 4, the possession of the defendants, sofaras plaintiffs are concerned, cannot be said to be unauthorised or illegal as the plaintiffs failed to prove a better title than D.1. Accordingly, the defendants are held not liable to pay past and future mesne profits. Accordingly, this point is also answered against the respondents/plaintiffs.

13) **Cross objections:** The plaintiffs suit is held not maintainable, cross objections filed by them are liable to be dismissed.

14) In the result, in view of the findings in points 1 to 5, this appeal filed by the respondents/defendants is allowed by setting aside the decree and judgment passed by the trial Court in O.S.No.761 of 1984. Consequently, the said suit—O.S.No.761 of 1984 is dismissed.

Cross objections (SR) No.46380 of 1994 filed by the plaintiffs are dismissed. No costs.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

Date: 18.11.2016
scs



U. DURGA PRASAD RAO, J