

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.5381 of 2015

ORDER:

The unsuccessful plaintiff and the proposed plaintiffs 2 and 3 filed this revision petition under Article 227 of the Constitution of India assailing the orders dated 07.08.2015 of the learned XXIV Additional Chief Judge, City Civil Court, Hyderabad, passed in IA.No.84 of 2014 in OS.No.106 of 2009 filed under Order I Rule 10 of the Code of Civil Procedure, 1908, requesting to permit the impleadment of the proposed parties as plaintiffs 2 and 3 in the suit.

2. I have heard the submissions of Smt. Manjari S. Ganu, learned counsel appearing for the revision petitioners.

2.1 Respondents 1 to 17 are stated to be not necessary parties. Notices sent to the respondents 18 and 19 returned unserved with the postal endorsement 'left'; however, it is stated that notice sent to the learned counsel appearing for the respondents 18 and 19 in the proceedings before the trial Court was served and proof of service *vide* USR.No.6202 of 2016 is filed in the Registry on 19.08.2016. Therefore, service against the said respondents is held sufficient. None appeared for the said respondents.

3. I have perused the material record.

4. The case of the plaintiff, as stated in the affidavit filed in support of the petition, in brief, is as follows: "The proposed plaintiffs 2 and 3 are the son and daughter of the sole plaintiff. She filed the suit for declaration and recovery of possession of the plaint schedule property.

However, out of love and affection towards her said children, she had gifted the plaint schedule property to them under an oral gift (Hiba) on 10.02.2013 in the presence of Obaid-Ur-Rehman and Mohammed Nasiruddin Khan. The said gift was accepted by the proposed plaintiffs 2 and 3. The sole plaintiff has subsequently confirmed the said past oral gift by a declaration dated 23.04.2013. The said declaration is filed along with the petition. Thus, the sole plaintiff has transferred the plaint schedule property in favour of her son and daughter, the proposed plaintiffs 2 and 3, and hence, they are entitled to come on record as plaintiffs 2 and 3 and prosecute the suit, being the owners of the plaint schedule property. Considering the nature of the suit, the proposed plaintiffs 2 and 3 are necessary and proper parties since they have acquired interest in the plaint schedule property under oral Hiba and a subsequent declaration. If they are impleaded as parties and the plaint is permitted to be amended for incorporating the said facts in the plaint by adding paragraph 9A after paragraph 9 of the plaint, no prejudice would be caused to the respondents-defendants. If the proposed plaintiffs 2 and 3 are not permitted to be added and the plaint is not permitted to be consequently amended as sought for, the plaintiff and the proposed parties would suffer serious and irreparable loss.”

5. Respondents 18 and 19 filed counter resisting the subject application. In the counter, it is contended as follows: “The suit for declaration and recovery of possession is filed in the year 2009. Until and unless the sole plaintiff is declared as owner, she has no right to settle it by way of oral gift or hiba on any person. As per the averments in the affidavit of the plaintiff, she made an oral gift on 10.02.2013 and

later made a declaration on 23.04.2013 with regard to the past oral gift. As on 10.02.2013, the sole plaintiff, who is the donor, has no capacity to gift the property to the proposed plaintiffs 2 and 3 by oral gift as she is not declared as owner as sought for in the suit. She is also not in possession of the property. Hence, she has no capacity to deliver possession. When she is not in a position to deliver possession, the acceptance of gift and delivery of possession do not arise for consideration. Since the right, title and interest over the subject matter of the suit is under dispute and as the plaintiff is not in possession, the alleged Hiba cannot stand the test of legal scrutiny both under facts and in law. The alleged Hiba is against the intent and spirit of the concept of oral Hiba. Hence, the contentions of the plaintiff cannot be countenanced in a Court of law. The oral Hiba is not valid and the declaration of the past oral Hiba cannot be looked into and considered. As the said acts are *ab initio* fraudulent and dishonest and are vitiated, the proposed plaintiffs 2 and 3 are not entitled to come on record and prosecute the suit by claiming that they are the owners of the plaint schedule property. They become the owners of the property under the alleged gift, if only their mother is declared as owner of the property in the present suit. Till the suit stands disposed of in her favour, they do not get any rights over the plaint schedule property. Since they have not acquired any valid right, title and interest in the suit property and as they have no interest in the suit property, they need not be impleaded as plaintiffs 2 and 3. If their impleadment is permitted, the same causes prejudice to the contesting defendants. The property is subject matter of *lis* since the year 1971. The proposed plaintiffs 2 and 3 cannot be treated as owners and they have no *locus standi* to seek their

impleadment in the capacity of owners of the property. Hence, permitting their impleadment and consequential amendment sought for does not arise for consideration. The petition may be dismissed.”

6. At the hearing before the trial Court, no oral and documentary evidence was adduced. The trial Court, having adverted to the contentions of the defendants, *inter alia*, observed that the oral Hiba is a transaction subsequent to the filing of the suit and that though in the affidavit, the plaintiff sought consequential amendment apart from impleadment of the proposed plaintiffs 2 and 3, in the prayer in the application of the plaintiff only impleadment of the proposed parties was sought but there is no specific mention to permit the plaint to be consequently amended and that the consequential amendment, which is sought in the affidavit creates new cause of action and changes the nature of the suit and that two reliefs cannot be sought in a single interlocutory application and that therefore the petition is liable to be dismissed and accordingly dismissed the petition.

7. Aggrieved thereof, the plaintiff and the proposed plaintiffs 2 and 3 filed this revision.

8. The plaintiff having claimed title and interest in the suit schedule property brought the suit against the defendants for declaration and recovery of possession of the plaint schedule property. Some of the defendants are resisting the suit. During the pendency of the suit, the plaintiff, her son and daughter, that is, the proposed plaintiffs 2 and 3, filed the application seeking the impleadment of the son and daughter of the plaintiff as plaintiffs 2 and 3. The plaintiff submits that out of love

and affection towards her said children, she had gifted the plaint schedule property to them under an oral gift (Hiba) on 10.02.2013 in the presence of Obaid-Ur-Rehman and Mohammed Nasiruddin Khan and that the said gift was accepted by the proposed plaintiffs 2 and 3 and that she has subsequently confirmed the said past oral gift by a deed of declaration dated 23.04.2013. In the counter affidavit, the contesting respondents submitted that since the suit is filed for declaration, the plaintiff's ownership is not yet decided in the suit and that, therefore, when her claim of ownership is in dispute she has no capacity to gift the property and that the gift is invalid for the reason that the plaintiff's ownership is in dispute and also as the plaintiff who is not in possession is not in a position to deliver physical possession and as such the question of making a gift and delivery of possession by the plaintiff to the proposed plaintiffs and the acceptance of the gift by them does not arise.

8.1 Be it noted that the validity of the gift need not be examined in detail at this stage. In *Hafeeza Bibi vs. Shaikh Farid (dead) by LRs and others.*,<sup>1</sup> the Supreme Court while considering an issue as to whether the hiba in that cited case is true, valid and binding on the plaintiffs therein, after analysis of the relevant provisions and on noticing earlier decisions, held as follows:

The position is well settled, which has been stated and restated time and again, that the three essentials of a gift under Mohammadan Law are; (i) declaration of the gift by the donor; (2) acceptance of the gift by the donee and (3) delivery of possession. Though, the rules of Mohammadan Law do not make writing essential to the validity of a gift; an oral gift fulfilling all the three essentials make the gift complete and irrevocable. However, the donor may record the transaction of gift in writing.

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<sup>1</sup> AIR 2011 Supreme Court 1695

In our opinion, merely because the gift is reduced to writing by a Mohammadan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammadan 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 Mohammadan Law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in Mohammadan Law.

Further in the decision in Khursida Begum and Ors. V/s Mohammad Farooq and Ors.<sup>2</sup> a contention was advanced to the effect that gift of undivided property was not valid as the Plaintiff was never given actual or symbolic possession of one-third share of property and that the gift was *hiba-bil-musha*. In that cited case the courts below have held the gift to be invalid on the ground that it was gift of undivided property which is capable of division and was not covered by any of the exceptions to the rule and hence, that gift of such property is irregular. However, it was submitted by learned Counsel for the Appellant therein that the property is freehold property in the city of Jaipur, which is a large commercial town, and this has been wrongly ignored by the courts below on the ground that there was no pleading or proof to that effect and that the description of property mentioned in plaint and in the gift deed itself shows that it is commercial property in the city of Jaipur, which is the capital of the State of Rajasthan, and that requirement of possession is also met when right to collect rent has been assigned to the Plaintiff under the gift deed itself, genuineness of which stands proved. Considering the said submissions, the Supreme Court held as follows:

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<sup>2</sup> AIR2016SC694

“We find force in the submission. The gift had no infirmity under the Muslim Law either on the ground that the possession was not delivered or on the ground that the gift was hit by *Hiba-bil-Musha*.”

Further, in the decision in *Amir Ali Khan and others v. Shahalam Khatoon and another*<sup>3</sup>, the facts of the case show that exhibit B1, a gift deed (Hiba nama) was executed by one Nabi Khan in favour of the 1<sup>st</sup> defendant and that the donee is the sister's daughter of the donor. In that setting of facts, this Court held that in case of gift of immovable property in possession of mortgagee, delivery of property can be only symbolic and not actual or physical and what is required is the intention of the donor to divest his ownership and rights in the property and that such intention can be borne out by the delivery of gift deed and that it would suffice to constitute a valid gift of property in the possession of a mortgagee, if the donor delivers symbolic possession of the property to the donee by handing over the gift deed divesting himself of his title, rights and interest in the property and it is not necessary that there should be any overt act either by way of beat of tom tom or publication or notice to the mortgagee or the like. Though gift of immovable property is not complete unless the donor parts with the possession and donee enters into possession, if the property is in occupation of tenants or mortgagee, gift can be completed by delivery of title deed or gift deed. The law also recognises delivery of possession by attornment or delivery of symbolic possession. Hence, the gift by the plaintiff in favour of her children, the proposed plaintiffs 2 and 3, *prima facie* has no infirmity. Be that as it may.

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<sup>3</sup> AIR 1974 AP 23

8.2 The next contention of the contesting respondents in the counter is that the plaintiff's claim of title is not yet declared as the suit is not yet disposed of and hence the plaintiff could not and did not convey any valid title to her children and hence, they have no right or interest in the schedule property and they have no *locus standi* to get themselves impleaded as plaintiffs 2 and 3. Under the Gift the plaintiff conveyed whatever rights she had in the schedule property. The proposed plaintiffs therefore stepped into her shoes and are hence, entitled to continue to prosecute the suit by getting themselves impleaded as plaintiffs 2 and 3; and they take the schedule property gifted to them subject to the final result in the suit. Therefore, there is no acceptable merit in the contention of the respondents.

8.3 By a catena of decisions the law is now well settled that the transferees, who acquired rights in the suit property *pendente lite*, are entitled to be impleaded. [See Thomson Press (India) Limited v. Nanak Builders & Investors Pvt. Ltd.<sup>4</sup>; Khemchand Shanker Choudhary v. Vishnu Hari Patil<sup>5</sup>; Basant Kumar Soni v. Mukund Das Soni<sup>6</sup>; Sumtibai and others v. Paras Finance Co.<sup>7</sup>; Kasturi v. Iyyamperumal<sup>8</sup>; and Mumbai International Air port Pvt. Ltd. Vs. Regency Convention Centre and Hotels Pvt. Ltd. And others<sup>9</sup>]

8.4 Coming to the aspect that the petition is liable to be dismissed for incorporating two prayers in the application, the said finding of the trial

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<sup>4</sup> 2013(3) ALD 111

<sup>5</sup> [(1983) 1 SCC 18]

<sup>6</sup> 2010(4) ALD 490

<sup>7</sup> (2007) 10 SCC 82

<sup>8</sup> (2005) 6 SCC 733

<sup>9</sup> AIR 2010 SC 3109

Court is totally erroneous in view of the provision of Rule 55 of the Civil Rules of Practice, which reads as under:

‘Separate Application for each distinct prayer: -

There shall be separate application in respect of each distinct relief prayed for. When several reliefs are combined in one application, the court may direct the applicant to confine the application only to one of such reliefs unless the reliefs are consequential and to file a separate application in respect of each of the others.’

8.5 On the above analysis of facts and the legal position, this Court finds that the order of the trial Court is unsustainable and is liable to be set aside.

9. Accordingly, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, IA.No.84 of 2014 in OS.No.106 of 2009 is allowed permitting the impleadment of the proposed parties as plaintiffs 2 and 3 in the suit. The trial Court shall now permit the necessary consequential amendments to the plaint and give an opportunity to the contesting defendants to file additional written statement/s in answer to the new pleading in the plaint and then ascertain upon what material propositions of fact or of law the parties are at variance and frame the relevant additional issue/s on which the right decision of the case appears to depend and dispose of the suit in strict accordance with the procedure established by law.

Pending miscellaneous petitions, if any, in this revision shall stand closed. There shall be no order as to costs.

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M. SEETHARAMA MURTI, J

03<sup>rd</sup> November, 2016  
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