HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

A.S.No. 1081 of 1998
and
Cross Objections

J U D G M E N T:

This is an appeal filed against the decree and judgment dated 19.10.1996 passed in OS.No.134 of 1986 by the Subordinate Judge, Chittoor.

The suit is filed in the lower Court for partition of the plaint schedule properties into three equal shares and for allotment of one such share to the plaintiff. The suit was dismissed and the unsuccessful plaintiffs are the appellants.

For the sake of convenience, as this is a first appeal, the parties are referred to as plaintiff and defendant.

The case of the plaintiffs, briefly, is that the plaintiff, 1st defendant and late S.A.Kareem Saheb are the sons of late Sabjan Saheb. He owned and possessed the plaint schedule properties having purchased them under a registered sale deed dated 15.06.1946. Sabjan Saheb died in 1971 leaving behind his widow-Beejan Bi, three sons and three daughters, who are the only heirs and thus they became co-owners of Sabjan Saheb's estate. In the properties of Sabjan Saheb, plaintiff/S.A.Latheef Saheb has 14/72 share, 1st defendant/S.A.Azam has 14/72 share and Beejan Bi/wife of Sabjan Saheb has 1/8th share. Three daughters of Sabjan Saheb have each jointly got 7/72 share.

S.A.Kareem Saheb died in 1978 leaving behind him his widow, the 2nd defendant and three sons, the defendants 3 to 5 herein. They succeeded to 14/72 share of Kareem Saheb. Beejan Bi out of love and affection gifted Ac.0.60 cents in Sy.No.277 to 1st defendant and Ac.0.50 cents in Sy.No.280 to Iqbal/son of the plaintiff, but both 1st defendant and Iqbal were put in possession of Ac.0.60 cents in Sy.No.277 only and they constructed a cinema theatre in that area. The other piece i.e Ac.0.50 cents in Sy.No.280 was being enjoyed jointly by all the co-owners. No other document executed by Beejan Bi was ever acted upon and all the co-owners continued to be in possession. The defendants 2 to 5 cannot claim exclusive ownership of plaint schedule property and they only entitled to only 14/72 joint share.

The three daughters of late Sabjan Saheb relinquished their rights in the property by a registered relinquishment deed dated 07.11.1984 and since then the plaintiffs and the defendants have been in joint possession and enjoyment of all the plaint schedule properties. As the defendants 2 to 5 are creating trouble in the joint enjoyment of suit schedule property and are contemplating to alienate portions of suit schedule property and as they are jointly entitle for 1/3rd share each on account of relinquishment of their sisters and the Beejan Bi, the suit is filed for partition of the suit schedule property.

Defendant No.1 filed his written statement on 23.03.1990 and defendant No.3 filed his written statement on 21.09.1987 which is adopted by defendant Nos.2, 4 and 5 alleging that the properties are acquired through the business belong to the father of the three sons. No item of property was treated as exclusive property of any member. Sabjan Saheb made oral gift of all the 1946 sale deed properties and also the site retained by him in favour of his wife Beejan Bi. The three sons and daughters consented for the gift. Beejan Bi accepted the gift and took possession of the properties in 1971. In 1976, Beejan Bi executed three registered settlement deeds all dated 04.10.1976. The particulars are (1) gift deed to Iqbal s/o Latheef Saheb and defendant No.1 in S.No.277/2 0.60 cents, S.No.290 0.51 cents; (2) Gift deed given to Akram Saheb S/o Azam Saheb. The defendant Nos.2 to 5 are absolute owners of plaint schedule properties. Defendant No.7 filed his written statement adopted by defendant Nos.6, 8 and 9 alleging that the gift deed dated 10.02.1988 in favour of S.A.Iqbal is neither legal nor valid and it is not binding upon them. On 22.07.1991 defendant Nos.1 and 3 filed their additional written statement adopted by defendant Nos.2, 4 and 5. Defendant No.3 got the additional written statement amended as per orders in I.A.No.419/1996 dated 18.03.1996 and para 5(A) has been included alleging that during the pendency of suit filed by the 1st plaintiff, he died and plaintiffs 2 to 4 got themselves impleaded as legal representatives under Order 22 Rule 3 of C.P.C., to continue the suit. The substituted legal representatives are only entitled to continue the suit laid by the deceased plaintiff and workout the claim as legal representatives and they are not entitled to plead the contrary or urge for grant of relief which the deceased was not entitled to. As such, the plaintiffs 2 to 4 are not entitled to claim independent title.

As per the impugned judgment, during the course of the arguments the following issues were framed:

1. Whether the oral gift by Sabjan Saheb in favour of his wife Beejan Bi in respect of his properties purchased under 1946 sale deed is true and valid?
2. Whether Beejan Bi took possession of the properties of her husband in 1971 in pursuance of the oral gift made by her husband Sabjan Saheb?
3. Whether the three registered gift deeds all dated 04.10.1976 executed by the Beejan Bi are true, valid and binding on the parties to the suit
4. Whether this is bad without the prayer for declaration of title in respect of the rights of the plaintiffs in the shoot schedule properties?
5. Whether the donees under the gift deed dated 04.10.1976 acquired title to their respective properties by way of adverse possession as pleaded by the defendants?
6. Whether the defendants are in physical possession of the entire suit property?
7. Whether the plaintiffs are entitled for partition and separation of possession of

1/3rd share in plaint A, B and C schedule properties?

8. Whether the suit is bad for non-joinder of necessary parties?

9. To what relief?

On behalf of the plaintiffs, PWs.1 and 2 were examined and Exs.A.1 and A.2 were marked. On behalf of the defendants, DW.1 was examined and Exs.B.1 to B.13 were marked.

After consideration of the entire evidence on record, the Court below dismissed the suit and the present appeal is filed questioning the said judgement.

Heard Sri K.S.Gopala Krishnan for the appellants and Sri A.K.Narasimha Rao, P.Gangaiah Naidu and Sri J.Ugra Narasimha for the respondents.

As was pointed out, during the course of submission, the first and foremost questions that arise are (a) whether the Beejan Bi, the wife of Sabjan Saheb, had a right to execute the gift for the entire properties under Exs.B.1 to B.3 and whether the oral gift by Sabjan Saheb in favour of his wife is true. (b) which of these documents, Exs.B.1 to B.3, were prior in point of time and their effect. (c) whether all the necessary and proper parties are added to the suit as parties. (d) whether the plaintiffs are entitled for a decree of partition etc.

The first question that falls for consideration is about the rights of Beeejan Bi, the wife of Sabjan Saheb in the property and if the defendants were able to prove what is mentioned in their written statement. It is an admitted fact that the suit properties were purchased by Sabjan Saheb under Ex.A.1 dated 15.06.1946. Is also a fact that Sabjan Saheb died in 1971. It is the plea set up in the written statement of the defendant Nos.1 and 3 that late Sabjan Saheb executed an oral gift in favour of his wife by which all the properties covered by 1946 sale deed Ex.A.1 were gifted to his wife Beejan Bi. They state that all the sons and daughters (three sons and three daughters) consented to the gift and Beejan Bi also accepted the gift and took possession of the properties.

The parties in this case profess to Muslim religion and therefore, an oral gift by a person professing Muslim religion is valid and is accepted as an exception to the general rule that a gift has to be executed by a registered instrument. As per the law laid down by the Hon'ble Supreme Court of India in ***Rasheeda Khatoon v. Ashiq Ali***[1] and ***Hafeeza Bibi and Others. v. Shaikh Farid (dead) by L.Rs. and Others***[2], the essentials of a Muslim gift are (a) declaration of the donor of his intention to gift the property (b) acceptance by the donee of the gift (c) delivery of possession.

Since the gift pleaded is an oral gift, the quality of evidence required is higher as there is no document

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[1] 2014 (10) SCC 459
[2] 2011 (5) SCC 654

evidencing the same. In this case, admittedly the evidence on record does not show that the three essential ingredients that are necessary for Muslim gift have been fulfilled. The Court below clearly noticed that there is no oral or documentary evidence to speak of to support this theory of oral gift. No contemporaneous documents are filed. DW.1 is not competent to speak about the gift made during the lifetime of his father. In fact, in his cross examination, he states that he was aged about 10 years when Exs.B.1 to B.3 itself were executed in 1971. There is no record of the said gift nor is the pleading clear. Neither the date nor the time of the said gift are proved to show that the gift was given or acted upon. No contemporaneous documents to show that the oral gift was acted upon are filed. Therefore, this Court is of the opinion that the oral gift is not proved.

In addition, the lower Court also relied upon the relinquishment deed marked as Ex.A.2. The lower Court correctly noticed that if the oral gift is valid and all the three daughters have accepted the gift, as was pleaded in the written statements, there was no need for the three daughters to have executed the relinquishment deed. The daughters can only relinquish the estate in which they have a right. Therefore, the fact that a registered relinquishment deed was executed in 1984 as per the pleadings clearly shows that the oral gift is not borne out by record. The Court rightly observed that till 1984 the daughters were claiming rights as they executed the relinquishment only in 1984. This belies the theory of an oral gift. Therefore, this Court concurs with the finding of the lower Court on this issue.

The next question that arises is whether Beejan Bi had any right to execute the three gift deeds, which are marked as Exs.B.1 to B.3. All the three gift deeds were executed on the same day i.e. 04.10.1997. Beejan Bi executed lease deeds as of she is the owner of the entire property. Beejan Bi is the widow of Sabjan Saheb. The said Sabjan Saheb admittedly died in the year 1971 leaving behind his wife Beejan Bi, (three sons and three daughters). Therefore, the succession to the estate of Sabjan Saheb opened up in the year 1971. At that point of time, Beejan Bi had only 1/8th share in the property. The rest of the shares belong to the other legal heirs, who have a right as per their personal law. Therefore, at best, Beejan Bi could only gift her 1/8th share and not the entire property.

An examination of evidence shows that all the three documents were executed on the same day namely 04.10.1997. So which among all these documents, was executed first and which documents takes precedence over the other is the critical issue. On an examination of the evidence, including the evidence of the attestor–C.Narayana Rao, the Court came to the conclusion that the document executed in favour of PW.1 and S.a.Azam at 10.00 a.m was presented first. This was followed by the other two documents. The fact that this document was executed first is also borne out by PW.1's cross-examination. Therefore, the evidence of both PWs.1 and 2 proves that the gift deed in favour of defendant No.1 and the plaintiff was executed first. In the cross-examination of DW.1, he also admits that he has no necessity to challenge the gift deed in favour of Iqbal and Azam. Iqbal is PW.1. He states as follows: "I admit the said settlement deed in favour of Iqbal and Azam-Ex.B.2". Therefore, it is clear that of these three documents, the first document executed is that of in favour of Iqbal and Azam. This document deals with Sy.No.277/2 on which a cinema theatre was also constructed. The other gift deeds, therefore, even if they are registered cannot give a valid title to the donees. It is also apparent from the evidence and the same also noticed by the lower Court that the other two gift deeds were not acted upon. This finding is also correct. Therefore, this Court concurs with the opinion of the lower Court that Beejan Bi could have at best executed a gift deed Ex.B.2 and not more.

Whether necessary and proper parties are added, is however, the crux of the issue. It is an admitted fact that there are three daughters born to Sabjan Saheb and Beejan Bi. Latheef sahib, the original first plaintiff, died during the pendency of the suit in February 1998. Then, I.A.No.442 of 1988 was filed to bring on record the legal heirs as a plaintiffs

2 to 4. Respondent No.3 filed a counter stating that in addition to the three proposed legal representatives, Latheef Saheb left behind four more sons and a daughter. Despite this specific averment that there are other children, the plaintiffs did not seek to bring them on record. As noticed by the Court below at a paragraph of 52 of the judgment, this is a suit for partition in which all the eligible legal representatives will be allotted shares if the suit is decreed whether they be a plaintiff or defendant. Admittedly, there are more legal heirs, who are not included in the plaint. It is not the case of the appellants during the course of hearing that what is stated in the counter filed in I.A.No.442 of 1988 is incorrect. The lower Court, therefore, rightly held that all the legal heirs are not added as the parties. The lower Court also correctly held following the judgment in ***Daya Ram and Others. v. Shyam Sundari***[3] that the plaintiff was not diligent or *bona fide* in his enquiry in searching for the legal representatives. If there was a due and proper diligence on the part of the plaintiffs and there is sufficient representation of the estate, there will not be abatement of the suit. In this case, the question of due diligence is of paramount importance. The proposed plaintiffs who were added and who came on record as a plaintiff 2 and 3 are the widow, son and daughter-in-law of the deceased/first plaintiff. They would definitely be aware of their other siblings. Therefore, it

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[3] AIR 1965 SC 1049

cannot be pleaded by them that they are not aware of the existence of their legal heirs. For all these reasons, this Court holds that plaintiff despite being put on notice, did not take steps to add the proper and necessary parties to the suit. Without the presence of these parties, an effective decree cannot be passed. The suit is, therefore, definitely bad for non-joinder of necessary parties. An effective decree cannot be passed without the presence of all the necessary parties. The suit has to fail on this ground.

As far as the cross objections are concerned, the first is about the oral gift by Sabjan Saheb in favour of his wife Beejan Bi. The same was answered already earlier in the judgment. The quality of evidence is not enough to hold that a gift was in fact given; the oral and documentary evidence including the 1984 deed by the three daughters; belies the theory of the oral gift. Even the possession said to have been taken by Beeja Bi is not proved. The documents filed do not prove her possession either 1971 or thereafter.

In view of the findings on these issues as discussed in the main appeal; the cross objections are also bound to be rejected.

Thus, the appeal is dismissed and the cross objections are also rejected. In the circumstances, both parties are to bear their own costs.

Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 15 .12.2017
KLP