THE HON'BLE SRI JUSTICE M.GANGA RAO

C.R.P.NO.2286 OF 2012

ORDER:

This revision petition, under Article 227 of the Constitution of India, is filed being aggrieved by the order dated 01.03.2012 passed by the Senior Civil Judge, Nandikotkur, in I.A.No.12 of 2012 in O.S.No.13 of 2002 whereby the application filed by the respondents/ defendants under Order XIII Rule 1(2) read with Section 151 of the Code of Civil Procedure, 1908 (for brevity 'CPC') was partly allowed.

2. Originally, the suit is filed by the petitioners herein for partition and separate possession of the suit schedule property and also for passing preliminary decree. During the course of trial, the respondents filed I.A.No.12 of 2012 under Order XIII Rule 1(2) of CPC seeking to receive the documents viz., 1) Gift deed dated 24.12.1957; 2) Relinquishment deed dated 19.04.1982; and 3) Agreement dated 22.06.1998, in evidence.

3. The 4th respondent filed an affidavit in support of the above I.A. stating that the unregistered gift deed dated 24.12.1957 and so also the relinquishment deed dated 19.04.1982 do not require registration as per Mohammadan Law. One Ghouse Baig, the grand father of the 4th respondent herein, gifted the schedule land to his grand

mother Kuburabee vide document dated 24.12.1957 and subsequently his grand mother i.e. Kuburabee executed a Will in favour of his father i.e. deceased 1st defendant. Further, the father of the 1st petitioner herein, who is the senior paternal uncle of the 4th respondent herein, also executed relinquishment deed dated 19.04.1982 in favour of the father of the 4th respondent herein by relinquishing all his rights over the schedule land, as he rendered services to their mother i.e. Kaburabee. Thereafter, petitioners 1 and 2 herein have also executed an agreement dated 22.06.1998 agreeing to give Ac.0.05 cents as they rendered services to their grand mother. Hence, these documents are necessary to mark as exhibits to prove their case.

4. The petitioners herein filed a counter affidavit before the Court below denying the allegations mentioned in the affidavit filed in support of the petition *inter alia* contending that if a written gift deed 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, then it must be registered under Section 17 of the Indian Registration Act,1908. Hence the gift deed dated 24.12.1957 is not admissible in law, for want of registration and, therefore, sought for dismissal of I.A.

5. After perusing the documents, hearing the arguments on both sides and also relying on the dictum of the Hon'ble Apex Court in *Hafeeza Bibi and others v. Shaikh Farid (Dead) by LRs. And others*([1]), the Court below concluded that the gift deed dated 24.12.1957 was based on love and affection; moreover the property was delivered to the donee and donar accepted the gift; and as the gift deed is in the form of declaration by the donar and not as an instrument of gift deed, no registration is required. Likewise, the Court below also concluded that the agreement dated 22.06.1998 also does not require registration. However, in respect of relinquishment deed dated 19.04.1982, the Court below concluded that as the right or title is transferred under the said document from executant to executee, the said document requires registration. Thereby, the Court below allowed the petition in part, permitting the respondents herein to mark gift deed dated 24.12.1957 and agreement dated 22.06.1998 as exhibits and disallowed the claim insofar as marking of relinquishment deed dated 19.04.1982, as it requires registration.

6. Being aggrieved by the said order, the present revision is filed, on the premise that permitting the

[1] 2011 (4) ALT 5 (SC)

respondents to mark gift deed dated 24.12.1957 and agreement dated 22.06.1998 as exhibits is contrary to law, unjust and unsustainable and the Court below failed to consider the judgment of Apex Court in *Hafeeza Bibi and others (1 supra)* in its proper perspective. The counsel for the revision petitioners placed reliance on the judgment of this Court in *Chand Bee and Others v. Hameedunnisa*([2]) to contend that through the present gift deed, property is gifted to the donee. As there is no oral gift anterior to the present gift, the present document requires to be registered under Section 17 of the Registration Act, 1908, otherwise, it is not admissible in evidence. He further contended that through agreement dated 22.06.1998 immovable property was transferred to the executee and as such the same is inadmissible in evidence unless it is registered. The learned counsel for the revision petitioners while placing reliance on another judgment of this Court in *Mayana Saheb Khan v. Mayana Gulab Jan and Others*([3]), further contended that the gift deed is not admissible in evidence without registration. Reliance is placed on para 11 of the said judgment, which reads as under:

> 11. It is settled principle of law that it is the prerogative of a Muslim, to effect gift of immovable properties without even executing a written document,

[2] 2007(1) ALD 810
[3] 2011(1) ALD 36

> much less registering the same. Oral gift in respect of such persons is permissible. Where however, the gift is said to have been made through a written document, it is required to conform with Section 123 of the Act. In the judgments, referred to above, which are relied upon by the learned Counsel for the appellant, this Court held that a document which evidences a gift, though made by a Muslim, cannot be acted upon, unless it accords with Section 123 of the Act. In the instant case, the document was admittedly unregistered and as such, the gift pleaded by the 1st respondent could not have been accepted at all. The trial Court and the lower appellate Court committed serious error of law in recognizing the gift pleaded by the 1st respondent."

7. On the other hand, the learned counsel for the respondents would contend that the gift deed is only a declaration and satisfy the following three essential requisites, as required under Mohammadan Law, to make a gift deed valid viz., (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. The learned counsel for the respondents further contended that in all cases where the gift deed is contemporaneous with the making of the gift, then such gift/deed must be registered under Section 17 of the Registration Act.

8. As contended by the learned counsel for the respondents, deed of gift executed by the Mohammadan is not the instrument effecting, creating or making the gift,

but a mere piece of evidence, such writing is not a document of title but is a piece of evidence. Hence the gift deed is a declaration and it need not be registered. The gift deed is a form of declaration by the donor and not an instrument of gift as contemplated under Section 17 of the Registration Act. As all three essential ingredients of a gift, as required under Mohammadan Law, are satisfied, the gift deed does not require registration and is admissible in evidence.

9. This Court perused the entire material on record and also the judgments relied upon by the respective counsel.

10. In *Hafeeza Bibi (1 supra)*, the Apex Court held that the deed of gift executed by a Mohammadan is not the instrument effecting, creating or making the gift, but a mere piece of evidence, such writing is not a document of title, but is a piece of evidence. Paras 27 and 31 of the said judgment are relevant for better adjudication of the *lis*, which reads as under:

> " 27. 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; (1) declaration of the gift by the donee and (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 wring. Asaf A.A. Fyzee in Outlines of Muhammadan Law, Fifth Edition (edited and revised by Tahir Mahmood) at page 182 states in this regard that writing may be of two kinds: (i) it may merely recite the fact of a prior gift; such a writing need not be registered. On the other hand, (ii) it may itself be the instrument of gift; such a writing in certain circumstances requires registration. He further says that if there is a declaration, acceptance and delivery of possession coupled with the formal instrument of a gift, it must be registered. Conversely, the author says that registration, however, by itself without the other necessary conditions, is not sufficient.

31. Section 129 of T.P. Act preserves the rule of Mohammadan Law and excludes the applicability of Section 123 of T.P. Act to a gift of an immovable property by a Mohammadan. We find ourselves in express agreement with the statement of law reproduced above from Mulla, Principles of Mohammadan Law (19th Edition), page 120. In other words, it is not the requirement that in all cases where the gift deed is contemporaneous to the making of the gift then such deed must be registered under Section 17 of the Registration Act. Each case would depend on its own facts."

11. Coming to the case on hand, three essential requisites of gift, stipulated under Mohammadan Law and as observed by the Apex Court in *Hafeeza Bibi (1 supra)*, are fulfilled to make the document valid.

12. Even as can be seen from the judgement relied on by the learned counsel for the petitioners in *Chand Bee (2 supra)*, this Court held that when the parties to the gift are Muslims and if the unregistered document refers to previous oral gift, then it can be acted upon,

notwithstanding the fact that it was not registered. However, if the gift is made through such an unregistered document itself, then registration becomes compulsory. Para 23 of the said judgment is extracted hereunder for better adjudication of the matter:

> " 23. On behalf of the plaintiff, it is contended that since the parties are Muslims, the requirement under Section 123 does not apply to them, as is evident from that very provision. It is no doubt true that Section 123 does not apply, if the parties to the transaction of a gift are Muslims. It means, an oral gift can also be made. Where, however, such parties choose to execute a gift deed, it must conform to the requirement under Section 123 of the Act. Here, a fine distinction is required to be kept in mind. If the unregistered document is the one, which merely refers to a previous oral gift, it can be acted upon, nothwithstanding the fact that it was not registered. On the otherhand, if a gift is made through such an unregistered document itself, registration becomes compulsory ..."

13. Thus, the Court below has considered the ratio laid down by the Apex Court in *Hafeeza Bibi (1 supra)* in proper perspective, while adjudicating the matter, and allowed marking of two documents. This Court see no illegality or perversity in the order of the Court below warranting interference under revisional jurisdiction under Article 227 of the Constitution of India. However, it is always open to the revision petitioners to test the veracity of the documents either at the time of cross examination, or arguments, as the case may be.

14. Accordingly, the Civil Revision Petition is dismissed. No order as to costs. This Court hope and trust that the Court below shall endeavour to dispose the suit, at an early date, in accordance with law without being influenced by any of the observations made in this order. Miscellaneous petitions pending in this revision, if any, shall also stand closed.

M.GANGA RAO, J

27.10.2017

Note : L.R. copy to be marked.

B/o.
TSNR