

**HIGH COURT OF CHHATTISGARH, BILASPUR****FA No.424 of 2017**

- Smt. Bilkis Fatima W/o Mohd. Safique, Aged About 48 Years R/o Baijnathpara, Raipur, Tahsil And District Raipur, Chhattisgarh. Plaintiff, Chhattisgarh

**---- Appellant/Plaintiff****Versus**

1. Jiyaar Rahman S/o Sheikh Ahmed, Aged About 53 Years R/o In Front Of Prakash Dhobi, Dhobi Gali, Baijnathpara, Raipur, Chhattisgarh., Chhattisgarh
2. Hafijur Rahman S/o Shiekh Ahmed, Aged About 38 Years R/o In Front Of Prakash Dhobi, Dhobi Gali, Baijnathpara, Raipur, Chhattisgarh, District : Raipur, Chhattisgarh
3. Naziur Rahman S/o Shiekh Ahmed, Aged About 36 Years R/o In Front Of Prakash Dhobi, Dhobi Gali, Baijnathpara, Raipur, Chhattisgarh, District : Raipur, Chhattisgarh
4. Anwarul Rahman S/o Shiekh Ahmed, Aged About 28 Years R/o In Front Of Prakash Dhobi, Dhobi Gali, Baijnathpara, Raipur, Chhattisgarh, District : Raipur, Chhattisgarh
5. Nasimur Rahman S/o Shiekh Ahmed, Aged About 35 Years R/o In Front Of Prakash Dhobi, Dhobi Gali, Baijnathpara, Raipur, Chhattisgarh, District : Raipur, Chhattisgarh
6. Deleted (Ataur Rahman) As Per Hon'ble Court Order Dated 22.11.2017 And 15.02.2018), District : Raipur, Chhattisgarh
7. Shafiur Rahman S/o Shiekh Ahmed, Aged About 43 Years R/o Central Jail, Throuth Jail Superintendent, Raipur, Tahsil And District Raipur, Chhattisgarh, District : Raipur, Chhattisgarh
8. Noorjahan Begum W/o Mohd. Rafique, Aged About 43 Years R/o Harda, Madhyapradesh, District : Harda \*, Madhya Pradesh
9. Rehana Beguj W/o Mohd. Rafi, Aged About 35 Years R/o Near Badi Omti, Jabalpur, Madhya Pradesh, District : Jabalpur, Madhya Pradesh
10. Hazra Begum Deleted
11. Altafur Rahman Deleted
12. State Of Chhattisgarh, Through Collector, Raipur, District Raipur, Chhattisgarh

**---- Respondents/Defendants**


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For Appellant: Shri G. M. Hasan, Advocate  
 For Respondent No.1, 3, 4 & 7 : Shri K. K. Dewangan, Advocate

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**D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava &  
 Hon'ble Smt. Justice Rajani Dubey**

**Order on board****Per Manindra Mohan Shrivastava, J.****08/08/2018**

1. This appeal is directed against impugned judgment and decree dated 28-02-2007 passed by the Xth Additional District Judge, Raipur in Civil Suit No.11-A/2005, by which, suit filed by the plaintiff has been dismissed.

2. The appellant-plaintiff filed a suit seeking relief of partition and separate possession on the pleadings, inter alia, that the plaintiff and the defendants are descendants of Kulsum Bee, who married with Sheikh Hussain and after his death, married with his younger brother-Sheikh Amir. It was pleaded that from the wedlock of Sheikh Hussain and Kulsum Bee, Sheikh Ahmed was born and out of the wedlock of Kulsum Bee and Sheikh Amir, Sheikh Ayub was born. As also, out of the wedlock of Sheikh Ayub, defendant No.11-Altaf-ur-Rehman was born. It was also pleaded that from the wedlock of Sheikh Ahmed and Hazra Begum, 7 sons (defendants No.1 to 9) and three daughters including defendants No.8 & 9 and the plaintiff were born.

3. The plaintiff's case was that out of two houses, which are being subject matter of suit, one of them was purchased by Kulsum Bee and another house was jointly purchased by Sheikh Ahmed and Sheikh Ayub. The plaintiff's case was that defendant No.11-Altaf-ur-Rehman, Son of Sheikh Ayub had gifted his share in the joint property in favour of the plaintiff-Bilkis Fatima and memorandum of this gift (Ex.P-1) was prepared in the presence of witnesses on 28-02-1997. On the basis of this gift deed, the plaintiff claimed partition to receive not only her share, to which, she would have been entitled, upon partition of two houses in dispute, but also the share, which devolved upon Altaf-ur Rehman, defendant No.11.

4. Defendant's No.1 to 4 and 6 opposed the plaintiff's case and denied that

any gift was made by defendant No.11-Altaf-ur Rehman in favour of the plaintiff and the entire property was held jointly by all the successors/parties to the suit of Bilkis Fatima, as such, they are entitled to equal share and in fact, partition to that effect has already been effected in the past.

5. However, the learned trial Court disbelieved the plaintiff's case of she having succeeded to the share of Altaf-ur Rehman under Oral Gift (*Hibba*). The trial Court therefore, held that the plaintiff was not entitled to the share of Altaf-ur Rehman on the basis of said oral gift.

6. Assailing correctness and validity of the impugned judgment and decree, particularly the finding recorded on Issue No.4, learned counsel for the appellant contended before us that the learned trial Court fell in error of law and fact both in recording a finding that the plaintiff failed to prove the oral gift of share of Altaf-ur Rehman in her favour. According to him, Altaf-ur Rehman was one of the defendants, impleaded in the suit and he did not specifically deny the plaintiff's case that she had received share of Altaf-ur Rehman by way of gift deed made in her favour by Altaf-ur Rehman. Therefore, the learned trial Court ought to have held in favour of the appellant-plaintiff that the gift by Altaf-ur Rehman, which was in favour of the plaintiff, was proved. Next submission of learned counsel for the appellant-plaintiff is that as far as the validity part is concerned, the trial Court has wrongly recorded a finding that the gift unaccompanied by possession, could not take effect in the eye of law. Relying upon the judgment of Division Bench of High Court of Madhya Pradesh in the case of ***Ajijanbai v. Abdul Shakoor, 1984 M.P. Weekly Note No.78***, it is argued that when the parties are in joint possession, the oral gift (*Hibba*) takes effect under the law and it is not necessary to prove delivery of possession as both the parties are in joint possession. Therefore, the appellant was entitled to relief.

7. On the other hand, learned counsel for the respondents argued that the plaintiff's plea of oral gift (*Hibba*) was required to be proved by clinching evidence. It is submitted that the trial Court has rightly disbelieved the evidence of Saiffudin, PW-2 as he was not the independent witness. The second submission is that even if the factum of such gift is proved, it did not transfer valid title in favour of the plaintiff to claim share of Altaf-ur Rehman, because partition had otherwise already taken place between the parties and therefore, so-called oral gift is not accompanied with possession.

8. We have heard learned counsel for the parties and perused the records.

9. The following two points arise for determination before us, which are as under:-

- (a) Whether the plaintiff succeeded in proving the oral gift (*Hibba*) in her favour by the defendant No.11-Altaf-ur Rehman ?
- (b) Whether the law required delivery of possession to be proved, when the parties admittedly are in joint possession?

10. In so far as the finding of learned trial Court that the oral gift (*Hibba*) is not proved, is concerned, we find that the Altaf-ur Rehman was impleaded as defendant No.11 in the suit. In the written statement filed in another dispute, defendant No.11-Altaf-ur Rehman did not dispute that there was gift made by him in favour of the plaintiff-Bilkis Fatima. Otherwise also, one of the attesting witness of the memorandum of Gift Deed, Ex.P-1 having been examined by the plaintiff and he having fully supported the case of the plaintiff with regard to gift of Altafur Rehman's share in favour of the plaintiff, the finding of the learned trial Court cannot be sustained in the eye of law.

11. In so far as validity of the oral gift (*Hibba*) on the ground of it being unaccompanied by delivery of possession is concerned, on the face of admitted position between the parties that they were enjoying possession of the house in

dispute, the legal position as adumbrated by the High Court of Madhya Pradesh in the case of ***Ajijanbai*** (supra), becomes applicable in the present case. In that decision, it was held:-

“Evidence in the case established that at the time of making the oral gift on 31-07-1969 the respondent was in possession of the property alongwith his donor, namely Ajijan. In such cases, no physical departure of formal entry is necessary. An oral 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 gift. (See, Mulla's Principles of Mohammedan Law, Eighteenth Edition, Page 162). [ See also Abdul Sattar vs. Syed Abdul Bakkar (A.I.R. 1977 Cal.132), Syed Md. Saleem Hashmi vs. Syed Abdul Fateh (A.I.R. 1972 Pat.279) and Md. Sadiq Ali Khan vs. Fakar Jahan Begum (A.I.R. 1932 P.C. 13).”

Therefore, the finding of the learned trial Court on Issue No.4 cannot be sustained in the eye of law and the same is liable to be reversed. We, accordingly hold that by virtue of oral gift (Hibba) in favour of the plaintiff-Bilkis Fatima by the defendant No.11-Altat-ur-Rehman (since dead), the plaintiff-Bilkis Fatima is entitled to the share of Altat-ur-Rehman also, in addition to share, which she has otherwise received under the partition between the parties.

12. Accordingly, the impugned judgment and decree passed by the learned trial Court is set aside. The appeal is, therefore, allowed. The plaintiff's suit is decreed. The plaintiff Bilkis Fatima is entitled to the share of Altat-ur-Rehman, in addition to the share, which she has received under partition. Let appellate decree be drawn accordingly in favour of the appellant/plaintiff.

SD/-  
(**Manindra Mohan Shrivastava**)  
JUDGE

SD/-  
(**Rajani Dubey**)  
JUDGE