

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

SECOND APPEAL NOS.1091 and 1182 of 2018

COMMON JUDGMENT:

Both these Second Appeals are preferred against the judgments and decrees passed, in A.S. No.158 and 157 of 2014 dated 08.06.2018 respectively, by the XXVI Additional Chief Judge, City Civil Court, Hyderabad.

The appellants in S.A.No.1182 of 2018 are the defendants in O.S. No.2226 of 2006 on the file of the 1st Senior Civil Judge, City Civil Court, Hyderabad. The said suit filed by the respondent-plaintiff, for a declaration that he is the absolute and lawful owner of a portion of the Suit schedule property which was gifted to him; for a consequential direction to the appellants-defendants to deliver vacant and peaceful possession of the Suit schedule property; he be put into peaceful and vacant possession thereof; for mesne profits to be granted directing the defendants to pay Rs.2,000/- per month to the plaintiff, from the date of filing the Suit, till the Suit was finally disposed of; and for costs.

O.S. No.603 of 2010 was filed by the appellants herein, against the 1st respondent (plaintiff in O.S. No.2226 of 2006) and others, seeking a preliminary decree for partition and separate possession of their 2/12th share each, in the Suit schedule property i.e. of an extent of 64 sq. yards in House No.17-3A-350, situated at SRT Colony, Yakutpura, Hyderabad; future mesne profits from the date of the Suit till delivery of possession of the shares of the plaintiffs'; and for costs.

The case of the plaintiff in O.S. No.2226 of 2006 (respondent in both these Second Appeals) was that his mother late Smt. Syeda Mohammedi Begum was the absolute owner, and in possession of house No.SRT 350 admeasuring 139 sq. yards situated at Yakuthpura Colony, Hyderabad; she had transferred a portion of her house, of an extent of 119 sq. yards, through a registered gift deed vide document No.3849 of 2006; before transferring the portion in the plaintiff's favour, she had gifted another portion admeasuring 42 sq yards in favour of the plaintiff's brother Sri Syed Ahmed Abbas; she was, however, unaware of the contents of the gift deed executed in favour of Sri Syed Ahmed Abbas, but believed that the gift deed was executed only for 20 sq. yards; it was later that she came to know that the gift deed was of an extent of 42 sq. yards; the area mentioned in the gift deed, executed in plaintiff's favour, should therefore have been for an extent of 97 sq. yards only; before the gift deed could be rectified she expired; she had no right or title with respect to the portion which was sold by her in favour of the 1st defendant (1st appellant herein) later, as the said portion was already gifted to the respondent (plaintiff) much earlier; the sale deed executed in favour of the 1st defendant does not confer any title on him; the 1st defendant had forcibly occupied the portion (illegally purchased by him), despite the plaintiff's protests, and had inducted the 2nd defendant into possession on 19.09.2006; an extent of 33 sq. yards of the Suit schedule property was illegally purchased by the 1st defendant; and, hence, the Suit was filed for declaration that the plaintiff is the absolute owner of the Suit schedule property.

The defendants filed their written statement admitting that their mother was the owner of the property, and she had gifted a portion thereof to Sri Syed Ahmed Abbas vide gift deed dated 27.06.1994. It is further stated that she expressed her intention to sell the Suit schedule property and, accordingly, the 1st defendant had paid Rs.2.00 Lakhs on 15.01.2006, entered into an oral agreement of sale dated 15.01.2006, and had obtained delivery of possession; since the 1st defendant was staying at Mumbai, on account of his job, he had permitted the 2nd defendant to reside in the portion purchased by him from his mother; he, thereafter, requested his mother to execute a registered sale deed in respect of the portion of house No.17-3A-350 admeasuring 33 sq yards covered by the oral agreement of sale dated 15.01.2006; on verifying the encumbrance register, he came to know of the alleged registered gift settlement deed dated 25.07.2006, said to have been executed by his mother in favour of the plaintiff for an extent of 119 sq yards from out of the subject house property; when he enquired with his mother, about the said gift settlement deed dated 25.07.2006, she told him that she never gifted any portion of the house to the plaintiff, and the plaintiff had got executed a registered document misrepresenting that it was a GPA to look after the house; the plaintiff had surreptitiously obtained a gift settlement deed from her; in view of the agreement of sale in respect of 33 sq yards, and having gifted an extent of 42 sq yards earlier, i.e., for a total extent of 75 sq yards, the plaintiff's mother could not have gifted an extent of 119 sq yards; hence the alleged gift settlement deed dated 25.07.2006 is void ab-initio; having come to know of the fraud, the plaintiff's mother had cancelled the

registered gift settlement deed dated 25.07.2006 executing a cancellation deed dated 15.09.2006; she had, thereafter, executed a registered sale deed dated 19.09.2006 in the plaintiff's favour; and she never delivered possession of 119 sq yards to the plaintiff, who was staying in the asbestos sheet roof portion of the house.

In O.S.No.2226 of 2006, the trial Court framed the following issues:

- 1) Whether the gift deed dated 25.07.2006 is true, valid and binding on the defendants;
- 2) Whether the plaintiff is having right and title over the plaint schedule property?
- 3) Whether the plaintiff is entitled for possession of the suit property?
- 4) Whether the suit property is matruka property?
- 5) Whether the suit is bad for non-joinder of necessary parties?
- 6) Whether the defendants are entitled for exemplary costs?
- 7) Whether there is cause of action to file the suit?
- 8) To what relief?

Thereafter, an additional issue was framed as to whether the revocation deed dated 15.09.2006, executed by plaintiff's mother, is legal and valid?

O.S. No.603 of 2010 was filed by the defendants in O.S. No.2226 of 2006 (i.e., the appellants herein) contending that the subject property was Matruka property left by their mother late Smt. Syeda Mohammadi Begum; she was the absolute owner, and was in exclusive possession of the subject house admeasuring 139 sq. yards which was a single room tenement consisting of one room, verandah, kitchen, western closet, a bath and open space;

she had made further construction and had developed the same; she had gifted a portion of the house, admeasuring 42 sq yards, to Sri Syed Ahmad Abbas under registered gift deed dated 27.06.1994; he had made further construction and was living there with his family members; their mother had sold an extent of 33 sq yards pursuant to an oral agreement of sale dated 15.01.2006, and thereafter by a registered sale deed; in the remaining area of 64 sq yards she had constructed an asbestos sheet room in which the plaintiff in O.S. No.2226 of 2006 was residing; they had demanded partition of the Suit property, and to separate their individual share; and the Suit was filed seeking partition and separate possession. During the pendency of the Suit, the 1st defendant died, his legal representatives i.e., defendants 2, 3, 5 to 8 were set ex-parte, and the Suit was contested only by the 1st defendant i.e. the plaintiff in O.S.No.2226 of 2006. The trial Court framed the following issues:

- (1) Whether the plaintiff is entitled to get 2/12th share in suit schedule property;
- (2) Whether the suit schedule property is liable for partition?
- (3) To what relief?

Subsequently, by order dated 30.12.2010, O.S. No.603 of 2010 was clubbed with O.S. No.2226 of 2006, and evidence was recorded in O.S.No.2226 of 2006.

On issues 1 to 4 and additional issue No.1, the trial Court observed that, according to Muslim law, the following conditions must be fulfilled for a gift deed to be valid i.e., (i) a gift must be made by a person to another person; (ii) the persons entitled to make, or take a gift, must have capacity to make or take a gift; (iii)

a gift must be of some subject which can be taken into possession; (iv) the formalities of making a gift must be fulfilled; (v) the gift deed may be revoked by the donor, at any time, before delivery of possession, as before delivery there is no completed gift at all; the gift may be revoked except: (a) when the gift is made by a husband to his wife or by the wife to her husband; (b) when the donee is related to the donor within the prohibited degrees; (c) when the donee is dead; (d) when the thing given has passed out of the donee's possession by sale, gift or otherwise; (e) when the thing given is lost or destroyed; (f) when the things given has increased in value, whatever be the cause of the increase; (g) when the thing given is so changed that it cannot be identified; (h) when the donor has received something in exchange for the gift; (i) a gift may be revoked by the donor, but not by his heirs after his death; (j) once possession is delivered, nothing short of a decree of the Court is sufficient to revoke the gift; neither a declaration of revocation by the donor nor even the institution of a Suit for resuming the gifted property would suffice to revoke the gift; and until a decree is passed, the donee is entitled to use and dispose of the subject of the gift.

The trial Court held that, when delivery of possession is made by the donor, the gift was complete; revocation of such a gift must either be by mutual consent of the parties or by a decree of the Court; cancellation of the gift deed was not with mutual consent of the plaintiff nor was it cancelled by a decree of a Court; the respondent- plaintiff had acquired property by way of a gift under Ex.A1; Ex.A3 cancellation deed did not recite that it was being cancelled by mutual consent; it recited that, due to variation

in love and affection, it was decided to cancel the gift deed; as the mother of the parties was the absolute owner of 139 sq yards, of which she had executed a gift deed in respect of 42 sq yards in favour of Syed Ahmad Abbas, and the remaining extent was 97 sq yards; the plaintiff had restricted his right and title over an extent of 97 sq yards; Ex.A1 gift deed was executed in favour of the plaintiff, prior to the sale deed executed in favour of the 1st appellant-1st defendant; the plaintiff was in possession of the plaint schedule property pursuant to the gift deed; Ex.B1 cancellation deed dated 15.09.2006 was not in accordance with law, and was not valid and binding on the plaintiff; it could therefore not be held that the first appellant herein was the owner of the Suit schedule property; the registered gift deed dated 25.07.2006 was valid; the plaintiff had acquired right and title over the plaint schedule property thereunder; and he was entitled for possession of the plaint schedule property, as the plaint schedule property was matruka property.

On Issue No.5, the trial Court opined that O.S.No.2226 of 2006 was filed for declaration, and not for partition; the Suit was, therefore, not bad for non-joinder of necessary parties. On Issue No.6, the trial Court held that the appellants-defendants were not entitled for exemplary costs. On Issue No.7, the Trial Court held that the defendants' contention that there was no cause of action to file the Suit was not tenable. On Issue No.8, the Trial Court observed that the plaintiff was entitled for a declaration that he was the absolute owner of the suit schedule property to the extent of 97 sq yards. Consequently, O.S.No.603 of 2010 was dismissed. The First Senior Civil Judge, City Civil Court, Hyderabad decreed

O.S.No.2226 of 2006 with costs and dismissed O.S.No.603 of 2010 by his common judgment dated 04.04.2014.

Aggrieved thereby, the appellants herein filed A.S.No.157 of 2014 against the judgment and decree in O.S.No.2226 of 2006 dated 04.04.2014, and A.S.No.158 of 2104 against the judgment and decree in O.S.No.603 of 2010 dated 04.04.2014. The Learned XXVI Additional Chief Judge, City Civil Court, Hyderabad, by his common judgment dated 08.06.2018, dismissed both the Appeals confirming the common judgment in O.S.No.2226 of 2006 and O.S.No.603 of 2010 dated 04.04.2014 passed by the 1st Senior Civil Judge, City Civil Court, Hyderabad.

The Appellate Court observed that, since the plaintiff in O.S.No.2226 of 2006 was claiming title over the plaint schedule property under Ex.A1 gift deed, the initial burden lay on him to prove Ex.A1. It was contended, on behalf of the appellants-defendants, that in Ex.A1 an extent of 119 sq yards was noted though, by that time, only an extent of 97 sq yards was available; the gift deed was therefore not valid in law; there was no delivery of possession of the property under Ex.A1; for a valid gift under the Mohammadan Law, three essential ingredients must be satisfied: (i) declaration of the gift by the donor; (ii) acceptance of the gift by the donee; and (iii) delivery of possession; and the appellants had contended that delivery of possession was not proved and, consequently, Ex.A1 gift deed was also not proved.

The Appellate Court held that Ex.A1 gift deed, executed in favour of the plaintiff, contained the recital that the schedule property therein was gifted to the plaintiff, he had accepted the same, and delivery of the property was also effected under the said

document; all the three essential ingredients of a valid gift, under Mohammadan Law, were satisfied under Ex.A1; the contention that, since there was a variation in the extent of the property mentioned under Ex.A1, delivery of possession could not be accepted, was not tenable; it is settled law that boundaries prevail over extent; even if the extent was erroneously noted as 119 sq yards, instead of 97 sq yards, since four boundaries were given in Ex.A1 gift deed, the said boundaries would prevail over the extent of land; and as such, delivery of possession of the property, mentioned in Ex.A1 gift deed, could be believed. With respect to execution of the gift deed, the Appellate Court observed that the defendants had admitted execution of Ex.A1 gift deed, by their mother, in favour of the plaintiff; they, however, claimed that the gift deed was obtained by fraud and misrepresentation; and their mother was led to believe that the document being executed was only a G.P.A.

The Appellate Court held that, since the appellants-defendants had taken the plea of fraud in executing the gift deed, the burden lay on them to prove that Ex.A1 was obtained by fraud or misrepresentation being played on their mother; fraud and misrepresentation were not mentioned in Ex.B1 cancellation deed, and the defendants had failed to establish that Ex.A1 was obtained by fraud or misrepresentation; the gift deed could not be unilaterally cancelled, without notice to the donee; as Ex.B1 was executed without notice and knowledge of the plaintiff, it was not binding on the plaintiff; and it was not a valid cancellation in the eye of law.

With regards delivery of possession, the Appellate Court noted the contention urged on behalf of the appellants-defendants that the plaintiff had stated 19.09.2006 as the date on which he was dispossessed by the 2nd defendant; the 2nd defendant was not in India on that date; and, as proof thereof, the 2nd defendant had produced a passport, and the entries therein, to show that he was not in India on the relevant date. The Appellate Court examined and observed that Ex.B3 passport was in the name of Sri Syed Zamanat Abbas, whereas the name of the 2nd defendant was Sri Syed Shoukath Abbas; the name of the 2nd defendant in O.S.No.2226 of 2006, and his name in the passport, did not tally; and hence, he could not rely upon Ex.B-3 passport.

With regards the rectification deed dated 19.02.2009, the Appellate Court held that as Ex.A1 was proved, even if Ex.A3 could not be executed unilaterally by the plaintiff, since boundaries prevail over the extent, Ex.A1 could not be declared as not valid; even if Ex.A3 was not considered, Ex.A1 was valid for an extent of 97 sq yards; and the objection of the appellants-defendants was not tenable.

With regards the first appellant's claim that he had purchased the Suit schedule property from his mother on 15.01.2006 under an oral agreement of sale, even prior to execution of Ex.A1 gift deed, the Appellate Court held that it was for the first defendant to establish the said oral agreement of sale dated 15.01.2006 in respect of the plaint schedule property; Ex.A2 registered sale deed dated 19.09.2006 made no mention of the alleged oral agreement of sale dated 15.01.2006; if really there was an oral agreement, it should have been mentioned in Ex.A2; the

appellant-first defendant had pleaded that, under the oral agreement, he had paid Rs.2.00 Lakhs to his mother, and had obtained delivery of possession of the plaint schedule property on 15.01.2006 itself; if this was true, it would have been mentioned in Ex.A2 sale deed dated 19.09.2006 wherein it was mentioned that on the date of Ex.A2, i.e. on 19.09.2006, possession of the property was delivered to the 1st defendant; if really there was an oral agreement of sale dated 15.01.2006, it should have been mentioned in Ex.A2 sale deed; since the same was not mentioned, the plea of the first defendant that he had purchased the suit schedule property, prior to execution of the gift deed, could not be believed; as the extent of 33 sq yards, sold under Ex.A2 sale deed, was part and parcel of the schedule property covered by Ex.A1 gift deed, it must be held that Ex.A2 sale deed was not valid under law; and it did not bind the plaintiff.

With respect to the appellants' claim for partition, in O.S. No.603 of 2010, for an extent of 64 cents, the Appellate Court held that, admittedly, 42 cents was gifted by the mother of the parties to one of her sons, and 97 square yards was gifted under Ex.A-1 to the plaintiff; there was no residue left, from the total extent of 139 square yards, for partition; and, therefore, the lower Court had rightly decreed O.S. No.2226 of 2006 and dismissed O.S. No.603 of 2010.

Mrs. Manjiri S. Ganu, Learned Counsel for the appellants, would submit that one of the three ingredients, for a valid gift under Mohammadan Law, is delivery of possession of the subject property; it was incumbent upon the respondent-plaintiff, who sought a declaration before the Court below, to establish that,

pursuant to the gift deed, possession of the subject property was delivered to him; the Appellate Court failed to consider that mere recital in the gift deed, regarding delivery of possession, would not suffice; independent evidence should have been adduced to show that possession was delivered; the respondent-plaintiff had contended that he was dispossessed from the subject property; no evidence was adduced by him to show whether any police complaint was lodged by him on his being forcibly dispossessed; in the absence of satisfactory evidence being let in to establish delivery of possession, the gift deed was invalid; and, consequently, the subject sale deed, executed after the gift deed was cancelled, was legal and valid. With regards A.S. No.158 of 2014, Mrs. Manjiri S. Ganu would contend that neither the appellate Court nor the trial Court had even considered the issues; and since both these orders are bereft of reasons, the judgment and decree in O.S. No.158 of 2014 is also liable to be set aside.

As is evident from the facts noted hereinabove, the mother of the plaintiff and the defendants was the owner of an extent of 139 square yards of land in which a single room tenement consisting of one room, verandah, kitchen, a western closet was constructed. She had, subsequently, made further constructions and developments on the subject property. The fact that she gifted an extent of 42 square yards, under registered gift deed dated 27.06.1994, in favour of her son Sri Syed Mahboob Abbas is not in dispute. The dispute, in the present appeals, relates only to the remaining extent of 97 square yards. It is also not in dispute that the plaintiff's mother had executed a registered gift deed in favour of the respondent-plaintiff for an extent of 119 square yards vide

registered gift deed dated 25.07.2006. The respondent-plaintiff, however, admitted that, while the gift deed disclosed that an extent of 119 square yards was gifted, his claim was only for an extent of 97 square yards, since 42 square yards had already been gifted in favour of his brother Sri Syed Mahbob Abbas by gift deed dated 27.06.1994.

The case of the appellant-defendant, on the other hand, was that an oral agreement of sale was entered into between the first appellant and his mother on 15.01.2006 which was validated by the subsequent registered sale deed dated 19.09.2006 for an extent of 33 square yards. It is their case that, in the remaining extent of 64 square yards, their mother was residing. (139-75) (i.e. 42 square yards gifted to Sri Syed Mahbob Abbas plus 33 square yards sold to the first-Appellant by registered deed dated 19.09.2006, i.e. for a total extent of 75 sq yards). It is the case of the appellants that the gift deed executed in favour of the respondent-plaintiff was cancelled by their mother vide cancellation deed dated 15.09.2006 prior to her executing a sale deed in favour of the appellants on 19.09.2006. It is also not in dispute that the cancellation deed dated 19.09.2006 was without the consent of, or notice to, the respondent-plaintiff. As has been rightly held by the Court below, it is only if the gift deed is cancelled either by mutual consent or by a decree of a court would such cancellation be valid; and, as it is not in dispute that the cancellation was without notice or consent the respondent-plaintiff, such cancellation is evidently illegal and invalid.

The Appellate Court has explained the discrepancy in Ex.A-1 gift deed and has observed that, since the factum of 42 square

yards having been gifted by their mother to Sri Syed Mahboob Abbas for an extent of 42 square yards was not in dispute, the remaining extent (139-42) was only 97 square yards; and, therefore, the respondent-plaintiff had rightly restricted his claim to this extent. The appellate Court has also held, rightly so, that since boundaries prevail over extent, the mere fact that the gift deed wrongly refers to the extent as 119 square yards is of no consequence, since the boundaries clearly disclose that the subject property was gifted to the respondent-plaintiff.

The Appellate Court has disbelieved the appellants' plea that an oral agreement of sale was entered into on 15.01.2006; and has held that, if really this was true, the recital in the subsequent sale deed dated 19.09.2006 should have recorded that an oral agreement of sale had been entered into on 15.01.2006, or that a consideration of Rs.2,00,000/- was paid pursuant thereto. As there was no such recital in the sale deed dated 19.01.2006, the appellants' contention of an oral agreement of sale having been entered into more than six months prior to the gift deed dated 25.06.2006, was rightly rejected by the Courts below.

The suit, in O.S. No.603 of 2003, was to partition an extent of 64 square yards (i.e., after deducting 42 square yards gifted to Sri Syed Mahboob Abbas vide registered gift deed dated 27.06.1994, and 33 square yards sold to the appellant-defendant vide sale deed dated 19.09.2006 from the total extent of 139 square yards owned by the mother of the plaintiff and the defendant). It is only if the suit in O.S. No.2226 of 2006 had been dismissed, and the respondent-plaintiff's claim to own 97 square yards of land, pursuant to the gift settlement deed dated

25.07.2006, had been rejected, would the question of partitioning an extent of 64 square yards arise. Since O.S. No.603 of 2010 was dismissed, on the suit in O.S. No.2226 of 2006 being decreed, it is only if the gift settlement deed dated 25.07.2006 is held to be invalid can the appellants herein be held to be justified in their claim that the remaining extent of 64 square yards should be partitioned.

The challenge to the validity of the gift deed, in Ex.A-1 dated 15.07.2006 is on the ground that one of the three ingredients of a valid gift, i.e. of possession being required to be delivered pursuant thereto, was not fulfilled. This contention was dealt with by the Appellate Court, in the order under appeal, and it was held that Ex.A-1 gift deed dated 15.07.2006 contained recitals that the schedule property was gifted to the plaintiff, he had accepted the same, and delivery of the property was affected. The fact that the gift deed contain such a recital has not been disputed before us.

Mr. Manjiri S. Ganu, Learned Counsel for the appellants-defendants, would however contend that the respondent-plaintiff ought to have adduced independent evidence, besides the recitals in the gift deed, to show that possession was delivered to him; likewise it was incumbent upon him to adduce evidence to prove that he was illegally dispossessed on the second defendant being inducted into possession on 19.09.2006.

As noted hereinabove, the appellate Court has accepted the respondent-plaintiff's plea that he was inducted into possession pursuant to the gift deed dated 15.07.2006, and was forcibly dispossessed therefrom on 19.09.2006. The Appellate Court has relied on the recitals in the gift deed in this regard. It has also

disbelieved the second defendant's plea that he was not even in the country on 19.09.2006, when the respondent-plaintiff had alleged that he was inducted into possession. The Appellate Court has noted that the name in the passport produced by the second-defendant (i.e. the second appellant) was at variance with the name of the second defendant in the cause title of the suit.

A Second Appeal, under Section 100 of the Civil Procedure Code, would lie only if the case involves a substantial question of law. A substantial question of law would arise, on findings of fact recorded by the Court below, only if the said findings are either perverse or are based on no evidence. It is only if the conclusions of the Appellate Court are such that no reasonable person would arrive at such a conclusion, can it then be said the findings arrived at by the Courts below are perverse. Likewise absence of evidence, acceptable to a reasonable man, would result in a finding based on no evidence which would give rise to a substantial question of law. The Appellate Court has relied on the recitals in the gift deed dated 15.07.2006 to conclude that the respondent-plaintiff was inducted into possession pursuant thereto. It has noted the discrepancy in the name reflected in the passport with the name reflected in the cause title of the suit, and has therefore disbelieved the 2nd appellant-defendant's claim that he was not even in the country on 19.09.2006. I am satisfied, therefore, that the concurrent findings of fact, recorded by the Courts below, do not necessitate interference, and no case has been made out by the appellants, for both these Second Appeals to be entertained under Section 100 of the Civil Procedure Code.

Both the Second Appeal Nos.1091 of 2018 and 1182 of 2018 fail and are, accordingly, dismissed. The miscellaneous petitions pending, if any, shall also stand closed. No costs.

(RAMESH RANGANATHAN, J)

After judgment was pronounced, Sri Sunil B. Ganu, Learned Counsel for the appellants, requests three months time to be granted for the appellants to vacate the subject property on their filing an affidavit before the trial Court within a week from today, undertaking to voluntarily and peacefully hand over possession of the subject property before the end of three months from today i.e. 20.12.2018. In the light of the undertaking furnished by the appellants, to voluntarily and peacefully vacate the property on or before 20.12.2018, suffice it to direct the Executing Court not to execute the decree till 20.12.2018.

(RAMESH RANGANATHAN, J)

Date:20.09.2018.

MRKR/CS