

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

AS.No.802 of 1998

JUDGMENT:

This appeal is filed against judgment and decree dated 26.08.1997 in OS.No.19 of 1983 on the file of the Court of the Subordinate Judge, Madanapalle.

For the sake of convenience as this is a first appeal, the parties are referred to as plaintiffs and defendants as in the lower Court only.

The brief facts of the cases are that:

The suit OS.No.19 of 1983 is filed for declaration of plaintiffs' right and title to the plaint schedule houses, for consequential permanent injunction, restraining the defendants from in any manner interfering with the plaintiffs' possession and enjoyment over item No.1 and from making necessary structural alterations with alternative relief for recovery of possession of item No.1 of suit property. Item No.1 is house property situated in Krishna Vidyala Street bearing Door No.5/338 shows four Thakus with distinct measurements and boundaries. Item No.2 consists of housing property situated in Krishna Vidyala Street bearing Door No.5/344.

Originally, one Shaik Silar Saheb filed this suit. As he died, plaintiff Nos.2 to 6 came on record as legal representatives. They are the elder brother's children of

deceased/plaintiff. The deceased first plaintiff was owner of both the items and was paying all the Municipal taxes and other taxes. The first defendant is the second wife of the deceased first plaintiff while defendant Nos.2, 4 and 6 are the children born to her through her former husband by name late Venkatappa. The deceased first defendant converted to Islam changed her name and became the second wife of the deceased plaintiff. The deceased plaintiff had lost his wife and had no children. Through the first defendant also he did not beget any children. The deceased plaintiff, therefore, used to shower his love and affection towards his elder brother's children who are other plaintiffs. After the deceased plaintiff's marriage with the first defendant, she brought pressure and got executed some documents keeping the properties in her name. The first plaintiff to appease and allay, the fears of the first defendant executed a nominal gift deed dated 17.07.1971 purporting to gift the western half of the house to the first defendant to be enjoyed by her after the life time of the plaintiff which document never acted upon or intended to be acted upon by the plaintiff and the deceased plaintiff himself has been keeping the original document. Against the insistence of the first defendant, the plaintiff executed another gift deed on 10.07.1975, in respect of the eastern half of the house bearing Door No.5/338 but the gift was also never acted upon nor intended to be acted upon by the deceased plaintiff. The plaintiff himself had retained

possession of the original gift deed besides continuing to be in possession and enjoyment of the entire house property by paying municipal taxes, electricity bills and other taxes due to the house.

The second item, originally belong to one Potukuri Reddemma and her daughters Sakunthamma, Lakshmiddevamma. The deceased plaintiff purchased it for a consideration of Rs.12,000/- on 12.03.1981, but the sale deed was kept in the name of the deceased first defendant benami. The entire sale consideration amount was paid only by the deceased plaintiff and the deceased first defendant absolutely had no role in it. She neither has the sources nor the financial capacity to purchase the house for Rs.12,000/- and the possession of original document is also with the deceased plaintiff. He alone was paying municipal taxes and other taxes due in respect of it.

While the things stood thus, defendants 2 to 6 entered the house, bearing No.5-338 one after another under the pretext of seeing their ailing mother and gradually the first defendant became a captive in their hands.

At the same time, even the plaintiff Nos. 2 to 6 had also come to live in the house and due to advanced age and changed circumstances, the deceased plaintiff had to rely upon plaintiff Nos. 2 to 6. On the advise of well wishers and to purchase peace, on 23.11.1981, the deceased first plaintiff

gifted away portion marked in red-colour to his brother's sons Saheb Peeran, Shaik Maqдум Basha and Shaik Arif-Bashe and the portion marked in blue colour and some landed property to the first defendant, under two separate gift deeds and put them in possession of the same, having retained possession and title of the remaining portion of the building more fully described in item No.1 of the plaint schedule. Plaintiff came to know that the first defendant has again gifted the properties got by her under gift deed dated 23.11.1981 to the sixth defendant. According to the deceased plaintiff, since the deceased first defendant was a benamidar, absolutely she had no right to gift item No.2 to the sixth defendant and that gift will not confer any rights on him. Thus, the deceased first plaintiff contends that he was constrained to file the instant suit.

Defendant Nos.2 to 6 filed their common written statement. They contended that the first plaintiff was not the owner of the houses mentioned in item No.1 of the plaint schedule. According to them, even item No.2 never belonged to the first plaintiff. The sixth defendant and deceased first defendant having sold their landed property of 0.50 cents situate at Makkalavandladinne village under duly registered sale deeds and with that amount the deceased first defendant purchased plaint schedule item No.2 from one Reddamma under a duly registered sale deed who put her in possession of the same.

They have denied the allegation that the deceased plaintiff executed nominal gift deed dated 19.07.1971 in respect of part of item No.1 and landed property measuring Ac.2.31 cents in Sy.No.7/1 and contended that the document was not a restricted one and was executed with absolute rights. Likewise, they have also denied that the gift deed dated 10.07.1975, by the deceased plaintiff in favour of deceased defendant concerning eastern $\frac{1}{2}$ of item No.1 is a nominal document never intended to be acted upon or acted upon. Concerning the later gift deeds dated 12.03.1981 and 25.07.1982; they contend that the deceased defendant due to love and affection voluntarily executed them with absolute rights in favour of the sixth defendant. Likewise, she had also executed yet another gift deed dated 14.09.1981 in favour of the second defendant concerning some portion of item No.2 and put her in possession of the same.

Basing on the pleadings, the following five issues were originally settled -

1. Whether the gift deeds dated 17.07.1971 and 10.07.1975 executed by the deceased first plaintiff in favour of the deceased first defendant or nominal one?
2. Whether the sale deed dated 12.03.1981 executed by P.Reddemma and others in favour of the deceased first defendant was benami for the deceased first plaintiff?

3. Whether the gift dated 23.11.1981 executed by the deceased first plaintiff in favour of the deceased first defendant is a nominal one?
4. Whether the plaintiffs 2 to 6 are the legal representatives of the deceased first plaintiff and whether they are entitled to conduct the case without obtaining succession certificate and whether they have locus standi to prosecute the suit?
5. Whether the plaintiffs are in possession of the suit property and whether the suit is maintainable for mere declaration and injunction without asking for possession?

After the alternative plea was introduced the following additional issue was settled for trial on 06.08.19971.

1. Whether the plaintiffs are entitled to alternative relief of recovery of possession of item No.1 as prayed for?

After the issues were framed, oral evidence was let in. PW.1 was examined for the plaintiffs and Exs.A.1 to A.8 were marked. For the defendants, 4 witnesses-DWs.1 to 4 were examined and Exs.B.1 to B.33 were marked. Ex.C.1 is the plan that is attached to the plaint itself and Exs.X.1 and X.2 are two registered sale deeds. Ex.X.1 is the sale deed executed by the fifth defendant in favour of C.H.Mangamma while Ex.X.2 is the sale deed executed by the deceased first

defendant in favour of the sixth defendant. After this evidence was introduced and considered, the lower Court ultimately came to a conclusion that issue No.1 and additional issue No.1 are to be held against plaintiff and as such, the suit of the plaintiffs was dismissed in its entirety. It is this order and judgment that is now impugned in the appeal.

This Court has heard Sri M.N.Narasimha Reddy, learned counsel for the appellant and Sri P.Jagadish Chandra Prasad, learned counsel for the respondents.

During the course of the submissions both the learned counsels submitted that the dispute is now confined to issue No.1 and additional issue No.1 only. They both agree that other issues do not survive for consideration. The matter initially heard and later reopened also and again it was clarified that issue No.1 and additional issue No.1 only survive for consideration.

Issue No.1 is to the following effect:

1. Whether the gift deeds dated 17.07.1971 and 10.07.1975 namely Exs.A.1 and A.2 are executed in favour of the deceased first defendant are nominal one? (This issue is reproduced as it is framed).
2. Additional Issue No.1 is to the effect that the whether the plaintiffs are entitled to recovery of the possession of item No.1 property?

This Court after hearing both the learned counsels is of the opinion that issue No.1 is not properly framed although the Court answered the same. The point for consideration in relation to issue No.1 is - whether the two gift deeds dated 17.07.1971 (Ex.A.1) and 10.07.1975 (Ex.A.2) are valid gift deeds or are they nominal gift deeds which were never meant to be acted upon?

Additional issue No.1 has been rightly framed and the point for consideration in this is - whether the plaintiffs are entitled to the alternative relief of recovery of possession.

The first question that arises for consideration is whether the plaintiff willingly and voluntarily executed the gift deeds Exs.A.1 and A.2 in favour of the deceased first defendant or whether they were nominally executed as pleaded and were never meant to be acted upon?

It is an admitted case that first defendant was a Hindu whereas deceased first plaintiff was a Muslim. As can be seen from the pleadings, the first defendant converted herself to Islam, changed her name and became second wife of the plaintiff. However, no children were born to the deceased plaintiff and the deceased first defendant out of this wedlock. The dispute now is between the original children of the plaintiff and children of the first defendant, who are arrayed as legal heirs in the suit and the appeal.

The case of the appellants/plaintiffs is that both these deeds Exs.A.1 and A.2 were executed nominally and were not acted upon. It is the case of the plaintiffs that the first defendant began to pressurise the deceased first plaintiff to execute a document in her name so that the deceased first plaintiff does not convey all his property to his natural children. The case of the plaintiffs is that although the documents were executed, they were never acted upon. They rely on the fact that the originals of these deeds are with the deceased first plaintiff only and he was enjoying the property as owner. Therefore, their contention is that these documents were never acted upon. Alternatively they also argue that there is no acceptance or delivery of possession also of the two gifts and therefore, the gifts are not completed by acceptance.

Learned counsel for the appellants also relied upon ***Rasheeda Khatoon v. Ashiq Ali***¹, of Hon'ble Supreme Court of India and argued that unless there is delivery of possession, the gift is not completed.

In reply to this, the defendants argued that Exs.A.1 and A.2 are not nominal documents; that the deceased first defendant who is living with the deceased plaintiff in his own house has also paid the house taxes and enjoyed the property as the owner. The counsel also pointed out that subsequently

¹ 2014 (6) ALD 89

the deceased first defendant executed gift deeds in favour of her son-sixth defendant; that the properties covered by gift deed Ex.A.2 was transferred to the sixth defendant; that the second plaintiff is an attester to Ex.A.2 gift deed and the first plaintiff was an attester to Ex.B.5/B.33 gift deed by which first defendant gifted the property. Therefore, they argued and stated that the first defendant acted as the owner of the property and that by attesting the subsequent deeds, the deceased first plaintiff himself acknowledged the title and that the subsequent transfers were actions of an owner and not a person, who only got a nominal deed in her name. Therefore, the first and foremost question that is to be decided in this case is whether Exs.A.1 and A.2 are nominal documents or properly executed gift deeds.

Learned counsel for the appellants argued that a gift is not complete more so under Muslim law unless the same is accepted. It is his contention that there should be actual delivery of possession along with the acceptance of the gift deed. Learned counsel points out that the originals of these two deeds always remained with the deceased first plaintiff and were produced by PW.1 in original. In addition, subsequent to these documents also, the taxes were being paid by the deceased first plaintiff only and not by the deceased defendant who is donee under these two gifts. The learned counsel also points out that there is no evidence whatsoever to prove the delivery of possession which is

required under law. The learned counsel also relied upon the case of ***Rasheeda Khatoon*** (1 supra) and argued that in the absence of delivery of possession, the gift is not valid. He relied upon paras 16 and 17 of this judgment and argued that there is no delivery of possession and contended that the gifts are invalid.

In reply to this, learned counsel pointed out that even Ex.A.3 tax receipts which are filed by the plaintiffs themselves show taxes were paid by the deceased first defendant herself. There is a handwritten endorsement on at least 5 receipts mentioning “paid by Fathima Bi”. There is no explanation from the witness PW.1 who produced these documents.

The learned counsel also pointed out that in the additional written statement they have taken a specific plea, which go to show that Ex.B.5 is attested by the first plaintiff himself. By Ex.B.5 the deceased first defendant transferred property to defendant Nos. 4 and 5. The counsel also pointed out that the lower Court correctly analysed the available documents and came to the conclusion that the gifts are not nominal and were acted upon. The learned counsel also pointed out Ex.A.1 contains certain land also in addition to the building which is the subject matter of the suit. This land was sold by the sixth defendant ultimately to the second plaintiff. In addition, the counsel also points out the admissions noted by

the Court below in the evidence of PW.1 and points out that the findings of the Court are correct.

This Court on an examination of the facts and the submissions of both the learned counsels notices the following salient and clear facts:

(1) Ex.A.1 is executed on 17.07.1971. Ex.A.2 is executed four years later on 10.07.1975. Ex.A.2 clearly refers to the earlier gift deed Ex.A.1 in the schedule as the western boundary. There is a time gap of four years between these two documents.

(2) Ex.A.1 gift deed in addition to the house property also contains other property which was transferred later by the sixth defendant to the second plaintiff by Ex B 6. The sixth defendant in turn got this property from the first defendant. Therefore, the second plaintiff is clearly aware of the flow of title.

(3) Ex.B.5 is a registered gift deed executed by the deceased first defendant. The certified xerox copy of this document is also filed as Ex.B.33. This document was attested by the first plaintiff himself. Therefore, the first plaintiff was aware of transfer being made.

4) This Court also notices that the lower Court also considered the admissions which are made by PW.1 himself in the lower Court, wherein he clearly say that remaining property which is there after the gift deed Exs.A.1 and A.2

was gifted to him under Ex.A.8. He also admitted that the remaining portion which is not shown in any colour in the property was gifted to the deceased first defendant.

He also agreed that the deceased first defendant and Venkataramana figured as attestors of Ex.A.8 and that he and Venkataramana have attested Ex.A.5 gift deed executed in favour of the first defendant. Ex.A.5 is a registration extract of a gift deed dated 23.11.1981 executed by the first defendant in favour of the sixth defendant.

5) It is also clear that the plaintiffs have amended the plaint and have sought recovery of possession which clearly shows that the plaintiffs admit the possession of the defendants.

6) This Court also notices that DWs.2 and 3 were also examined to prove the subsequent gifts of the property. DW.1 is the attestor of Ex.B.4 which is a gift deed executed in favour of defendant Nos.2 and 3 by the deceased first defendant. This witness also states that Exs.B5/B.33 was written in his presence and he has seen what is written therein. DW.3 is another witness, who attested Ex.B.2 gift deed executed by the deceased first plaintiff in favour of the deceased first defendant. He clearly deposes to the fact that the contesting second plaintiff attested Ex.B.2. In the cross-examination, he states that along with Ex.B.2 another gift deed dated 23.11.1981 was executed by the deceased first

plaintiff in favour of the second plaintiff and his brothers. He attested that deed also. There is no clear cross-examination at all in other aspects. Therefore, from a reading of this evidence, this Court finds that the second plaintiff, who is the main contesting plaintiff was himself a party to the transactions covered by the documents as an attester and also been privy to the further transfers.

7) The tax receipts filed by the plaintiffs themselves clearly show some taxes have been paid by Fathima Bi-deceased first defendant.

8) The further transfer of the land covered by Ex.A.1 also clearly shows that second plaintiff is aware of the flow of title of the sixth defendant. If sixth defendant did not have title, the second plaintiff would not have purchased the property under Exs.B.6 and B.7.

9) In addition, this Court notices that the nominal nature of the document is not really strongly spoken about by PW.2 in his evidence. By virtue of the proviso to section 92 of the Evidence Act, the plaintiff is entitled to introduce evidence to prove that the document was meant to be acted upon. This is an exception to the general rule that there cannot be oral evidence about the terms of a written document. However, despite some pleading, such evidence is totally lacking in this case.

10) In addition, it is important to note that both the deceased first plaintiff and his wife the deceased first defendant were living in the same house as man and wife. The witness PW.1 clearly admits that the first defendant was residing with her husband in the same property till her death. As the parties profess Muslim faith, the question is whether actual physical delivery of the possession should be evidenced by a departure of the plaintiff and actual physical entering into possession by the donee. The principles of Mahomedan Law by Sir Dinshaw Fardunji Mulla, 20th edition, discussed this issue in detail. Clause 152 is to the following effect:

152. Delivery of possession of immovable property (1) Where donor is in possession. --- A gift of immovable property of which the donor is in actual possession is not complete, unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession.

However, clause 152 (3) states that where both the donor and donee are residing at the time of the gift in the same property, some overt act is enough. This Rule laid down in clause 152 (3) is made applicable to a gift of an immovable property by husband to a wife and Rule 153 clarifies the position as follows:

153. Gift of immovable property by husband to wife: The rule laid down in clause 152 (3) applies to gifts of immovable property by a wife to the

husband, and by a husband to the wife, whether the property is used by them for their joint residence, or is let out to tenants. The fact that the husband continues to live in the house or to receive the rents after the date of the gift will not invalidate the gift, the presumption in such a case being that the rents are collected by the husband on behalf of the wife and not on his own account.

To the same effect is the other leading text on Mahomedan Law (19th edition) by Former Chief Justice M Hidayatullah wherein the learned author discusses the same clauses/sections including 152(3) and states that actual physical delivery is not needed and an overt act is enough in case of a gift by the husband to the wife particularly when they are living in the same house.

The lower Court also during the course of its judgment on issue No.1 and the additional issue discussed about need for the delivery of possession and has relied upon Muslim law and also the case law reported in ***Syed Md.Saleem Hashmi v. Syed Abdul Fateh***², which is applicable to the facts of the case. The learned Judge in this case concluded in para 36 that actual physical delivery of possession to constitute a valid gift is not necessary in case of a house gifted by husband to the wife.

² AIR 1972 Patna 279

The Hon'ble Supreme Court of India in the judgment relied upon by the learned counsel for the appellant in ***Rasheeda Khatoon*** (1 supra) also noticed Rule 152 (3) of Mulla's Mahomedan Law in para 22 of the judgment, wherein their Lordships have approved that actual physical departure or formal entry is not necessary where both the donor or donee are residing in the same property.

In the case on hand, it is clear that the donor and donee were residing in the same property. The attestation of Ex.B5 by PW.1 and attestation of Ex.A.2 gift deed by second plaintiff, who is natural son of the deceased first plaintiff, clearly show that these gifts were entered into for the purpose of donating the same. In addition, the documents filed by the plaintiffs show the payment of taxes by Fathima Bi. The further transfer by the deceased first defendant in Ex.B.5 and Ex.B.33 and attestation of this document by the deceased first plaintiff in 1981 which is 10 years after Ex.A.1 and six years after Ex.A.2 clearly show that the donor recognises her title. He accepts that he has transferred the property to the deceased first defendant and in turn he attested the document by which she was transferring the property. Therefore, this Court is of the firm opinion that the "overt acts" necessary to prove that Exs.A.1 and A.2 are genuine gift deeds are present in this case.

This Court is, therefore, of the opinion that Exs.A.1 and A.2 were not executed nominally. They were gift deeds which were executed with a specific purpose. For all these reasons, this Court holds that Exs.A.1 and A.2 are valid documents and they resulted in a transfer of the property to the deceased first plaintiff.

In view of all of the above, issue No.1 is decided in favour of the defendants/respondents and against the plaintiffs/appellants. As a consequence, the additional issue No.1 is also decided in favour of the defendants/respondents and against the appellants.

This Court, therefore, is of the opinion that there are no merits in the appeal and accordingly, the same is dismissed. No order as to costs.

As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S.SOMAYAJULU, J

Date: 13.07.2018

KLP