

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No.191/2013**

% **23rd August, 2018**

SHAKEEL AHMED Appellant

Through: Mr. Sanjiv Sharma, Advocate
(M. No.9871323957)

versus

SYED AKHLAQ HUSSAIN Respondent

Through: Ms. Reetika Gupta, Advocate
with respondent in person (M.
No.9821710680).

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the Judgment of the Trial Court dated 5.3.2013 by which the trial court has decreed the suit for possession and *mesne* profits filed by the respondent/plaintiff with respect to the suit property comprising of ground floor and first floor of property bearing no. J-67/2, Thokar no.

4, Abdul Fazal Enclave, Part-I, Okhla, New Delhi on plot of 62 sq. yds. (hereinafter referred to as 'the suit property').

2. The case set up by the respondent/plaintiff was that he purchased the suit property from one Laiq Ahmed in terms of documentation dated 20.2.2008 being the Agreement to Sell (Ex. PW1/F), Affidavit (Ex. PW1/H), General Power Attorney (Ex. PW1/G), Will (Ex. PW1/I), Receipt (PW1/J) etc. The seller Laiq Ahmed has purchased the suit property from the earlier owner Islauddin Safi and who was the owner of the suit property in terms of General Power of Attorney (Ex. PW3/1) and Special Power of Attorney (Ex. PW3/2). Appellant/defendant is the brother of Laiq Ahmed, and from whom Laiq Ahmed, the respondent/plaintiff has purchased the suit property. Laiq Ahmed had allowed the appellant/defendant, his brother, to stay in the suit property as licensee but in spite of notice of termination dated 23.1.2008 (Ex. PW1/K) issued by Laiq Ahmed, the appellant/defendant had failed to vacate the suit property. On the respondent/plaintiff purchasing the suit property he sent a notice dated 16.4.2008 (Ex. PW1/N) apprising the appellant/defendant that Laiq Ahmed had sold the suit property to the

respondent/plaintiff, and therefore, appellant/defendant should hand over the physical possession of the property. Appellant/defendant gave his reply dated 24.4.2008 (Ex. PW1/O) claiming that no license exists between the appellant/defendant and his brother Laiq Ahmed and there did not arise any question of its revocation. Respondent/plaintiff therefore was left with no option and subject suit was for possession and *mesne* profits was filed.

3. Appellant/defendant contested the suit and pleaded that the suit was a collusive suit between his brother Laiq Ahmed and the respondent/plaintiff who was a practicing Lawyer. It was pleaded that the reliance placed by the respondent/plaintiff was on the unregistered documents and therefore such documents would have no value in view of Sections 17 and 49 of the Registration Act, 1908. It was pleaded that the suit property was gifted to the appellant/defendant by his brother Laiq Ahmed out of the natural love and affection and that in Muslim law oral gift/Hibba with possession was permissible and appellant/defendant since gifting to him of the suit property on 29.11.1997 was in possession of the same. Suit was therefore prayed to be dismissed.

4. After pleadings were complete, trial court framed issues and evidence was led by the parties, and which aspects are stated in paras 2.1, 2.2 and 3.1 of the impugned judgment and these paras read as under :

“2.1 On 03.08.2011, the following issues were framed, from the pleadings and record of parties :

- 1. Whether the plaintiff has locus-standi to file the suit ? OPP**
- 2. Whether it is collusive suit of the plaintiff and the defendant's brother, if so, its consequences ? BPD**
- 3. Whether the suit is bad for non-joinder of necessary party, if so, whom and its consequences ? BPD**
- 4. Whether the suit is barred by provision of Order II Rule 2 CPC for want of suit for declaration ? OPP**
- 5. Whether the plaintiff came to Court without clean hands by suppressing material facts, if so, its consequences ? OPD**
- 6. Whether the defendant was licensee in the suit property and it was terminated by notice dated 23.01.2008 by plaintiff's predecessor in interest ? OPP**
- 7. Whether the plaintiff is entitled for decree of possession of suit property, as prayed in prayer clause (a), against the defendant ? OPP**
- 8. Whether the plaintiff is entitled for decree of permanent injunction, as prayed in prayer clause (b), against the defendant ? OPP**
- 9. Whether the plaintiff is entitled for decree of recovery of damages of Rs. 2,10,000/, as prayed in prayer clause (c), against the defendant ? OPP**
- 10. Whether the plaintiff is entitled for decree of damages @ Rs. 10,000/ per month, as prayed in prayer clause (c), against the defendant, if so, for what period ? OPP**

11. Relief.

2.2 (Names of witnesses of parties) In order to establish the case and issues, for which burden and onus lies on plaintiff, the plaintiff/PW1 himself appeared in the witness box, he got examined PW2 Sh. Arif Ali Khan, a margin witness to the documents (Ex. PW1/F to Ex. PW1/J) and PW3 Sh. Vimal Kumar, Head Clerk from the Office of SubRegistrar, Mehrauli with regard to registration of General Power of Attorney and Special Power of Attorney (Ex. PW3/1 = MarkA/PW1 and Ex. PW3/2 = MarkB/PW1, respectively), then evidence was closed in affirmative. Similarly, in order to discharge the onus of proof by the defendant, the defendant /DW1 himself appeared in the witness box and also got examined his bhabhi/DW2 Ms. Shabnam, DW3 Sh. Riazuddin, DW4 Sh. Avdesh Kumar Mishra with regard to the circumstances or their presence on 29.11.1997 about Hibba or Sh. Laiq Ahmed left the suit property and lastly got examined DW5 Sh. Zeeshan to establish that he is tenant in a portion in suit property on a monthly rent of Rs. 2,000/ under the defendant. Then, defendant's evidence was closed. However, no evidence in rebuttal has been led by the plaintiff.

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3.1 (Undisputed facts) While assessing the facts, documents and evidence of the parties, certain facts are emerging as undisputed facts, the same are enumerated hereinbelow:

(a) Sh. Laiq Ahmed had purchased land measuring 152 sq.yds comprising Khasra no. 251, Village Okhla, Abdul Fazal Enclave, Delhi from Sh. Shamsul Hassan on 07.12.1995;

(b) The said Laiq Ahmed bifurcated the plot in two plots of 90 sq.yds and 62 sq.yds, the later was developed into a building and the suit property is in respect of built up property of 62 sq.yds.;

(c) Sh. Laiq Ahmed was having wooden interior job on contract basis, the defendant also joined him and worked upto the year 1999, the defendant is younger brother of Laiq Ahmed;

(d) Laiq Ahmed's notice dated 23.01.2008 (Ex. PW1/K) was received and acknowledged by DW2 Shabnam on A/D card (Ex. PW1/L), however the notice was not replied by the defendant;

(e) The plaintiff sent notice dated 16.04.2008 (Ex. PW1/N) to the defendant, who replied it by reply dated 24.04.2008 (Ex. PW1/O);

(f) The defendant and his brother Laiq Ahmed are Sunni, they are governed by Sunni Personal Law. The essential for a validity of Gift are:

(1). A declaration of gift by the donor, (2). an acceptance of the gift, express or implied, by or on behalf of the donee; and (3). delivery of possession of the subject of the gift by the donor to the donee. Their personal law does not require registration of Gift as per sections 123-129 of Transfer of Property Act and;

(g) There was an FIR No. 334/2000 through the complainant Smt. Tahira and it has been decided on 14.01.2009, which result into acquittal of defendant, as per judgment (Mark G/DW1).”

5. The only issue to be decided by this Court is as to whether there existed a valid oral gift/Hibba by Laiq Ahmed in favour of his brother, and who is the appellant/defendant herein.

6. Trial court has disbelieved the case of the appellant/defendant that the suit property was gifted to the appellant/defendant by his brother Laiq Ahmed. I completely agree with the reasoning and conclusions of the trial court because trial court has referred to the fact that the stand of the suit property being gifted to the appellant/defendant was taken up for the first time only in the written statement and no such case was taken up by the appellant/defendant when he gave a Reply dated 24.4.2008 (Ex. PW1/O) to the Legal Notice dated 16.4.2008 (Ex. PW1/N) sent by the respondent/plaintiff. I also agree with the trial court that the issue of Gift Deed could not be believed because in the written statement filed by the

appellant/defendant there were no names which were given as to who were the relatives and the other persons present when the alleged oral gift had taken place by Laiq Ahmed to his brother/appellant/defendant. Even in his affidavit by way of evidence filed by the appellant/defendant there was complete silence as regards the persons/their names who were present at the time of the alleged oral gift of the suit property made by Laiq Ahmed to his brother/appellant/defendant. I therefore agree with the conclusion of the trial court that appellant/defendant has failed to prove that the suit property was gifted to him by his brother.

7. Though not argued on behalf of the appellant/defendant one other issue which requires consideration is as to whether respondent/plaintiff can rely upon the unregistered documents dated 20.2.2008 being the Agreement to Sell (Ex. PW1/F), General Power of Attorney (Ex. PW1/G), Affidavit (Ex. PW1/H), Will (Ex. PW1/I), Receipt (PW1/J) in view of the Act 48 of 2001 becoming effective from 24.1.2001 and by which Act, documents such as agreement to sell cannot be looked into for conveying the title of part performance under Section 53A of the Transfer of Property Act, 1882 of the

property unless the same are duly stamped and registered. Trial court in this regard has held that the judgment of the Supreme Court in the case of *Suraj Lamps & Industries Pvt. Ltd. Vs. State of Haryana and Anr. 183 (2011) DLT 1 (SC)* being only prospective in nature and therefore will not affect the validity of the subject documents executed in 2008, however in my opinion this reasoning is questionable, but the subject suit for possession still had to be decreed because respondent/plaintiff can definitely be said to be suing as an attorney for and on behalf of the owner Laiq Ahmed, and Laiq Ahmed is not in any manner objecting to the respondent/plaintiff taking possession of the suit property. Respondent/plaintiff therefore clearly is held to have an entitlement to take possession of the suit property, not only on behalf of the Laiq Ahmed but also because he had a better title to possession of the suit property than the appellant/defendant. This additional reasoning I am giving under Order XLI Rule 24 CPC. Trial court therefore, in my opinion, was justified in decreeing the suit for possession and *mesne* profits.

8. No other argument has been urged before this Court on behalf of the appellant/defendant.

9. In view of the aforesaid discussion, there is no merit in the appeal and the same is therefore dismissed, leaving the parties to bear their own costs.

AUGUST 23, 2018
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VALMIKI J. MEHTA, J

