

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CR No.2438 of 2016 (O&M)
Date of decision: 08.03.2019

Mohd. Sharif

... Petitioner

Versus

Mst. Shaista Parveen

... Respondent

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present : Mohd. Yousaf, Advocate
for the petitioner.

Mr. Bhupinder Banga, Advocate
for the respondent.

REKHA MITTAL, J.

The present petition directs challenge against order dated 28.01.2016 passed by the Appellate Authority, Sangrur whereby appeal preferred by the respondent against order dated 13.09.2011 passed by the Rent Controller dismissing the application for eviction, was allowed and the petitioner has been directed to vacate the demised premises within three months from passing of the order.

The facts relevant for disposal of the present petition are that Saeed Ahmed Khan son of Habib Ul Rehman Khan was owner/landlord of the shop in dispute. The petitioner took the property from Saeed Ahmed Khan vide rent note dated 26.03.1991 at monthly rent of Rs.400/-. The petitioner is running a tailor shop under the name and style of 'USA

Tailors'.

As per plea of the respondent, respondent and Saeed Ahmed Khan are Muslims by caste and governed by Muslim Personal Law in their affairs. On 02.10.2006, Saeed Ahmed Khan orally gifted the suit property to the respondent in presence of relatives and respectables. There was due acceptance of the gift by the respondent. At that time, Saeed Ahmed Khan also handed over the original rent note dated 26.03.1991. After this oral gift, respondent became owner/landlady of the property and the petitioner became her tenant. The petitioner was required to make payment of rent to respondent but he did not bother.

Further, a memorandum of oral gift dated 05.06.2007 was executed as a proof of oral gift, duly signed by Saeed Ahmed Khan and attested by marginal witnesses. After this memorandum, request was again made to the petitioner to vacate the shop but to no response. The petitioner paid rent only till 31.08.2006 to Saeed Ahmed Khan and remaining rent is due. On 18.06.2007, respondent through her counsel sent registered notice along with photocopy of the oral gift dated 05.06.2007 and requested the petitioner to pay the rent from 01.09.2006. The notice was replied by the petitioner on 03.07.2007 putting conditions against facts. The name of respondent is also existing in municipal records. The respondent filed the eviction petition on the ground of non-payment of rent and personal necessity for her own use and occupation.

The petitioner filed reply and contested claim of the respondent that she is the owner/landlady of the shop in question. It is

averred that originally property was taken on monthly rent of Rs.300/- in 1983 and the same was revised @ Rs.400/- per month vide rent note dated 26.03.1991. It was further denied that Saeed Ahmed Khan gifted the property to respondent on 02.10.2006 or memorandum of gift was prepared on 05.06.2007. No relationship of landlord and tenant came into existence as gift deed dated 05.06.2007 is sham, illegal, unregistered, inadmissible and fraudulent document which does not confer any right in favour of the respondent. Saeed Ahmed Khan is still owner of the property. He is running a PCO and also working as contractor in Panchayati Raj, PW Division. He has other shops and common properties in his name. Rent has been tendered in Court proceedings to avoid complications though respondent is not entitle to rent as she is not the landlady. All other material averments of the application were denied with a prayer for dismissal thereof.

In rejoinder, the respondent reiterated her stand taken in the eviction application and denied the averments raised in the written statement.

The Rent Controller framed following issues for determination:-

1. Whether there is relationship of landlord and tenant between the parties?OPA
2. Whether the petitioner is in need of the shop in question for personal necessity?OPA
3. Whether the petition is not maintainable in the present form?OPR
4. Relief.

To prove her case, respondent appeared in the witness box and examined Hafiz Ul Rehman AW2.

To rebut evidence of the respondent, the petitioner examined Babu Khan RW1, Atma Singh RW2, Harjinder Singh RW3 and Mohd. Ramzan RW5 and himself appeared in the witness box to support his cause.

The Rent Controller, in view of facts elicited in cross examination of the respondent, when examined in the light of essentials of a valid gift under Muslim Law recorded its finding that the respondent did not become owner/landlady of the shop in question and as such, there exists no relationship of landlord and tenant between the parties in order to entitle the respondent to seek eviction of the petitioner on any of the grounds available under the East Punjab Urban Rent Restriction Act, 1949 (in short 'the Act').

The Appellate Authority reversed findings of the Rent Controller with regard to relationship of landlord and tenant and eventually allowed the eviction on the ground of bonafide personal necessity of the respondent to use the shop for running a boutique.

Counsel for the petitioner would urge that the Appellate Authority grossly erred by reversing findings of the Rent Controller in regard to there being no relationship of landlord and tenant between the parties. It is argued with vehemence that the Appellate Authority has misdirected itself by holding that 'contradiction of mentioning the gift deed in 2007 cannot be given undue importance, as it is established fact that human memory blurs with passage of time and minor hiccups in cross

examination cannot boomerang the entire petitioner's version. Corroborative evidence is also clear that oral gift was made in 2006 and writing was made in 2007'. In addition, it is argued that as Saeed Ahmed Khan husband of the respondent is also in possession of other shops in urban area concerned, the story of oral gift and memorandum of gift has been created in order to seek eviction of the petitioner who is in possession of the tenancy premises since 1983. It is further argued that in case application for eviction had been filed by Saeed Ahmed Khan for the alleged need of Mst. Shaista Parveen his wife, possession of other shops by him would have been the subject matter of controversy in order to decide if the need projected by him is bonafide/genuine or otherwise.

Counsel representing the respondent has supported the impugned order with the submission that the Appellate Authority has taken a very genuine and reasonable view of matter while appreciating evidential value of testimony of Mst. Shaista Parveen to hold that minor contradictions can neither be attached undue importance and some contradictions are bound to happen with passage of time. It is further argued that as Saeed Ahmed Khan made an oral gift in favour of his wife which was duly accepted by her and symbolic possession of the shop was delivered to the donee, the oral gift became complete in October, 2006 though later for record purpose, a memorandum of gift was executed in the year 2007. According to counsel, Saeed Ahmed Khan is stated to be in possession of one shop in which he is running PCO and the other shop

vacated by one Gurbachan Singh is joint ownership of family of Saeed Ahmed Khan, therefore, contention of the petitioner that gift deed is a ploy to seek eviction of the petitioner is patently false and liable to be rejected. In support of his contention, he has relied upon latest judgment of this Court **Mohd. Aslam Vs. Nabeela Parveen, CR No.6298 of 2016, decided on 20.09.2018**, wherein the controversy involved was in respect of an oral gift made by Mohd. Bashir father-in-law of Nabeela Parveen under the Muslim Law.

I have heard counsel for the parties, perused the paper book and records.

There is no dispute that under Muslim Law, an oral gift is permissible but in order to create a valid gift there are three essential requirements/ingredients namely (i) declaration of gift by the donor, (ii) acceptance of the gift, express or implied, by or on behalf of the donee, and (iii) delivery of possession of the gifted property by the donor to donee as mentioned in paras 149 and 150 of the principles of Mohammedan law.

The plea of petitioner is that the third essential requirement of the gift i.e. delivery of possession is missing in the present case in view of the facts elicited in cross examination of Mst Shaista Parveen.

The respondent in para 4 of the eviction application has raised the averments with regard to oral gift. The same being germane to the controversy are reproduced hereunder, for ready reference:-

That on 02.10.2006, above said Saeed Ahmed Khan son of Habib Ul Rehman Khan resident of Club Road Malerkotla

had orally gifted away the above said shop to the petitioner in the presence of relatives and respectables. The oral gift was duly accepted by the petitioner in the presence of relatives and respectables. At that time Saeed Ahmed Khan also handed over the original rent note dated 26.03.1991 to the petitioner, which is attached herewith.

A perusal of aforesaid extract makes it evident that no such plea has been raised by the respondent that at the time of oral gift on 02.10.2006, possession either actual or constructive of the gifted property was delivered to the respondent. Not only this, prior to initiation of eviction proceedings, admittedly, the respondent issued legal notice dated 18.06.2007 Ex.A3. In para 3 (wrongly numbered as para 6) of the said notice averments are verbatim the same as contained in para 4 of the eviction application except in place of words 'which is attached herewith' the words used are 'which is now in possession of my client'.

The respondent, to prove her claim of suit shop being gifted to her by Saeed Ahmed Khan and to seek eviction on the ground of arrears of rent and personal necessity appeared in the witness box. She tendered into evidence her affidavit Ex.AW1/A by way of examination in chief along with documents referred to therein marked as Exs.A1 to A6. Counsel for the petitioner objected to the documents Exs.A1 to A6 on the ground of mode of proof. In cross examination, a relevant extract from her testimony with regard to oral gift reads as follows:-

The oral gift took place on 22.10.2006. It took place at my house. At the time of oral gift Hafiz Ul Rehman and Juwair were present. Both are witnesses of gift. It was scribed

at 10.00 am on the same day. I do not know the name of scribe of memorandum of oral gift. The possession of the shop was delivered in the year 2007. When the document was scribed I took possession of the shop in dispute. I intimated the respondent about gift on 23.10.2006.

A plain but careful reading of the aforesaid extract would show that the respondent had stated that the oral gift took place on 22.10.2006 instead of 02.10.2006, pleaded by her. When the entire testimony of the respondent is appreciated, it can safely be held that error with regard to date of gift is either typographical or slip of tongue and the same cannot be given much relevance and significance. However, statement of the respondent with regard to delivery of possession in the year 2007 cannot be said to the result of human memory having blurred or a minor contradiction in the case as has been held by the Appellate Authority. If such a serious contradiction or fact elicited in cross examination of the respondent is ignored by accepting the observations made by the Appellate Authority, the very purpose of cross examination would be rendered nugatory.

The Appellate Authority has held that the petitioner in her examination in chief had categorically deposed about gift being made in the year 2006. Accordingly, contradiction of mentioning the gift deed in 2007 cannot be given undue importance. This observation of the Appellate Authority is either the result of its effort to avoid the adverse affect of deposition of the respondent with regard to the year of delivery of possession or failure to appreciate part of the cross examination highlighted by the Rent Controller in its order, in right perspective. The matter would

have been different if the respondent had only mentioned that possession of the shop was delivered to her in the year 2007 in place of 2006. The things were made much more clear when she stated in the very next line that when the document was scribed she took possession of the shop in dispute. A conjoint reading of the two consecutive sentences from statement of the respondent namely 'The possession of the shop was delivered in the year 2007. When the document was scribed I took possession of the shop in dispute' leaves no manner of doubt that the respondent had stated that possession of the shop was delivered to her in the year 2007 when admittedly the memorandum of gift propounded by the respondent is of the year 2007. The Appellate Authority has also failed to examine the pleadings in detail wherein there is complete absence of a plea with regard to date, month or year when possession on the basis of alleged oral gift was delivered in favour of the respondent. As has been noticed hereinbefore, neither in the eviction application nor in the legal notice served upon the petitioner prior to filing of eviction application, there is reference with regard to delivery of possession much less at the time of oral gift. In this view of the matter, statement of the respondent in her examination in chief particularly para 4 of affidavit Ex.AW1/A with regard to delivery of possession is beyond pleadings and is the result of an after-thought. It further appears that since Saeed Ahmed Khan did not deliver possession of the shop in dispute to the respondent at the time of alleged oral gift on 02.10.2006, for that reason, there is no reference to delivery of possession either in the first version contained in the notice Ex.A3 or in the eviction

application and the said fact mentioned for the first time in affidavit prepared by her counsel gets falsified and belied in view of cross examination of the respondent, extracted hereinbefore.

Not only this, the respondent examined Hafiz Ul Rehman who is none-else but brother of Saeed Ahmed Khan husband of the respondent and stated to be present at the time of oral gift on 02.10.2006 as well as an attesting witness to the memorandum of gift dated 05.06.2007. Hafiz Ul Rehman Khan tendered into evidence his duly sworn affidavit Ex.AW2/A by way of examination in chief. The affidavit of Hafiz Ul Rehman Khan is verbatim copy of the affidavit filed by Shaista Parveen particularly para 4 of the affidavit of Shaista Parveen and para 5 of the affidavit of Hafiz Ul Rehman Khan, sufficient to show that these affidavits were prepared by counsel for the respondent. The testimony of Hafiz Ul Rehman Khan with regard to delivery of possession at the time of oral gift on 02.10.2006 is beyond pleadings as discussed hereinbefore. However, a relevant extract from his cross examination in Punjabi but translated in English with regard to oral gift reads as follows:-

The oral gift by Saeed Ahmed Khan in favour of Shaista Parveen was made on 02.10.2006. Perhaps Saeed Ahmed Khan had given the papers of his ownership to Shaista Parveen. At that time the whole family was present and they were Khalil Rehman Khan, his wife Nehahat Begum and Mazib Khan etc. Oral happened in the evening and pakka was made in the noon time. Oral gift was made in the house. At the time of oral gift Saeed Ahmed Khan said that he gives shop in gift besides this no other proceeding was done. After

the oral gift Mohd. Sharif was told with regard to delivery of possession, the witness has stated that Shaista Parveen got possession which was received in the year 2006.

As per the statement of Hafiz Ul Rehman Khan, no other proceeding was conducted on the day when the oral gift was made on 02.10.2006. In the later part of his cross examination, he would state that Shaista Parveen got possession in 2006 but again he does not say that possession was delivered to her at the time of oral gift on 02.10.2006. Taking a cumulative view of the aforesaid discussion particularly absence of pleadings with regard to delivery of possession at the time of oral gift and facts elicited in cross examination of Shaista Parveen and Hafiz Ul Rehman Khan, it can safely be held that findings of the Appellate Authority that there was a valid oral gift of the shop in question in favour of the respondent and on the basis whereof she has become owner and landlady of the shop in question, thus, creating a relationship of landlord and tenant between the parties, cannot be allowed to sustain being the result of perversity and failure to appreciate the evidence correctly and in right perspective.

No sooner, one of the essential ingredients of oral gift with regard to delivery of possession (constructive or symbolic) becomes missing, the respondent cannot claim herself to be the owner/landlady of the demised shop and is not entitle to seek eviction on one or more grounds available under the Act. Since this Court has set aside findings of the Appellate Authority with regard to relationship of landlord and tenant

between the parties, I need not to go into the question, if the shop is required by the respondent for her bonafide use and occupation to run boutique therein. In view of the above, the respondent cannot derive any advantage to her contention from the judgment in **Mohd. Aslam's case (supra)** passed in peculiar facts and circumstances of that case.

For the foregoing reasons, the petition is allowed. The order passed by the Appellate Authority is set aside and that of the Rent Controller is restored. As a natural corollary, eviction application filed by the respondent is dismissed with costs throughout.

08.03.2019
ashok

(REKHA MITTAL)
JUDGE

Whether speaking/reasoned:	Yes / No
Whether reportable:	Yes / No