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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.02.2021

PRONOUNCED ON : 09.02.2021

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No. 1204 of 2008

1. Asruffunisa Begum
Son of Syed Basha
2. Musthiri Begum
W/o. Abdul Rahman
3. Askeri Begum
W/o. K. Mohammed Ismail

...Appellants/Plaintiffs

Vs.

1. M.S. Nasimudeen
S/o. Late A.M. Shamshudeen
2. Badurunisa
W/o. M.S. Basheer Ahammed
3. Nazeer Ahamed
S/o. M.S. Basheer Ahammed
4. Parveen Banu
D/o. M.S. Basheer Ahammed
5. Ajaj Ahamed
S/o. M.S. Basheer Ahammed
6. Asif Ahamed
S/o. M.S. Basheer Ahammed
7. Ansari Begum
W/o. M. Abdulla Ravaf

... Respondents/Defendants 2,6 to 11

Prayer: Second Appeal filed under Section 100 of CPC, 1908 against the judgment and decree in A.S. No.133/2007 on the file of the Principal Sub-court, Salem, dated 03.12.2007 in reversing



the judgment and decree in O.S. No.1812/2004 on the file of II Additional District Munsif Court, Salem, dated 10.01.2007.

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For Appellants : Mr. V. Raghavachari

For Respondents

For R1 to R6 : Ms. Mythili Suresh
for Sarvabhauman Associates

For R7 : No appearance.

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 03.12.2007 passed in A.S. No.133/2007 on the file of the Principal Subordinate court, Salem, reversing the judgment and decree dated 10.01.2007 passed in O.S. No.1812/2004 on the file of II Additional District Munsif Court, Salem.

2.For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. The plaintiffs in OS.No.1812 of 2004 are the appellants in the Second Appeal.

4.Suit for partition and for mesne profits.

5. Briefly stated, the case of the plaintiffs is that, the plaintiffs and the defendants 1,2, and 11 are the children of one Ayesha Begum and M.Ajjilal alias Shamshudeen and the defendants 3 to 5 are the tenants of the plaint 'A' schedule properties and the plaint 'A' schedule properties were owned by Sheik Masthan Sahib and he had executed a settlement deed in favour of his daughters-in-law, namely, Ayesha Begum and Mamutha Begum on 09.08.1971 and by way of the oral partition, the plaint 'A' schedule properties were allotted to the share of Ayesha Begum, and she had enjoyed the same till her death and after her death, the suit properties devolved on her husband and her children as per Muhammadan law and after the demise of Shamshudeen on 09.11.1990, his share devolved on his children as per Muhammadan law and as such, the plaintiffs and the 11th defendant have got 1/8 share each and the defendants 1 and 2 have 1/4 share each in the suit properties. Ayesha Begum had also died leaving behind her jewels described in the plaint 'B' schedule and accordingly, the plaintiffs and the defendants 1, 2 and 11 are also entitled to the respective shares in the jewels



described in the plaint 'B' schedule. The shops in the plaint 'A' schedule had been let out to the tenants, namely, the defendants 3 to 5 and the rents are being collected by the defendants 1 and 2 and they are bound to account for the same. Inasmuch as during the pendency of the suit, the third plaintiff had acted against the interest of the other plaintiffs in collusion with the second defendant, according to the plaintiffs, she had been transposed as the 11th defendant. The defendants 1 and 2 have failed to hand over the shares to which the plaintiffs are entitled to and despite the legal notice calling upon them to effect the partition of the suit properties, the defendants 1 and 2 have not sent any reply and the defendants 3 to 5 sent a reply containing false allegation and hence, according to the plaintiffs, they had been necessitated to lay the suit for appropriate reliefs.

6. In the written statement, the defendants resisted the plaintiffs' suit by putting forth the case that, as averred in the plaint, the plaint 'A' schedule properties had been allotted to Ayesha Begum by way of the partition deed on 17.04.1976 after deriving the title to the same from her father Sheik Masthan Sahib and denied the case of the plaintiffs that the plaint 'A' schedule properties were in the possession and enjoyment of Ayesha Begum till her demise on 26.05.1987. Further denied the case of the plaintiff that following the death of Ayesha Begum, the suit properties devolved on her husband and her children. On the other hand, according to the defendants, even on 22.05.1987, Ayesha Begum had bequeathed the plaint 'A' schedule properties to the defendants 1 and 2 by way of the oral gift in the presence of two witnesses, C.A. Ramasamy, Son of Karuppa Gounder, Mallur and A. Jamasha Sahib, foreman, who has retired from TNEB, Salem and also in the presence of her husband and the same was accepted at the same time by the defendants 1 and 2 and on 23.05.1987 a muchalika was executed by Ayesha Begum and the defendants 3 to 5 regarding the change of ownership and the payment of rents and it was also acted upon by changing the names in the relevant records in the town panchayat office with the assent of Shamsudeen and therefore, according to the defendants Ayesha Begum did not have any properties at the time of her demise and the plaintiffs cannot lay any claim of share in the plaint 'A' schedule properties.

7. From the date of oral gift (hiba) i.e. 22.05.1987, it is only the defendants 1 and 2, who are the owners of the plaint 'A' schedule properties. The tenants are regularly paying the rents only to the defendants 1 and 2 as per the muchalika dated 23.05.1987. The defendants further denied the case of the plaintiff that Ayesha Begum left behind the jewels described in the plaint 'B' schedule. Therefore, according to the



defendants, the plaintiffs have no right to seek for the relief in respect of the plaint 'A' schedule properties and the suit is liable to be dismissed.

8. In the reply statement, the plaintiffs would contend that the oral gift projected by the defendants 1 and 2 is false and the further case of the defendants 1 and 2 that following the oral gift, the muchalika dated 23.05.1987 has been executed is also false and according to the plaintiffs, the abovesaid muchalika is a fabricated document and put forth the case that Ayesha Begum was a very old lady and does not know to write and read and not in a sound state of mind and the plaintiffs were residing in the suit house and therefore put forth the case that the defendants 1 and 2 cannot claim any exclusive title to the plaint 'A' schedule properties based on the oral gift and accordingly prayed for the acceptance of their case as projected in the plaint.

9. In support of the plaintiffs' case P.W.1 was examined and Exs.A1 to A16 were marked. On the side of the defendants, D.Ws.1 to 3 were examined and Exs.B1 to B11 were marked.

10. On an appreciation of the materials placed on record, both oral and documentary, and the submissions put forth by the respective parties, the trial court was pleased to declare that the plaintiffs and the 11th defendant are each entitled to 1/8 share in the plaint 'A' schedule properties and that the second defendant and the defendants 6 to 10, being the legal representatives of the first defendant are each entitled to 1/4 share in the plaint 'A' schedule properties and dismissed the plaintiffs' suit qua the plaint 'B' schedule property and accordingly directed the determination of mesne profit by way of a separate proceeding and accordingly granted the preliminary decree in favour of the plaintiffs. On an appeal preferred by the defendants 2, 6 to 10, the first appellate court was pleased to set aside the judgment and decree of the trial court and by way of allowing the appeal preferred by the defendants 2, 6 to 10 consequently dismissed the plaintiffs' suit. Impugning the judgment and decree of the first appellate court, the present second appeal has been preferred by the plaintiffs.

11. At the time of admission of the second appeal, the following substantial question of law was formulated for consideration.

"Whether the lower appellate court is justified in accepting in accepting the oral hiba when it was not established in a manner known to law?"

12. The relationship between the parties is not in



dispute. It is found that the plaintiffs and the 11th defendant are the daughters and the defendants 1 and 2 are the sons of the deceased Ayesha Begam and her husband Ajjilal alias Shamshudeen. Ayesha Begum died on 26.05.1987 and her husband died on 09.11.1990. It is found that pending the suit, the first defendant having died, his LRs have been brought on record as the defendants 6 to 10. Originally, the plaintiffs and the 11th defendant had filed the suit against the defendants 1 and 2. Subsequently, as the 11th defendant (originally third plaintiff) acted adversely to the interest of the other plaintiffs in collusion with the defendants 1 and 2, it is noted that she had been transposed as the 11th defendant.

13. From the materials placed on record, it is found that the parties are not at dispute that the plaint 'A' schedule properties belonged to Ayesha Begum and therefore, according to the plaintiffs following the demise of Ayesha Begum and Ajjilal alias Shamshudeen, they are entitled to their respective shares qua the same as per the Muhammadan law. The defendants resisted the plaintiffs' suit mainly contending that Ayesha Begum, during her life time, had orally gifted the plaint 'A' schedule properties to the defendants 1 and 2 on 22.05.1987 in the presence of two witnesses and also in the presence of her husband Shamshudeen. On 23.05.1987 a muchalika was also executed by Ayesha Begum and the defendants 3 to 5, being the tenants of the plaint 'A' schedule properties, and thus according to the defendants, the plaintiffs are not entitled to claim any share in the plaint 'A' schedule properties as put forth by them and thereby sought for the dismissal of the suit property.

14. In the light of the abovesaid defence projected by the defendants, as rightly held by the trial court, to deprive the plaintiffs of their share in the properties of their mother Ayesha Begum described in the plaint 'A' schedule, the defendants having projected the plea of oral gift by way of hiba, the burden is heavy upon the defendants to establish the oral gift put forth by them as per law and that they are in the exclusive possession and enjoyment of the plaint 'A' schedule properties as the absolute owners thereof and exercising the said right till the date of filing of the suit and subsequent thereto.

15. In the decision reported in (2014) 10 Supreme Court Cases 459 (Rasheeda Khatoon (dead) through legal representatives v. Ashiq Ali, S/o. Lieutenant Abu Mohd (dead) through legal representative) as to what are the essential requisites of oral gift of immovable property in Muslim law and how to establish the said plea had been outlined by the Apex Court and the principles of law with reference to the same had



been outlined in the abovesaid decision, which are extracted below.

A. Family and Personal Laws - Muslim Law - Gift - Oral gift of immovable property (house) - validity - Essential requisites (1) Declaration of gift by donor; (2) acceptance of gift, express or implied, by donee; and (3) delivery of possession by donor and taking of actual or constructive possession of gifted property by donee - If these requisites are shown to have been satisfied, gift would be valid.

- Possession - constructive possession - what is - person who has actual control of the premises - proof - inference of - where donor and donee both reside in same house at time of execution of oral gift thereof, donor's act of granting actual control over the property to donee thereby divesting himself of such control, held, is indicative of taking of constructive possession by donee.

- Oral gift of house alleged to have been made by predecessor of respondents in favour of appellant - But same not mentioned in unregistered deed of gift of the house executed several years thereafter in favour of appellant - Deed showing that property remained in donor's possession till its execution - plaintiff (purported donee) was not living in the suit premises with the purported donor, but in her own house with her husband - No proof of even constructive possession of donee pursuant to alleged oral gift established in any manner - Having regard to gift deed and concomitant facts, held, oral gift not proved in present case.

B. Family and Personal Laws - Muslim Law - Gift - Gift Deed - Registration - when required - deed whether creative / constructive of gift or merely evidential of validly created gift - Held, a gift under the Muhammadan law can be an oral gift and need not be registered, a written instrument does not, under all circumstances require registration - solely because the writing in respect of a gift by a Muslim is contemporaneous of the making of the gift deed, it does not warrant registration under S.17 of the Registration Act - Document recording oral gift executed by donor - if essential conditions of a valid gift satisfied, document need not be registered - Unregistered gift deed can be treated as evidence of gift itself - Registration Act, 1908 - S.17(1)(a) - Transfer of property Act 1882, S.129.

C. Property Law - Possession - What is - Proof/inference of - Possession can be shown not only by enjoyment of the land or premises in question but also by asserting who has the actual control over the property - Someone may be in apparent occupation of the premises, but the other would have control and



gaining advantage of possession - Words and Phrases - "Possession".

D. Constitution of India - Art. 136 - Interference with concurrent findings of fact - when called for.

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The appellant-plaintiff filed a suit in 1975 against the original defendant, seeking recovery of possession of the suit house, the case of the plaintiff was that the owner of the house was one A whom she was looking after in his old age. Being pleased with her services, A had made an oral gift of the suit house in her favour in 1968, which was accepted by her and possession of the house was also handed over to her. Pursuant to the oral gift she lived in the premises and continued to look after A. However, being apprehensive that some others might disturb in her possession, A executed a deed of gift in writing in 1970 evidencing the oral gift. A died in 1972. It was pleaded that within one month from the death of A, the defendants dishonestly moved an application under Section 145Cr.PC before SDM with an intention to evict the plaintiff and in the said proceedings, the property in question was attached, and all these circumstances constrained the plaintiff to file the civil suit for declaration that she was the owner-in-possession of the house in question. During the pendency of the suit, as alleged, the defendants took over possession in pursuance of the release order passed by the SDM in 1975 and thereafter the plaintiff amended the plaint and sought the relief of recovery of possession as well.

The trial court held that the plaintiff had proved the oral gift executed by A in her favour, that the gift deed did not require registration; that the deed of gift could not be ignored solely because it was not registered when it had demonstrably been established by the oral and documentary evidence that A had made a gift in favour of the plaintiff and had put her in possession, and that she was the owner of the suit premises and entitled to get back possession. Accordingly, the trial court decreed the suit. In appeal, the first appellate court concurred with the view of the trial court. But the High Court in second appeal opined that the document in question makes it clear that up to the date of execution of gift deed no gift was made; that the executant of the deed was in possession of the house; that the deed transferred the property in favour of the plaintiff in praesenti; and that it is clear from the language employed in the gift deed that the executant had not delivered possession to the donee. On that basis it held that the courts below erred in treating the deed of 1970 to be an oral gift though it was a document under which transfer was made and, therefore, it was compulsorily registrable and accordingly, allowed the appeal. Hence, the present appeal by



special leave.

Dismissing the appeal, the Supreme Court Held:

A gift under the Muhammadan law can be an oral gift and need not be registered; a written instrument does not, under all circumstances require registration; to be a valid gift under the Muhammadan law three essential features, namely, (i) declaration of the gift by the donor, (ii) acceptance of the gift by the donee expressly or impliedly, and (iii) delivery of possession either actually or constructively to the donee, are to be satisfied; solely because the writing is contemporaneous of the making of the gift deed, it does not warrant registration under Section 17 of the Registration Act. Actual physical possession may not be always necessary if there is constructive possession of the donee. In Mulla's Principles of Muhammadan Law [Section 152(3)] it is stated: "No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the 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 the gift. The possession can be shown not only by enjoyment of the land or premises in question but also by asserting who has the actual control over the property. Someone may be in apparent occupation of the premises, but the other would have control and gaining advantage of possession.

The real thrust of the matter is whether the essential ingredients of the gift as is understood in the Muhammadan law have been satisfied. A deed of gift solely because it is a written instrument does not require registration. It can always be treated as a piece of evidence evidencing the gift itself, but, only provided if, the gift fulfils the three essential conditions of a gift by a muslim so that it may be termed as a valid gift under the Muhammadan law.

A deed of gift by a Muslim solely because it is a written instrument does not require registration. If the essential features are met with no registration is necessary. It can always be treated as a piece of evidence evidencing the gift itself. Solely because the writing in respect of a gift by a Muslim is contemporaneous of the making of the gift deed, it does not warrant registration under Section 17 of the Registration Act.

Hafeeza Bibi v. Sk. Farid (2011) 5 SCC 654; (2011) 3 SCC (Civ) 103, followed Mahboob Sahab v. Syed Ismail, (1995) 3 SCC 693, Valia Peedikakkandi Katheessa Umma v. Pathakkalan Narayanath Kunhamu,,, AIR 1964 SC 275, relied on



Karam Illahi v. Sharfuddin, AIR 1916 All 351; Nasib Ali v. Wajid Ali, AIR 1927 Cal 197 approved.

Govt. of Hyderabad v. Tayyaba Begum, AIR 1962 AP 199, Ghulam Ahmad Sofi v. Mohd. Sidiq Dareel,, AIR 1974 J&K 59; Chota Uddandu Sahib v. Masthan Bi, AIR 1975 AP 271; Amirkhan v. Ghouse Khan, (1985) 2 MLJ 136; Sunkesula Chinna Budde Saheb v. Subbamma, (1954) 2 MLJ 113 (AP), held, overruled.

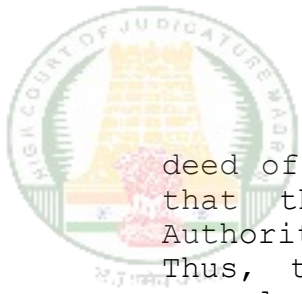
Bishwanath Gosain v. Dulhin Lalmuni, AIR 1968 Pat 481,,; Boya Ganganna v. State of AP, (1976) 1 SCC 584; 1976 SCC (cri) 102; Kamar-un-Nissa Bibi v. Hussaini Bibi, ILR (1881) 3 All 266; Mohd. Abdul Ghani v. Fakhr Jahan Begum, (1921-22) 49 1A 195: AIR 1922 PC 281; Assan Ravther v. Manahapara Charayil, AIR 1972 Ker 27; Jabeda Khatun v. Moksed Ali, AIR 1973 Gau 105, referred to

Mohd. Sadiq Ali Khan v. Fakhr Jahan Begam (1931-32) 59 IA 1: (1932) 35 LW 118. AIR 1932 PC 13, cited

Principles of Mohammedan Law, (19th Edn.) p. 120; Tyabji; Muslim Law, relied on outlines of Mohammedan Law, Tahir Mahmood (Ed. & revised) (5th Edn, Oxford University Press) 182, referred to.

In the present case, it is manifest from the gift deed that A had declared therein that he had always been the owner-in-possession and the entire house was in his exclusive ownership and possession and free from all encumbrances. Thus, the said recital belies the case of the plaintiff that there was an oral gift seven years prior to filing of the suit. Such a fact, had it been true would have definitely formed a part of the written instrument. Omission of such a fact, defies common sense. The case of the plaintiff that she resided with A and therefore, the principle of donor getting fully divested or handing over of physical possession is not attracted, is wholly contrary to the evidence on record. The family register and voters list, indicate that the plaintiff was residing in her house with her husband and not in the suit premises. Though the gift deed mention that she was entitled to get her name mutated in respect of the premises, yet it was not done. On the analysis of evidence in the back drop of the deed, it is extremely difficult to hold that she was residing with A in the premises in question. Thus scrutinised it is clear that she was not in actual physical possession.

However, in the context of constructive possession existence of any overt act to show control requires to be scrutinised. A plea was advanced by the plaintiff that she had been collecting rent from the tenants inducted by the donor, but no rent receipts have been filed. On the contrary certain rent receipts issued by the donor after the execution of the

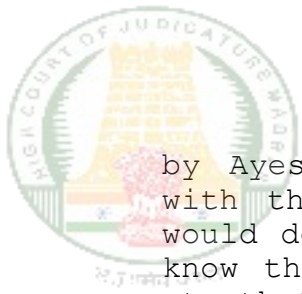


deed of gift have been brought on record. There is no proof that the land was mutated in her favour by the Revenue Authorities. She was also not in possession of the title deeds. Thus, the evidence on record on a studied scrutiny, clearly reveal that the plaintiff was not in constructive possession. Therefore, one of the elements of the valid gift by a Muslim has not been satisfied. As the plaintiff could not prove either actual or constructive possession, the gift was not complete and hence, there is no necessity to advert to the aspect whether the instrument in question required registration or not.

The finding of the trial judge as well as the appellate judge is based on unwarranted inferences which are not supported by the evidence brought on record. While not accepting the said finding of the courts below, the conclusion of the High Court that the document being a contemporaneous document or document in praesenti required registration is also not acceptable. As the original and the first appellate courts have recorded findings which are contrary to material brought on record and the High Court has proceeded exclusively on the concept of a deed in praesenti, it has become necessitous for the Supreme Court to scrutinise the deed of gift and the material brought on record. The Supreme Court in exercise of power under Article 136 of the Constitution can interfere with the concurrent findings of fact, if the conclusions recorded on certain factual aspects are manifestly perverse or unsupported by the evidence on record.

Alamelu v. State, (2011) 2 SCC 385; (2011) 1 SCC (cri) 688; Heinz India (P) Ltd. v. State of U.P., (2012) 5 SCC 443: (2012) 3 SCC (Civ) 184: (2012) 3 SCC (Cri) 198; Vishwanath Agarwal v. Sarala Vishwanath Agarwal, (2012) 7 SCC 288: (2012) 4 SCC (Civ) 224: (2012) 3 SCC (Cri) 347, relied on Ashiq Ali v. Rasheeda Khatoon, (2005) 2 AWC 1342, affirmed."

Applying the abovesaid principles of law to the case at hand, we have to see whether the defendants have established the oral gift projected by them. As above pointed out, the parties are not at issue that the plaint 'A' schedule properties originally belonged to Ayesha Begum. Now according to the defendants, the oral gift was effected by Ayesha Begum on 22.05.1987. Immediately 3 days later Ayesha Begum had died on 26.05.1987. The oral gift, according to the defendants, has been effected by Ayesha Begum in the presence of the witnesses C.A. Ramasamy, S/o. Karuppa Gounder, and A. Jamasha Sahib. The witness C.A. Ramasamy, S/o. Karuppa Gounder, has not been examined. However, the defendants have proceeded to examine A. Jamasha Sahib as D.W.3 in support of their case of oral gift. Considering the evidence of D.W.3, the witness to the oral gift said to have been effected on 22.05.1987, according to D.W.3, he was asked



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by Ayesha Begum's husband to be present in their house along with the other witness Ramasamy and in that connection, D.W.3 would depose that only after reaching the house, he had come to know that Ayesha Begum had decided to effect the oral gift and at that point of time, Ayesha Begum, Shamshudeen, he and Ramasamy were present and Ayesha Begum declared her intention to effect the oral gift and on the date of the oral gift, i.e, on 22.05.1987 other than the abovesaid 4 persons, no one was present and on the next day i.e. on 23.05.1987, the muchalika was executed and at the time of execution of the muchalika, he, Ramasamy Gounder, the tenants, the scribe and the sons of Ayesha Begum were present. Therefore, as rightly concluded by the trial court, from the abovesaid evidence adduced by D.W.3, who is said to be the witness of oral gift, it is evident that the two sons of Ayesha Begum, namely the defendants 1 and 2 were not present on the date of oral gift i.e, on 22.05.1987. Considering the principles of oral gift as enunciated by the Apex Court, it is seen that the essential requisites, namely, the declaration of the gift by the donor, the acceptance of the gift express or implied by the donee and the delivery of the possession of the donor and taking of the actual gift by the donee should all simultaneously co-exist and be fulfilled on the same date of the oral gift and without the fulfilment of the abovesaid requisites, the oral gift cannot be a valid one. The same principles have been outlined by the Division Bench of our High Court in the decision relied upon by the plaintiffs reported in 2020 2 LW 642 (N.A. Abdul Rahim and another v. A.M.K. Mariam Bibi and 3 others), wherein, it has been held that the abovesaid three essential requisites/conditions should be satisfied and the above being the position of law, when as per the evidence of the eye witness examined as D.W.3, the donees, namely, the defendants 1 and 2 were not present at the time of effecting the oral gift, it is obvious that the donees i.e, the defendants 1 and 2 could not have accepted the gift said to have been made by the donor Ayesha Begum and therefore, as rightly concluded by the trial court, unless the declaration of the gift by the donor is followed by an acceptance on the same by the donees, only then the oral gift could be presumed as valid and the three requisites to constitute a valid gift should be present together at the same time so as to bring out the complete gift or hiba. When, as above pointed out, the defendants 1 and 2 were not present at the time of effecting the oral gift, it cannot be stated that they had accepted the gift after the declaration by the donor and in such view of the matter, as rightly concluded by the trial court, the gift is found to be incomplete as one of the essential requirements has not been established. Even though the defendants would claim in the written statement that they have accepted the gift on 22.05.1987, however, the materials placed on record through the evidence of D.W.3 would only go to show that the defendants were



not in the picture at the time of making the alleged oral gift by Ayesha Begum.

16. Now according to the defendants, following the oral gift, the muchalkika was written on the next day i.e. 23.05.1987, which has come to be marked as Ex.B7. As rightly concluded by the trial court, based on the materials placed on record, the defendants 1 and 2 are not clear as to when actually they had accepted the oral gift and when actually they had acquired the possession of the plaint 'A' schedule properties, whether it be actual or constructive. When, D.W.3, the eye witness, has not spoken about the delivery of possession actual or constructive to the defendants 1 and 2 by Ayesha Begum on 22.05.1987 and on the other hand when it is therefore clear that they were not at all present in the scene on 22.05.1987 and when it is seen that as per the evidence tendered by D.W.2 that the possession had been handed over only on the next day when Ex.B7 muchalika was executed, in such view of the matter, as rightly held by the trial court, if really the possession had been handed over to the defendants 1 and 2 either actually or constructively on 22.05.1987 itself, there is no necessity at all to recite the same in Ex.B7 as such. On the other hand, the recitals found in Ex.B7 would go to show that the possession had been handed over to the defendants 1 and 2 only pursuant to the muchalika Ex.B7 on 23.05.1987 and that, only from that date it has been made clear that Ayesha Begum had no right over the plaint 'A' schedule properties. In Ex.B7 when there are no recitals that the possession, either actual or constructive, had been handed to the defendants 1 and 2 on the date of oral gift i.e. 22.05.1987 itself in the presence of the two witnesses and that the donees had accepted the same on 22.05.1987 itself, on the other hand, when the reading of the recitals contained in Ex.B7 go to show that only on 23.05.1987 Ayesha Begum had transferred her right over the properties from 23.05.1987 and when it is further noted that the three tenants of the plaint 'A' schedule properties had even chosen to attorn the tenancy in favour of the defendants 1 and 2 only from 23.05.1987, it is seen that as held by the trial court, the defendants have failed to establish the three essential requisites for constituting the valid gift. As held by the trial court, only by way of Ex.B7, Ayesha Begum had chosen to relinquish her ownership over the plaint 'A' schedule properties i.e. only from 23.05.1987. Therefore, the trial court is found to be correct in declining to accept the validity of the oral gift put forth by the defendants.

17. Furthermore, the defendants have also failed to establish that, following the oral gift, they have taken the possession of the suit properties and enjoying the same as such. From the materials placed on record, it is found that it is only



Shamshudeen, the father of the plaintiffs and the defendants 1 and 2, who had been in the exclusive control of the plaint 'A' schedule properties and it is he who had collected the rent and living there till his demise. The same could be gathered from the letter written by him marked as Exs. A11 to A13. As pointed out by the trial court, the lease deeds projected by the defendants marked as Exs. B5 and B6 is pertaining to the year 1991, which are found to have come into existence after the death of Shamshudeen. They have not exhibited any acceptable document to hold that after the oral gift said to have been made on 22.05.1987, it is they who had been in the exclusive control of the plaint 'A' schedule properties and that it is they who had been collecting the rents qua the plaint 'A' schedule properties from the date of oral gift. In such view of the matter, when as held by the trial court, the defendants 3 to 5 are the tenants of the plaint 'A' schedule properties over a continuous period of time and it is only Ayesha Begum who had let out the same to them it is very strange on the part of the defendants to obtain the fresh lease deeds from them namely Exs. B5 and B6 and therefore it is obvious that Exs. B5 and B6 had been secured by the defendants only to buttress their defence version one way or the other and the same does not fall in line with the normal conduct of human affairs.

18. In addition to that, if really the oral gift had been validly effected in favour of the defendants 1 and 2 by Ayesha Begum as put forth by the defendants 1 and 2, they would have disclosed about the same to their relatives or their sisters immediately and or atleast after the demise of their mother and demise of their father. On the other hand, it is seen that the defendants have not whispered anything about the oral gift till the filing of the present suit and the abovesaid aspect also throw a serious doubt regarding the truth and validity of the oral gift projected by the defendants.

19. The defendants would contend that they have effected the change of their names in the relevant records maintained in the town panchayat office with the assent of their father. However, considering the patta document projected by the defendants, the same being of the year 1994 that too, during the pendency of the suit, as rightly concluded by the trial court, nothing prevented the defendants from changing the patta immediately after the oral gift and no proper explanation has been given by the defendants 1 and 2 as to why they had waited till 1994 for mutating their names in the revenue records. That apart, the suit having been laid by the plaintiffs on 20.04.1992 and the defendants endeavoured to get the patta during the pendency of the suit in the year 1994 only go to expose the weakness of the defence case of oral gift. Furthermore, the second defendant examined as D.W.1 would also



testify that after the demise of the father, they had been discussing as to how the properties should be partitioned and however, no document has been effected and would also further depose that they had discussed with their sisters as to how the partition should be done and also would state that a muchalika was created for the same, however, he had only signed the same and the said document is not in his custody and the said document has not come into force and therefore, the negotiation made for the partition did not fructify and only thereafter, the suit has come to be laid by the plaintiffs. Considering the abovesaid evidence of D.W.1 in toto, if really the oral gift had been effected by Ayesha Begum validly on 22.05.1987, there is no necessity for the defendants to make an effort to effect the partition of the suit properties with their sisters and when it is noted that they had even gone to the extent of executing a muchalika and the said endeavour did not fructify one way or the other and the abovesaid factor also would go to expose that there had been no oral gift validly effected by Ayesha Begum during her life time and only on account of the same, the defendants have endeavoured or tried to effect the partition qua the suit properties with their sisters one way or the other, but as the same did not yield any positive result and accordingly it is also noted that the plaintiffs were necessitated to file the suit for partition.

20. Another interesting fact which is required to be noted is that, when according to the defendants Ayesha Begum has divested her ownership qua the plaint 'A' schedule properties by way of the oral gift on 22.05.1987 itself validly, as held by the trial court, there is no necessity for her to be a party in the muchalika dated 23.05.1987. If really the oral gift had been validly effected in favour of the defendants 1 and 2 on 22.05.1987 itself in the presence of the two witnesses, as held by the trial court, the muchalika effected thereafter could have been executed between the defendants 1 and 2 and the tenants in the presence of the witnesses and therefore the abovesaid factor also would go to expose that inasmuch as no actual or constructive delivery of possession of the plaint 'A' schedule properties had been taken over by the defendants 1 and 2 on 22.05.1987, it is seen that the defendants had come out with the case that Ayesha Begum was also the signatory to Ex.B7 muchalika.

21. Considering the abovesaid factors in toto, as also held by the trial court, the defendants have failed to establish that a valid oral gift had been effected by Ayesha Begum qua the plaint 'A' schedule properties as put forth by them and in such view of the matter, the trial court is found to be justified in coming to the conclusion that the oral gift pleaded by the defendants is not true and valid.



22. The first appellate court, without considering the principles of law governing the oral gift in Muslim law as enunciated by the Apex Court as above pointed out and the necessary proof to be adduced by the party who is projecting the plea of oral gift and as above discussed when the materials placed on record go to disclose that the defendants had failed to prove either actual or constructive possession of the gifted properties on the date of the gift, the irreversible conclusion that could be made is that the gift was not complete and hence the abovesaid defence of oral gift projected by the defendants for declining the lawful share of the plaintiffs over the plaint 'A' schedule properties cannot be countenanced in any manner.

23. In the light of the abovesaid factors, the first appellate court is not justified in accepting the oral gift (hiba) when, as above pointed out, it has not been established in the manner known to law, particularly, the defendants having failed to establish the essential requisites for constituting the valid hiba as enunciated by the Apex Court in the decision referred to supra, hence the substantial question of law formulated in the second appeal is accordingly answered against the defendants and in favour of the plaintiffs.

24. For the reasons aforesaid, the judgment and decree dated 03.12.2007 passed in A.S. No.133/2007 on the file of the Principal Subordinate court, Salem, are set aside, resultantly, the judgment and decree dated 10.01.2007 passed in O.S. No.1812/2004 on the file of II Additional District Munsif Court, Salem, are confirmed and accordingly the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

bga

To

1. The Principal Subordinate Judge,
Salem.



2. The II Additional District Munsif,
Salem.

3. The Section Officer,
VR Section,
High Court, Madras.

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.6904

+1cc to M/s.Sarvabhauman Associates, Advocate, S.R.No.6913

Pre-delivery Judgment
made in
S.A.No.1204 2008

NMI (CO)
SU (04/10/2021)