



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.08.2021

CORAM

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.No.850 of 2008

H. Chand Basha ...Appellant/Appellant/Plaintiff

Vs.

1. Abdul Wahid

2. The Tahsildar
Vaniyambadi

3. The Collector
Vellore District
Vellore

...Respondents/Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of CPC, 1908 against the decree and judgment dated 24.09.2007 on the file of the Sub-ordinate Court, Thirupattur, in A.S.No.58/06, confirming the decree and judgment dated 25.02.2005, on the file of the District Munsif-cum Judicial Magistrate Court, Ambur, in O.S. No.206/04.

For Appellant	:	Mr.L. Prabakar
For R1	:	No appearance
For R2 & R3	:	Mr.M.R.Gokul Krishnan Government Advocate.

JUDGMENT

The unsuccessful plaintiff before both the courts below, has filed the present Second Appeal.

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

3. The brief facts of the case of the appellant/plaintiff are as follows:

The suit property is the property of the appellant/plaintiff and the first respondent/defendant and their father executed a gift settlement deed (Hiba) dated 20.02.1986, through the original of Ex.A1 in favour of the appellant and his sister Dowlath Bi. The possession of the suit property was also handed



over to them. However, the first defendant, in order to grab the suit property, created a cancellation deed dated 26.11.1986 cancelling the gift deed dated 20.02.1986. According to the appellant/plaintiff, the first respondent is attempting to get the mutation of records in his name and that as per Mohammedan law, the first defendant does not have any right over the suit property. He, therefore, prayed for the following reliefs.

- 1) a decree of declaration that the plaintiff and his sister Dowlath Bi are the absolute owners of the suit property by means of the gift settlement deed dated 20.02.1986.
 - 2) for a mandatory injunction directing the respondents 2 and 3 to include the names of the plaintiff and his sister Dowlath Bi in the revenue records and
 - 3) for costs.
4. The suit was resisted by the first respondent/defendant on the following grounds.
- 1) The appellant has filed the suit without disclosing the actual facts.
 - 2) The settlement deed dated 20.02.1986 was cancelled on 26.11.1986 through a registered Cancellation deed. The father of the plaintiff and the first defendant earlier executed a settlement deed in favour of his first wife Bibijohn during the year 1981, who in turn executed a settlement deed in favour of the first defendant on 24.04.1997. By virtue of the said settlement deed executed by Bibijohn in favour of the first defendant, the first defendant became entitled to the suit property and patta was also issued in favour of the first defendant. The plaintiff did not raise any objection at the time of issuance of patta in favour of the defendant.
 - 3) Neither the plaintiff nor his sister was in the possession of the suit property.
 - 4) Since Dowlath Bi has not been impleaded as a party to the suit, the suit is bad for non joinder of necessary parties.

The first defendant, therefore, prayed for dismissal of the suit.

5. In the written statement filed by the second respondent/second defendant and which was adopted by the third



respondent/third defendant, it is averred that they granted patta to the first defendant after perusing the various documents provided by the first respondent/appellant including the settlement deed dated 24.04.1997 executed in his favour and that the appellant/plaintiff did not raise any objection at the time of issuance of patta, They had, therefore, prayed for the dismissal of the suit.

6.The trial court, after framing necessary issues, dismissed the suit vide its decree and judgment dated 25.02.2005. The first appellate court also upheld the findings of the trial court vide its decree and judgment dated 24.09.2007. Both the courts concluded that the appellant/ plaintiff did not adduce any acceptable evidence to show that the possession of the suit property was handed over to the plaintiff after the execution of the settlement deed (Ex.A1).

7. Now the present second appeal is filed on the following substantial questions of law:

- 1) "Whether the judgments and decree of the courts below are perverse on account of its misconception of the documents in Ex.P1?
- 2) Whether the settlement deed executed by the father of the appellant/plaintiff is liable to be rejected when there is no reservation made in the deed of settlement enabling the settlor to cancel the said deed on a subsequent occasion?
- 3) Whether the findings of the courts below with respect to possession is erroneous, perverse and based on no evidence?"

8. Mr.L.Prabakar, learned counsel for the appellant/plaintiff contended that when there is a specific recital in the settlement deed (Ex.A1) as to the handing over of possession of the suit property, both the courts below had wrongly recorded a finding that the possession of the suit property is not with the plaintiff. He would further contend that since the suit property is a vacant land, the appellant/plaintiff could not adduce any documentary evidence to prove his possession over the suit property.

9. Per contra, Mr. M.R. Gokul Krishnan, Government Advocate (Civil side) contended that patta was issued in favour of the first respondent/defendant by the official respondents after verifying the documents adduced by the first respondent and hence, prayed for dismissal of the appeal.



WEB COPY

10. In Mulla's Principles of Mohammedan Law, 18th Edition in chapter XI, while dealing with "Gift" under Section 149, the learned Author had said this.

The three essentials of a gift:

It is essential to the validity of a gift that there should be

- 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 as mentioned in Section 50.

If these conditions are complied with, the gift is complete. (Hiba in Mohammedan law is a transfer of the corpus).

11. Learned counsel for the appellant submitted that there is delivery of possession as per the recitals of the Hiba (Ex.A1) and therefore, the gift is complete.

12. It is true that there is a presumption that when there is a statement or declaration by the donor that the property has been delivered, it binds the persons claiming under them. But that is only a presumption, which could be rebutted by other evidence. Both the courts below had concurrently held that no documentary evidence was adduced on the side of the appellant/plaintiff to show that he and his sister Dowlath Bi took delivery of possession of the property. Apart from this, the settlor, subsequent to the execution of Ex.A1 settlement deed, had cancelled the same within one year of the execution of the settlement deed on 27.11.1986 by observing that though he (settlor) executed a gift settlement deed in favour of his son and daughter, he is cancelling the same as the purpose for which the gift was executed was not fulfilled and that the possession was not also handed over to his son (plaintiff) and daughter Dowlath Bi. It is contended that once the settlement deed is executed, the same cannot be cancelled especially when the settlor has not reserved his right of cancellation of the deed.

13. But in the instant case, the handing over possession of the gifted property has to be proved by the plaintiff, since as per the Mohammedan law, for a gift to be complete, handing over possession of the property is a prerequisite. Section 150(2) of the Mohammedan Law specifically states that a registration of a deed of gift does not cure the want of delivery of possession. Therefore, the mandate of Section 150 of the Mohammedan Law is very clear that in order to make a gift valid, the factum of delivery of possession a sine qua non, which cannot be dispensed with notwithstanding its Registration. Section 152 of the



Mohammedan Law stipulates that the donor has to physically depart from the premises and the donee must have to formally enter into possession. Section 167 of the Law speaks about the revocation of gifts before the delivery of possession, mainly, thereby the gift would not be completed without possession. It is pertinent to note that Section 167(4) of the Mohammedan Law mandates that once possession is delivered, the gift would become final and it cannot be revoked except by a decree of Court. The question as to whether the possession has been given or not is a question of fact, which both the courts below, after appreciating the evidence adduced on both sides, had concurrently held that there is no valid gift in favour of the appellant as the possession has not been actually given to him and his sister Dowlath Bi. The plaintiff, in fact, did not adduce any documentary evidence to show that he is in possession of the suit property and on the other hand, the first defendant had adduced (i) a copy of "A" Register (Ex.B2), in which his name appears as the owner of the suit property and (ii) a patta (Ex.B3) issued in his favour. The Village Administrative Officer (V.A.O) (Malayampattu Village) (D.W.2) also deposed that the first defendant has been in possession of the suit property. There is no good ground to reject the evidence of D.W.2. Both the courts below, based on the evidence adduced on both sides, had concurrently held that the possession of property gifted to the plaintiff and his sister has not been handed over to them after the execution of Ex.A1 Settlement Deed. As already observed, one of the three important ingredients of a valid gift is delivery of possession of subject of the gift. The fact that the name of the first defendant appears in the 'A' Register and a patta (Ex.B3) was also issued to him shows that the gift is not complete as contemplated under Mohammedan Law. It is also to be noted that even among Muslims, when a gift is reduced in writing and registered, such an act of registration would not remove and take away the applicability of the possession of Mohammedan Law by which conditions have been imposed for a valid gift. In the circumstances, the substantial questions of law 1 to 3 are answered against the appellant.

In the result, the second appeal is dismissed and the findings of both the courts below are upheld. No costs.

Sd/-

Deputy Registrar (Accounts)

//True Copy//

Sub Assistant Registrar

bga



To

1. The Sub-ordinate Court,
Thirupattur

2. The District Munsif-cum Judicial Magistrate Court,
Ambur.

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

+1cc to the Spl.Government Pleader, S.R.No.40122

S.A.No.850 of 2008

KV(CO)
RGA(03/12/2021)