

THE HONOURABLE SRI JUSTICE M.LAXMAN

CITY CIVIL COURT APPEAL No.410 of 2003

JUDGMENT:

1. This appeal has been directed against the judgment and decree dated 05.08.2003 in O.S.No.781 of 1999 on the file of the Additional Judge, City Small Causes Court-cum-VI Senior Civil Judge, City Civil Court at Hyderabad, wherein the suit filed by the appellant herein for partition and separate possession was dismissed.

2. The appellant herein is the plaintiff and the respondents herein are the defendants in the suit. For the sake of convenience, the parties hereinafter are referred to as they are arrayed in the suit.

3. The sum and substance of the case of the plaintiff is that his father Mohd. Ghiasuddin was the absolute owner and possessor of house property bearing Nos.18-8-123 and 18-8-123/A to L, consisting of residential house and fourteen (14) mulgies, admeasuring 2000 square yards, situated at Edi Bazar, near Dargah Barhana Shah, Hyderabad (hereinafter referred to as 'suit property'). Later, he died on 11.02.1998 leaving behind the plaintiff and the defendants as successors to his estate. The

plaintiff and defendant Nos.2 to 9 are the children of said Mohd. Ghiasuddin from his first wife and defendant No.1 is second wife of Mohd. Ghiasuddin and she had no issues. According to the plaintiff, he is entitled to share in the property in terms of Mohammadean Law and he seeks 2/17th share in the suit property. Hence, the present suit.

4. Defendant Nos.1 and 9 filed their written statement and defendant Nos.2 to 8 remained *ex parte*. They did not dispute about the ownership of Mohd. Ghiasuddin, his death and also their relationship with the plaintiff. Their case is that during the life time of Mohd. Ghiasuddin, he raised building and other structures in the suit property and he gifted 1386 square yards including the buildings and other structures therein in favour of defendant No.1 on 22.12.1973 by way of oral gift. Subsequently, he executed registered gift deed in favour of defendant No.1 under Ex.B-2 to B-4 vouching the fact of execution of earlier oral gift. He also executed joint gift settlement deed in favour of defendant No.1 and 9 under Ex.B-5. Hence, no property was left by the deceased Mohd. Ghiasuddin at the time of his death. Therefore, according to the defendants, no

property is available for partition and prayed to dismiss the suit.

5. On the basis of the above pleadings, the trial Court has framed the following issues:

“1. Whether the plaint schedule property was gifted to defendant No.1 and defendant No.9 by late Mohd. Ghiasuddin and whether it is not liable to be partitioned?

2. Whether late Mohd. Ghiasuddin acquired property bearing No.17-3-766 and 767 admeasuring 800 Sq.yards at Yakutpura, Hyderabad and 5 Acres of land at Qutubullapur and it is liable to be partitioned among plaintiff and defendants as pleaded by defendant Nos. 1 and 9?

3. Whether the plaintiff is entitled for partition in the suit schedule property and for preliminary decree?

4. To what relief?”

6. The plaintiff, to support his case, examined himself as P.W.1 and relied upon Exs.A-1 to A-3. The defendants, to support their case, examined D.W.1 and relied upon Exs.B-1 to B-6.

7. The trial Court, after appreciating the evidence on record, accepted the transactions under Exs.B-1 to B-5 and dismissed the suit of the plaintiff for partition and separate possession. Hence, the present appeal at the instance of the plaintiff.

8. Heard both sides.

9. The points emerging for consideration in this appeal are as follows:

“1. Whether the suit schedule property is available for partition?

2. Whether the documents under Exs.B-1 to B-5 are true and valid documents and the defendants are entitled to setup title basing on such documents?

Point Nos.1 and 2:

10. As seen from Ex.B-1, record of past transaction of oral gift, which is alleged to have made on 22.12.1973, pertains to 385 square yards out of total land held by late Mohd. Ghiasuddin. This gift was made in favour of defendant No.1, who is second wife of late Mohd. Ghiasuddin. Apart from the same, defendant No.1 set up her claim over the remaining property on the basis of Exs.B-2 to B-4 – registered gift deeds i.e., Ex.B-2 in respect of land admeasuring 666.38 square yards, Ex.B-3 in respect of land admeasuring 720 square yards and Ex.B-4 in respect of land admeasuring 26.36 square yards. All the said documents are gift settlement deeds executed in favour of defendant No.1 by Mohd. Ghiasuddin. She also set up her claim under Ex.B-5 in respect of land

admeasuring 600 sq.yards which is jointly gifted in favour of defendant Nos.1 and 9.

11. As seen from Ex.B-5, the gift settlement deed jointly made in favour of defendant Nos. 1 and 9, contains a sketch demarcating how much share each of them would get under the said deed.

12. The contention of learned counsel for the appellant is that Ex.B-1 cannot be accepted for the simple reason that the document contains no attestors. Though Ex.B-1 records the past transaction of oral gift, there is no evidence that oral gift has been validly made as per the provisions of the Mohammadean Law, which requires that such oral gift has to be made in the presence of two witnesses. The second ground raised by the learned counsel for the appellant is that Exs.B-2 to B-5 cannot be acted upon, since they are compulsory attestable documents, but no attesor was examined to prove such documents. Therefore, according to him, the suit ought to have been decreed in favour of the plaintiff. He also contended that if Exs.B-2 to B-5 are accepted, they rule out the oral gift theory propounded by defendant No.1 basing on Ex.B-1.

13. Respondent No.1 herein/Defendant No.1, who is issueless, died during the pendency of present appeal. Therefore, the appeal was dismissed as abated against her vide order of this Court dated 28.04.2011.

14. Learned counsel for respondent No.9 submitted that defendant No.9 is no way concerned with gift deed under Ex.B-1. According to him, the gift settlement deed under Ex.B-5 is validly proved since it is a registered document. As per Section 68 of the Indian Evidence Act, 1872, it is not necessary to examine any attester to the document, if the document is registered one. Hence, the trial Court has rightly believed such documents in rejecting the claim of the plaintiff.

15. As seen from Ex.-B-1 document, this document pertains to record of oral gift. According to the document, original gift was made on 22.12.1973 and the same was recorded through this memorandum (Ex.B-1) on 13.07.1974. This document contains only the signature of the executant and there is blank in witness column.

16. The Mohammadean Law requires that whenever oral gift is made, it must be done in the presence of two

persons, who are not otherwise disqualified to be witnesses. This document does not reflect whether such original gift was made in the presence of two witnesses, as required by the Mohammadean Law. Even though the memorandum of past oral gift is pressed into service to prove the past oral gift, the production of this document does not dispense with proof of valid oral gift. This memorandum of recording of past gift is one piece of evidence which can be relied upon. However, it cannot be the sole piece of evidence and the person who relies upon it requires to prove that the oral gift, which was made as part of record under the memorandum of gift deed, was voluntarily and validly made. This evidence is lacking in the present case.

17. The other contention of the learned counsel for the appellant that since the document (Ex.B-1) is not signed by the witness, it is an invalid document, has no merit. He failed to place on record under what provision of law the document requires to be compulsorily attestable. This document is not a gift deed, but it records the past gift and there is no transfer of property under it. It is the only acknowledgement of what was transferred in the past.

Therefore, this document is not a gift and it is not compulsorily registerable one. Absence of witnesses to the said document has no relevancy to believe the document.

18. Apart from absence of evidence with regard to presence of two witnesses, this document creates doubt when we look at the transaction under registered documents under Exs.B-2 to B-5. The total land covered under those documents is 2086 square yards. The entire case of the plaintiff is that by the time of death of Mohd. Ghiasuddin, the available property was only 2000 square yards. Even going by the recitals of Ex.B-1, if the extent covered under Exs.B-2 to B-5 is calculated, it is more than the land what the executant had owned and possessed. This is one of the circumstances to disbelieve Ex.B-1. Therefore, the trial Court has committed error in placing reliance on Ex.B-1. Such findings are liable to be set aside.

19. The contention of the learned counsel for the appellant that no attestor was examined and hence, the said document shall not be placed reliance by the defendants cannot be accepted in the light of proviso to Section 68 of the Indian Evidence Act, which clearly says

that when the law requires that the document is to be compulsorily attestable, and if it is registered, examination of one of the attestors to the said document is not required, except the Will. The party who disputes the document can examine the witnesses to establish his contention.

20. In the present case, the plaintiff has not resorted to disprove the execution of the document. Therefore, such contention has no merit. Hence, the documents under Exs.B-2 to B-5 were rightly relied upon by the trial Court and such findings require no interference.

21. It is stated by learned counsel for both sides that defendant No.1 died without any testator, and hence, the land owned by defendant No.1 has to be divided among her successors in terms of Mohammadean Law. The death of defendant No.1 opens the succession in respect of property she holds by virtue of Exs.B-2 to B5 and it gives a fresh cause of action to institute a fresh suit for partition, if the plaintiff or any other person claims to have right by way of succession to the estate of defendant No.1. Such relief cannot be granted in these proceedings.

22. In the result, the appeal is dismissed, confirming the judgment and decree dated 05.08.2003 in O.S.No.781 of 1999 on the file of the Additional Judge, City Small Causes Court-cum-VI Senior Civil Judge, City Civil Court at Hyderabad. However, the plaintiff is given liberty to institute a fresh suit in respect of the property owned by defendant No.1, if he has any right to claim succession. There shall be no order as to costs. Miscellaneous petitions, if any, pending, shall stand closed.

Date: 31.10.2022
TJMR

M.LAXMAN, J