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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

WEDNESDAY, THE 5TH DAY OF JULY 2023 / 14TH ASHADHA, 1945

R.S.A.NO. 210 OF 2011

AGAINST THE DECREE AND JUDGMENT DATED 18.09.2010 IN A.S.NO.99 OF 2004 OF THE SUB COURT, NEYYATTINKARA AND THE JUDGMENT DATED 17.06.2004 IN O.S.NO.516 OF 2003 OF THE II ADDITIONAL MUNSIFF COURT, NEYYATTINKARA

APPELLANT/1ST RESPONDENT/PLAINTIFF:

ABDUL JABBAR
AGED 57 YEARS, S/O.MOHAMMED KANNU, RESIDING AT JUMU BHAVAN, NEAR, TOWN CHURCH, KADAVATTARAM, NEYYATTINKARA, THIRUVANANTHAPURAM DISTRICT.

BY ADVS.
SRI.K.R.AVINASH (KUNNATH)
SRI.ABDUL RAOOF PALLIPATH

RESPONDENTS/APPELLANTS & 2ND RESPONDENT/DEFENDANTS:

1 KHADEEJA BEEVI
AGED 40 YEARS, /O.BASHEER, RESIDING AT THUNDU, VILAKOM, KADAVATTARAM, NEYYATTINKARA,THIRUVANANTHAPURAM - 695 121.

2 BEEVI UMMAL, AGED 55 YEARS
D/O.SULEKHA BEEVI, RESIDING AT VELLOOR STREET, NEAR COLLECTORATE,'S', NAGERCOIL.

3 RASHEED BEEVI, AGED 30 YEARS
THUNDUVILA,KADAVATTARAM,NEYYATINKARA, THIRUVANANTHAPURAM - 695 121.

BY ADVS.
SRI.V.G.ARUN
SMT.INDULEKHA JOSEPH
SRI.NEERAJ NARAYAN

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THIS REGULAR SECOND APPEAL HAVING COME UP FOR FINAL HEARING ON 23.06.2023, THE COURT ON 05.07.2023 DELIVERED THE FOLLOWING:

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P.G. AJITHKUMAR, J.

R.S.A.No. 210 of 2011

Dated this the 5th day of July, 2023

JUDGMENT

The judgment and decree dated 17.06.2004 of the Additional Munsiff-II, Neyyattinkara in O.S.No.516 of 2003 were reversed in appeal, A.S.No.99 of 2004 by the Sub Judge, Neyyattinkara as per the judgment dated 18.09.2010. The Appellate Court on setting aside the decree granted by the Munsiff in favour of the plaintiff, dismissed the suit. The plaintiff is therefore in appeal before this Court under Section 100 of the Code of Civil Procedure, 1908.

2. On 17.02.2011, this Court formulated the following substantial question of law, on which, this appeal was admitted,-

> "When Ext.A1 gift deed provides for taking usufructs from the property gifted by the donor during his life time, whether the finding of the courts below that the donor did not part with possession is sustainable and if so, whether Ext.A1 gift deed is not valid."

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3. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents.

4. The facts relevant for the appreciation of the question of law are stated thus:

The appellant is the son of Sri.Mohammed Kannu. He had executed Ext.A1 settlement dated 18.10.1989 in favour of the appellant. The appellant claims that he had accepted the gift and taken over possession of the property. He effected mutation and paid tax. While so, Sri.Mohammed Kannu executed Ext.B1 cancellation deed on 02.03.1995. That followed Exts.B2 and B3 sale deeds. The appellant alleging that his possession was tried to be interfered with by the respondents, who are his sister-in-law and sisters, instituted the suit for a decree of declaration of his title and injunction.

5. Respondents No.1 and 2 contended that Ext.A1 settlement deed did not come into effect for want of delivery of the property by the donor. The recital in Ext.A1 that the donor retained possession of 2½ cents, out of the total 3

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cents and also retention of right of enjoyment of whole of the property are highlighted by respondents No.1 and 2 and took the stand that the gift as per Ext.A1 is not a valid one. The trial court after appreciating the aforesaid documents and also the oral testimonies of DW1 and also the Commissioner, held that the gift as per Ext.A1 was a valid one and that resulted in granting a decree as prayed.

6. The First Appellate Court considered in detail the recital in Ext.A1 in the light of the law governing a Mohammedan Gift and held that, possession of the property was not delivered over to the appellant in terms of Ext.A1, and therefore the same remained as an unenforced gift. The First Appellate Court held that, not only possession of 2½ cents of property was not handed over, but also the right to take usufructs was retained by the donor. The court took the view that retention of right to take usufructs on its own, may not invalidate a Mohammedan gift, however, the recitals in Ext.A1 enable only one interference that possession of 2½ cents of property was not delivered over

to the donee, and therefore, a valid gift was not constituted as per the deed.

7. The learned counsel appearing for the appellant would submit that other than the right to take usufructs, nothing has been retained by the donor and the view taken by the First Appellate Court is inconsistent with the true intendment of the recitals in Ext.A1. The learned counsel for the appellant by placing reliance on Sections 148 and 149 of Mulla's Mahomedan Law, 20th Edition, contended that all the ingredients insisted therein for valid gift are satisfied by the gift as per Ext.A1.

8. *Per contra*, the learned counsel appearing for respondent Nos.1 and 2 placing reliance in **Pichakannu v. Aliyarkunju Lebba [1963 KLT 226], Kunhayissu v. Chirukandan [1971 KLJ 796], Ibrahim Kunju Shahul Hameed and others v. Pakkeer Muhammed Kunju and others [1984 KLJ 890], Mahboob Sahab v. Syed Ismail and others [(1995) 3 SCC 683], Hafeeza Bibi and others v. Shaikh Farid (dead) by LRs. and others AIR 2011 SC**

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1695] and **Rasheeda Khatoon (dead) through LRs. v. Ashiq Ali (dead) through LRs. [(2014) 10 SCC 459]** contended that the transaction vide Ext.A1 is short of delivery of the possession, dehors the property being a deliverable one, and therefore it is not a valid Mohammedan gift.

9. Sections 148 and 149 of the Mulla's Muhammadan Law, 20th Edition, read,-

> "148. Relinquishment by donor of ownership and dominion.- It is essential to the validity of a gift that the donor should divest himself completely of all ownership and dominion over the subject of the gift.
> 149. 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 150. If these conditions are complied with, the gift is complete."

10. As regards requirements for a valid gift (Hiba) there cannot be any dispute. The law has been succinctly laid down by the Apex Court in a catena of decisions. In **Rasheeda Khatoon [(2014) 10 SCC 459]** the Apex Court

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reiterated the law as follows:-

> "17. From the aforesaid discussion of the propositions of law it is discernible that a gift under the Muhammadan Law can be an oral gift and need not be registered; that a written instrument does not, under all circumstances require registration; that 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; that 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."

The same is the law laid down by the Apex Court and this Court in the decisions, which are mentioned above.

11. As regards the first two components, there is no reason for any doubt. The recitals in Ext.A1 coupled with the facts that donor and donee were living together and Ext.A1 in original along with a series of tax receipts were produced by the appellant in the court sufficiently substantiate that, there was a declaration of the gift by the donor and the donee accepted the gift. The question therefore is only with respect

to the third requirement that is, delivery of possession of the property to the donee; actual or constructive. The stipulation in Ext.A1, as reproduced in the judgment of the Appellate Court, is as follows,-

> "താഴെ പട്ടികയിൽ വിവരിക്കുന്ന വസ്തുവെ താഴെ ചേർക്കുന്ന വ്യവസ്ഥയ്ക്ക് വിധേയമായി നൽകിയിരിക്കുന്നതിനാൽ പട്ടികയിൽ വിവരിക്കുന്ന 3 സെന്റ് വസ്തുവിൽ 1/2 സെന്റ് വസ്തു നാളതുമുതൽ അനുഭവിച്ച് 3 സെന്റ് വസ്തുവെയും പോക്ക്‌വരവ് ചെയ്ത് പട്ടയം പിടിച്ചും കരം തീർത്തും കഴിഞ്ഞു കഴിഞ്ഞുകൊള്ളേണ്ടതും കരം തീർക്കുന്നതിനോ പോക്ക് വരവ് ചെയ്ത് പട്ടയം പിടിക്കുന്നതിനോ എന്റെ പ്രത്യേക സമ്മതം ആവശ്യമില്ലാത്തതും പട്ടിക വസ്തു വകകളിലുള്ള വൃക്ഷങ്ങളിലുള്ള ആദായം എന്റെ കാലം വരെ ഞാൻ തന്നെ അനുഭവിക്കുമെന്നുള്ളതും എന്റെ അറിവും സമ്മതവും കൂടാതെ യാതൊരുവിധ കാരണങ്ങളും ജനിപ്പിക്കാൻ പാടില്ലാത്തതും"

12. By reciting so, the donor reserved the right of enjoyment of the property with him during his lifetime. This Court in **Kunhayissu [1971 KLJ 796]** held that reservation by the donor of the right to take usufructs from the property during his lifetime does not invalidate the gift. A Division Bench of this Court in **Ibrahim Kunju Shahul Hameed [1984 KLJ 890]** affirmed the said principle. It was held that,

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a condition in a gift deed that, the whole of the usufructs shall be taken by the donor during his lifetime would not make the gift deed invalid, if the possession of the subject matter of the gift was given to the donee. Therefore, the reservation of the right to take usufructs in Ext.A1 by Sri.Mohammed Kannu during his lifetime does not invalidate the gift.

13. The law emerges from the decisions referred to above is that, possession of the whole of the property, if capable of being delivered, shall be parted with by the donor in favour of the donee for the gift to be valid. The appellant was allowed to enjoy half a cent alone from the total of 3 cents of the plaint schedule property. He was allowed to pay tax for the entire property. It is not stated in Ext.A1 that possession of remaining 2½ cents was handed over to the appellant. It is true, the right of enjoyment cannot be treated synonymous to the possession of an immovable property. But on a conjoint reading of the whole of the recitals in Ext.A1 does not enable to find or infer that possession of 2½ cents of property was delivered over to the appellant. Such a recital is

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totally lacking in Ext.A1, whereas, there is a positive assertion that the donor would continue to enjoy the property. From the above the possible deduction is that, the donor did not intend to hand over the possession of 2½ cents of property to the donee immediately. There did not surface any other evidence to substantiate that the appellant got possession of the property, when he shied away from mounting the box and give oral evidence. That leads to the irresistible conclusion that Ext.A1 did not create a valid gift in favour of the appellant. The obvious consequence is that the second appeal fails. It is accordingly dismissed. No costs.

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr