
(1969) 11 OHC CK 0009
In the Orissa High Court
Case No : First Appeal No. 26 of 1964

Fakir Muhammad	Vs	APPELLANT
Fazal Khan and Others		RESPONDENT

Date of Decision : 19-11-1969

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : (1970) 36 CLT 334

Hon'ble Judges : S. Acharya, J;A. Misra, J

Bench : Division Bench

Advocate : D. Mohanty and P.V. Ramdas, for the Appellant; P.V.B. Rao, for the Respondent

Final Decision : Dismissed

Judgement

A. Misra, J.—The unsuccessful Plaintiff is the Appellant. He filed the suit for declaration of his title to the immoveable and moveable properties described in Schedules A, B, C and D annexed to the plaint and recovery of possession of the same, except item No. 2 in Schedule B and the lands situate in village Tuludi in Schedule A. which are said to be in his possession.

2. Plaintiff's case, in brief, is that one Fiaz Muhammad died leaving two widows Rahmat Bibi and Mariyam Bibi who succeeded to his properties. Plaintiff is the son of Fiaz through Mariyam Bib J. Mariyam Bibi filed O.S. No. 7 of 1921 in the Court of Subordinate Judge, Berhampur for partition of the properties inherited from Fiaz Muhammad. The said suit was compromised and under the compromise decree Rahmat Bibi was allotted Re .1/- anna share Rahmat Bibi had a sister Farid Bibi, mother of Defendant No. 1. Both of them inherited the properties of their father Fazle Muhammad, who died in the year 1914. Thus, Rahmat Bibi came to possess the share of the properties inherited from her father as well as the share of properties of her deceased husband allotted to her in the partition suit. Rahmat Bibi had a son named Hanif through Fiaz Muhammad who died at a very early age. After his death, it is stated that

Rahmat Bibi bestowed all her affection on the Plaintiff, got him married in 1940, put him in management of all her properties and intended to settle them on him, except a small portion which she proposed to endow by way of religious gift" While matters stood thus, Defendant No. 1, on dismissal from the Madras Police Service for misconduct, came to Bhanjanagar with his family and resided in a portion of the house contiguous to the one occupied by Rahmat Bibi. He tried to trespass into the house of Rahmat Bibi and forcibly take possession of her properties, both moveable and immoveable. Rahmat Bibi lodged a report at the police station of theft of her gold ornaments in the year 1957 and also complained to the police and the District Magistrate against the conduct of Defendant No. 1 and prayed for promulgation of a prohibitory order against the Defendants. On 10-2-1958, Rahmat Bibi transferred all her properties, both moveable and immoveable to the Plaintiff by an oral gift in the presence of a number of persons which was accepted by the latter and no physical delivery of possession was necessary to complete the gift, as already Plaintiff was in management; There was unequivocal expression of intention by the donor to divest herself of her rights and acceptance by the donee. After the death of Rahmat Bibi in 1960, Defendants are alleged to have trespassed into her residential house, removed moveables including gold and tried to dispossess the Plaintiff from other properties. This resulted in a Criminal Case as well as two proceedings u/s 145, Code of Criminal Procedure in respect of different items of suit properties which had been gifted by Rahmat Bibi to the Plaintiff. Therefore, Plaintiff filed the present suit as Defendant No. 1 disputed his rights to the properties gifted by Rahmat Bibi. Originally the suit was filed against Defendant Nos. 1 to 3, the latter two being the sons of Defendant No. 1. During the pendency of the suit, Defendant No. 1 died and Defendants Nos. 1/a to 1/h have been substituted as his legal representatives.

3. Defendants admit that Rahmat Bibi inherited half the properties of her deceased father and got Re. -/1/- anna share allotted to her under the compromise decree out of her deceased husband's estate and was in possession. They, however, deny that Plaintiff was ever treated with affection by Rahmat Bibi or was entrusted with the management of her properties. Defendant No. 1 who happens to be the sister's son of deceased Rahmat Bibi being the nearest legal heir of the deceased, succeeded to all her properties. They deny the allegation that Rahmat Bibi at any time entertained any intention to settle or gift her properties in favour of Plaintiff or to have conveyed the same by any oral gift or otherwise on 10-2-1958 to the Plaintiff. According to them, for proper management of their properties Defendant No. 1 resigned from service, returned to Bhanjanagar and resided in the same house with Rahmat Bibi. Rahmat Bibi performed the marriage of Defendant No. 1 at Bhanjanagar and all along they were living together as members of the same family and Defendant No. 1 was attending to the management of the entire properties. After the death of Rahmat Bibi on 14-10-1960, Borne of the muslim inhabitants of Bhanjanagar requested Defendant No. 1 to endow a portion of the properties of the deceased for a

mosque, but as he did not agree to this proposal, they all combined, set up a false case of oral gift in favour of Plaintiff and got the suit filed. In short, Defendants' case is that as legal heir, Defendant No. 1 succeeded to the entire properties of deceased Rahmat Bibi and the claim of oral gift by Plaintiff is not true. In addition, Defendants also plead that some of the properties included in the suit Schedules belong to Defendant No. 1 and do not appertain to the estate of Rahmat Bibi and that Plaintiff's mother Mariyam Bibi was not the legally married wife of Fiaz Muhammad.

4. On the pleadings, the trial Court framed as many as 13 issues. It found that Mariyam, mother of Plaintiff was the married wife of Fiaz Muhammad and left, open the question whether any of the items of the suit properties belonged to Defendant No. 1 as claimed by him and not to the estate of Rahmat Bibi. The question whether Mariyam was the legally married wife of Fiaz Muhammad is not very material in this litigation as Plaintiff bases his claim on an oral gift alleged to have been made by Rahmat Bibi. Similarly, the relevancy of the issue as to whether any of the items of the suit properties did not appertain to Rahmat Bibi's estate and belonged to Defendants would arise for consideration only, if it is found that Plaintiff has acquired title to all the assets of Rahmat Bibi under a valid oral gift.

5. The following facts are not disputed. Rahmat Bibi and Mariyam inherited the properties of their deceased husband Fiaz Muhammad. The partition suit filed by Mariyam registered as O.S. No. 7 of 1921 was in respect of the properties inherited from Fiaz Muhammad and under the compromise decree, Rahmat Bibi was allotted Rs. 1/- anna share. Rahmat Bibi and Farid Bibi, mother of deceased Defendant No. 1 were two sisters, who inherited the assets of their father Fazal Muhammad, who died in 1914. Rahmat Bibi had a son Hanif, who died at a very early age in or about 1923. Rahmat Bibi was in possession and enjoyment of the share of properties inherited from her father as well as Re. -/1/-anna share out of her husband's estate as per the compromise decree. It is also not disputed that under Mahommedan law, deceased Defendant No. 1 and not Plaintiff was the legal heir of Rahmat Bibi.

6. The aforementioned facts not being disputed, the point for decision is whether Plaintiff has acquired title to the properties owned and possessed by Rahmat Bibi. Plaintiff claims to have acquired title to the said properties by virtue of an oral gift alleged to have been made by Rahmat Bibi on 10-2-195a. It is not disputed that under law, Rahmat Bibi had the right to gift away her properties and that an oral gift is permissible under Mahommedan law. It is also not disputed that if a valid oral gift is proved, Plaintiff will be entitled to the properties of Rahmat Bibi and Defendant No. 1 as legal heir will be deprived of his right to inherit. Thus, the sale question for decision is the truth and validity of the oral gift alleged by the Plaintiff.

7. It is well settled and is not disputed that under Mahommedan law, a holder of property may, in his or her life time, gift away the whole or part of his or her

property orally. To constitute a valid gift, the three essential requirements to be fulfilled are firstly, a declaration of gift by the donor; secondly, expression implied acceptance of the gift by or on behalf of the donee and thirdly, delivery of possession of the subject of gift by the donor to the donee. Actual physical delivery of possession in all cases may not be necessary or feasible, and therefore, it will satisfy the requirement, if such possession as the subject of gift is susceptible of is given. It is equally well settled that the burden of proof is upon the incumbent who seeks to set up such a transaction to show very clearly that the requirements have been complied with to constitute a valid gift.

8. We now proceed to consider the evidence to determine how far Plaintiff has succeeded in establishing the oral gift in his favour alleged to have been made by Rahmat Bibi on 10-2-1958 which had the effect of depriving the legal heir of his right to succeed. The evidence adduced on the side of Plaintiff consists of the testimony of 12 witnesses including the Plaintiff besides the documents marked Exs. 1 to 34. On the side of Defendants, the evidence consists of the testimony of 15 witnesses, besides a number of documents. While considering and analysing the evidence, we propose to confine ourselves to the testimony of material witnesses examined on either side and the documents relevant for the purpose. Plaintiff's case is that Rahmat Bibi, after the death of her son Hanif in or about 1923, showered all her affection and intended to settle her properties by gift on him, in pursuance of which, she made the alleged oral gift on 10-2-1958. Evidence adduced on the side of Plaintiff can broadly be divided into three parts. The first part purports to relate to the period preceding 10-2-1958, the date of the alleged oral gift. It has been suggested that since the death of her only son Hanif in or about 1923 Rahmat Bibi bestowed all her affection on the Plaintiff, got him married and put him in charge of management of her properties. Similarly, attempt has been made to prove that shortly prior to the date of the alleged gift, Rahmat Bibi had made reports and complaints to the police and the Magistrate against Defendant No. 1 accusing him of theft of her valuables and threats to trespass into and dislodge her from her house and properties. Thus, it has been sought to establish that Rahmat Bibi was highly dissatisfied with Defendant No. 1 prior to the date of the alleged gift which probablises her intention to deprive him of his rights to succeed. The second part relate's to the evidence of Usman Khan (p.w. 3). Mirza Bakhar Baig (p.w. 4), K. Suryanarayan Achari (p.w. 5), Kalu Charan Goudo (p.w. 6), Yunus Muhammad (p.w. 7,) Jagannath Behera (p.w. 8), Sattar Khan (p.w. 10) and Plaintiff (p.w. 11) who have deposed that in their presence on 10-2-1958 Rahmat Bibi made the declaration of making an oral gift of her properties to the donee and acceptance of the same by the latter. The third part relates to the conduct of Plaintiff in dealing with the properties of Rahmat Bibi.

9. Learned Counsel for Appellant in the course of arguments laid considerable emphasis on material relating to the conduct of Rahmat Bibi prior to the date of the alleged gift to show that in view (If the strained relations existing between her and Defendant No. 1, it is highly probable that the former must have

intended to deprive the latter of his right to succeed to her properties as legal heir and confer the benefit on the Plaintiff whom she was treating with affection by making an oral gift.

In para 5 of the plaint, it has been alleged that on the death of her son Hanif in or about 1923, Rahmat Bibi bestowed all her affection on her step-son Plaintiff, and as a matter of fact, got him married in 1940. The evidence of Plaintiff examined as p.w. 11 shows that the above statements are not true. In cross-examination, he has stated that from the year 1940, his mother Mariyam and Rahmat Bibi were staying in different houses. Since 1940, himself, his mother Mariyam and his wife were living together at Purunabazar Sah J. He is unable to say where Rahmat Bibi was living during 1929 or 1930 and that he came to know Rahmat Bibi for the first time in the year 1940. These statements belie the version given in the plaint that since after the death of her son, Rahmat Bibi bestowed all her affection on Plaintiff and was treating him as a son. To prove the strained relations between Defendant No. 1 and Rahmat Bibi, reliance has been placed on the documents marked Exs. 33 series and 34. Ex. 34 is the F.I.R. lodged by Rahmat Bibi at the P.S. on 2-7-1957 alleging that certain ornaments were stolen from an iron chest in her house about a month prior thereto. Ex. 33 series are station diary entries lodged between 2-6-1957 and 2-2-1958. Ex. 33 relates to a report by Defendant No. 1 alleging that Plaintiff and one Bakhar Baig were instigating Rahmat Bibi to implicate him in a false case. Ex. 33/a purports to be a report from Rahmat Bibi alleging that Defendant No. 1/a and his brother were trying to dig her well and that they assaulted her. Ex. 33/b is a report by Defendant No. 1 that there was enmity between him and his aunt and he was apprehending danger and Ex. 33/c is a report by Bakhar Baig on behalf of Rahmat Bibi denying the truth of the above reports. Defendant No. 1 in his written statement has explained that for a short period during 1957-58, some misunderstandings had cropped up between him and Rahmat Bibi as he had to perform his daughter's marriage at Berhampur against the wishes of the latter, but shortly thereafter cordiality was restored. This explanation is not improbable, inasmuch as, nothing else has been produced to show that disputes or differences continued between them subsequently, though Rahmat Bibi lived for more than two years thereafter. At best, these documents prove that some ill-feeling for a short period during 1957-58 had arisen between the two. This itself will not be sufficient to draw an inference that Rahmat Bibi was so much dissatisfied with Defendant No. 1 that she made a gift in favour of the Plaintiff. Thus, the Plaintiff's allegation of Rahmat Bibi having bestowed all affection on him since the death of her son in or about 1923 is not true and the evidence also does not establish that there was continuous strained feelings between Rahmat Bibi and Defendant No. 1.

10. Next we come to the evidence of the witnesses in whose presence Rahmat Bibi is said to have made the declaration of oral gift in favour of Plaintiff on 10-2-1958. The learned Subordinate Judge has considered in detail the testimony of these witnesses and declined to place reliance on them. p.w. 11 is

the Plaintiff and his evidence is necessarily interested. p.w. 3 in cross-examination admits that Plaintiff's mother Mariyam is the daughter of Muhammad Khan, his paternal uncle p.w. 4 cannot be considered disinterested. As a member of the Rahmatia Wakf Board, he tried to claim the Baunslandi lands of Rahmat Bibi alleging that she had made a gift of these properties. In that connection, he issued registered notices to the tenants, but ultimately his efforts proved futile. He being a person interested in securing a portion of the properties of Rahmat Bibi, it is not unlikely that he has joined hands with Plaintiff in the bid to deprive Defendant No. 1 of his legitimate right of inheritance. It is admitted by p.w. 3 that his wife and the wife of p.w. 11 are sisters. So also, p.w. 10 is related to Plaintiff, inasmuch as, p.w. 3 admits that p.w. 10 is the son of Plaintiff's maternal uncle Golab Khan. Thus p.w.s. 3, 4, 7 and 10 are relations of Plaintiff and their evidence is necessarily interested. The remaining three witnesses are p.w. 5, a local goldsmith, p.w. 6, a local tailor and p.w. a, a vegetable vendor. It is not clear why these persons who do not occupy any position or status in society should have been particularly invited to be present and be witnesses to the alleged declaration of gift. Learned Counsel for, Appellant contends that close relations and others who were intimate with Rahmat Bibi and in whom she had confidence were particularly selected to be present at the time of the declaration with the object of keeping the whole transaction a secret out of fear that if Defendant No. 1 came to know of it, he might cause trouble and harass the old lady. This explanation does not appeal to us. If as argued, there was bitter hatred between Rahmat Bibi and Defendant No. 1 which had led to filing of report against each other before public authorities, there can be hardly any reason for Rahmat Bibi to make secret of her feelings towards Defendant No. 1. Similarly if disclosure of this transaction was made in the presence of persons like p.w.s. 5, 6 and 8, it is difficult to believe that any attempt was being made to maintain secrecy of what Rahmat Bibi proposed to do. For the reasons discussed above, the trial Court has rejected the testimony of these witnesses as interested and undependable, and we find no reason to differ from the said conclusion.

11. The next part of the evidence concerns the conduct of the parties in relation to the properties of Rahmat Bibi. Admittedly, Rahmat Bibi died on 14-10-1960 more than two years after the date of the alleged oral gift. If on 10-2-1958 as stated by Plaintiff, she made the oral gift and divested herself of her rights in the properties, it is reasonable to expect that Plaintiff would have taken steps for getting his name mutated. No such steps were taken. Even assuming that she out of fear was keeping the transactions a close secret from Defendant No. 1, as alleged by Plaintiff-Appellant, after her death, there was no further reason for such secrecy which prevented Plaintiff from taking steps for getting his name mutated. This conduct of Plaintiff militates against the truth of the alleged oral gift dated 10-2-1958.

12. On behalf of Appellant reliance has been placed on the documents marked Exs. 1, 5 to 8, 9, 10, 11, 12, 22, 23, 27 series, 32, 29 and 30 series to show that Plaintiff was participating in the management of the properties of Rahmat Bibi

which it is argued highly probablises the Plaintiff's case of alleged oral gift in his favour. A perusal of these documents hardly lends support to the contention of Plaintiff-Appellant. Exs. 1 and 32 are two applications of the year 1953 by Rahmat Bibi to the Divisional Forest Officer. In Ex. 32, she has requested the Forest Officer to send the permit book through his son Fakir Muhammad. Ex. 1 also is a similar application seeking a permit to get some timber to Russelkonda. These two were long before the date of the alleged gift. Reference to Fakir as son is nothing unusual as he was her step son. These two documents only prove that Rahmat Bibi utilised the services of Plaintiff to receive the permits from the Forest Department on her behalf. Exs. 9 & 10 are municipal tax receipts showing payment of municipal tax by Plaintiff on behalf of Rahmat Bibi on 17-11-1961 for the assessment year 1961-62. These receipts relate to a period subsequent to the commencement of disputes between the parties after the death of Rahmat Bibi. Ex. 5 to 8 are of the year 1961 showing payment of list for Rahmat Bibi's lands by Plaintiff. Firstly, these receipts relate to a period subsequent to the death of Rahmat Bibi when disputes had already commenced, and secondly, even in these receipts, payment is made by Plaintiff on behalf of Rahmat Bibi. If as early as 1958, she had divested herself of her rights and Plaintiff had acquired title to her properties, there is no explanation why he should be paying rent on behalf of the former. Exs. 11 and 12 are similar rent receipts of the year 1962 which were long after the proceedings u/s 145, Code of Criminal Procedure started. Therefore, these rent receipts cannot be treated as lending support to the Plaintiff's case of his having dealt with the properties of Rahmat Bibi after acquiring rights under the alleged gift. Ex. 22 is a registered letter sent by the Advocate for Defendant No. 1 to one Benu Naik, a tenant of some lands of Rahmat Bibi in Tuludi village demanding the raj-bhag on the ground that his client had succeeded to the properties. Ex. 23 purports to be the reply by the said Benu Naik stating that Plaintiff has been managing the properties and receiving the raj-bhag, as in 1958 Rahmat Bibi gifted all her properties to him. Reliance is sought to be placed on this document to support the truth of the alleged gift. Benu Naik has not been examined and the statements contained therein are not admissible. Secondly, all these documents relate to a period subsequent to the commencement of disputes between the parties and the 145 proceedings when obviously attempts were being made to create evidence in support of their respective claims. Therefore, no importance can be attached to these documents. Ex. 27 series are affidavits filed on behalf of Plaintiff in the 145 proceedings and they cannot be evidence in the present suit. Exs. 29 and 30 series are registered sale deeds executed by Rahmat Bibi in 1955 in favour of different purchasers. They have been filed to show that Plaintiff acted as her identifier at the time of registration. Plaintiff being the step-son and known to Rahmat Bibi, his act of identifying her on these occasions do not in any manner provide evidence in favour of the alleged oral gift or show that Plaintiff was in possession and management of her properties. Thus, these documents do not lend support to Plaintiff's case that he was in the management of Rahmat Bibi's properties or dealing with them asserting rights in himself either during or after

her lifetime.

13. On the other hand, Defendants have filed some documents which clearly prove that it is the Defendant No. 1 who was attending to the management of the properties of Rahmat Bibi and the case of oral gift sought to be made out by Plaintiff is only an afterthought. Ex. R series are the municipal tax receipts showing payment of house tax for Rahmat Bibi's house during the years 1958, 1959, 1960, 1961 and 1962. The tax has been paid in the name of Rahmat Bibi and receipts are produced by Defendant No. 1. Subsequent to her death, it is the Defendant No. 1 who has paid the tax. Ex. X is a registered muchalika dated 22-10-1960 executed by one Kashi Swain in respect of lands situate in village Lalsingi which admittedly belonged to Rahmat Bibi. Therein, Plaintiff has described the properties as his PITRAJIRTA (paternal property). This shows that even subsequent to the death of Rahmat Bibi Plaintiff did not conceive the idea of claiming this property by virtue of the alleged gift, but tried to claim it as his paternal property. The next document is one marked Ex. AA. This is another muchalika executed on 11-9-1960 in favour of Mirza Bakhar Baig, one of the p.w.s. in respect of the Baunslandi lands appertaining to the subject-matter of the alleged gift. Bakhar Baig claimed title to these lands on the basis of an oral gift. Bakhar Baig filed an O.T.R. case against the tenant Mala Pradhan. Plaintiff admits that he entered appearance as an intervener in the said O.T.R. proceeding and put forth a claim through his tenant Bhima Pradhan. Ex. 33 is the petition filed by Plaintiff before the O.T.R. Collector. In para 2 of the said petition, he has specifically stated that he was looking after the properties of Rahmat Bibi during her life time and he was in possession alongwith Rahmat Bibi (sic) her death, and after her death, he was in exclusive possession of the disputed lands as landlord. This furnishes clear proof that by the date of filing of this petition, he had not entertained any idea of claiming Rahmat Bibi's properties under an oral gift. He admitted that Rahmat Bibi was in possession till her death which demolishes the present claim of Rahmat Bibi having made a gift of her properties in 1958, divested herself of her rights and possession from that date and transferred the same to the Plaintiff. The next series of documents are Exs. Z series. They are rent receipts showing payment of rent for the lands of Rahmat Bibi. Some of the rent receipts like Exs. Z/35, Z/49 and Z/44 also show that Defendant No. 1 had paid the rent on behalf of Rahmat Bibi during her life time. Ex. N is a sale deed executed jointly by Rahmat Bibi and Defendant No. 1 on 12-7-1960 conveying certain properties which is another instance which belies the story of gift pleaded by Plaintiff in 1958. Ex. HH is a receipt for Rs. 200/- granted by Rahmat Bibi on 10-3-1958 to one Somnath Panda towards rent of her house which she purports to have leased out. If Rahmat Bibi had gifted the properties on 10-2-1958, she would not have leased out the house on 10-2-1958 and asserted her right to it. Ex. FF is the petition filed by Plaintiff in M.C. No. 1aa of 1960 which arose subsequent to the death of Rahmat Bibi. In that petition, though Plaintiff alleged that Rahmat Bibi had bestowed all her affection on him and put him in possession of her properties, there is absolutely no mention or reference to any

gift in 1958. Thus, the documentary evidence filed on behalf of Defendants leave no room for doubt that neither during the life time of Rahmat Bibi, nor even after her death till the date of filing of the affidavits in the 145 proceedings on 25-10-1961, Plaintiff conceived the idea of making a claim under an oral gift from Rahmat Bibi in February, 1958. It is not unlikely as has been observed by the Court below that prior to 25-10-1961 Plaintiff must have entertained a wrong impression that as the step-son he was entitled to succeed, but finding that under Mahommedan law Defendant No. 1 was the nearest heir of deceased Rahmat Bibi, at a belated stage he has tried to make out a case of oral gift.

14. On a consideration of evidence, oral and documentary, the conduct of the parties and particularly of Plaintiff subsequent to the death of Rahmat Bibi, we agree with the finding of the trial Court that Plaintiff has miserably failed to prove the oral gift in his favour by Rahmat Bibi on the basis of which he claims title to the suit properties. Thus, Plaintiff having failed to prove acquisition of any title to the properties left by deceased Rahmat Bibi, is not entitled to any of the reliefs prayed for.

15. Accordingly, we find no merit in the appeal which is dismissed with costs.

S. Acharya, J.

16. I agree.