(2012) 01 AP CK 0007

In the Andhra Pradesh High Court

Case No : Writ Petition No. 7558 of 2011

Fazalullah Khan APPELLANT

Vs

State of Andhra Pradesh and others RESPONDENT

Date of Decision : 13-01-2012

Acts Referred:

Evidence Act, 1872 — Section 90
Registration Act, 1908 — Section 68
Transfer of Property Act, 1882 — Section 123

Citation : AIR 2012 AP 163

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : Nazir Ahmed Khan, for the Appellant; Khaja Manzoor Ali, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—Petitioner is the younger brother of respondent No. 3. The latter owned the property bearing No. 17-5-551 near Bungalow Bini, Dabeerpura, Hyderabad. He executed a gift deed, dated 19-7-2006, in favour of the petitioner. There is a recital to the effect that possession of the property is delivered to the petitioner on the same day. The petitioner contends that after the gift became complete with the delivery of possession, entries were made in his name, in the municipal records. He states that the ration card and other amenities are extended to him with reference to the address of the said house and that he is paying the electricity and other charges for the property.

2. Respondent No. 3 executed a deed of cancellation on 26-11-2010 cancelling the gift deed, dated 19-7-2006. The document was registered by the Sub-Registrar, Azampura, respondent No. 2 herein. The petitioner challenges the action of respondent No. 2 in registering the deed of cancellation, dated 26-11-2010. He contends that once the gift deed was executed by respondent No. 3, accepted by the donee i.e. the petitioner and possession of the gifted

property was delivered, respondent No. 3 is not competent in law, to execute a deed of cancellation that too unilaterally. He submits that valuable rights have accrued to him, on becoming the absolute owner of the property and such rights cannot be taken away by unilateral exercise. He contends that the registration of the document by respondent No. 2 is contrary to Rule 26(k)(i) of the A. P. Rules under the Registration Act, 1908 (for short ''the Rules'') framed u/s 68 of the Registration Act, 1908 and the law laid down by the Hon''ble Supreme Court.

3. Respondent No. 2 filed a counter-affidavit stating that the judgment rendered by the Hon''ble Supreme Court in Civil Appeal No. 317 of 2007 is in relation to the cancellation of a sale deed and the same does not apply to the cancellation of a gift deed.

4. Respondent No. 3 filed a detailed counter-affidavit and supporting documents. He submits that though there is a recital in the gift deed, dated 19-7-2006, to the effect that possession of the property was delivered, the physical possession of the property is still with him. He submits that since the possession was not actually delivered, no transaction of gift contemplated under Mohammedan Law can be said to have taken place. According to him, it is always competent for a donor to cancel the gift before the gifted property is delivered to the donee. An objection is raised as to the very maintainability of the writ petition and it is urged that in case the petitioner feels aggrieved by the deed of cancellation, the only course open to him is to file a suit for declaration. Reliance is placed upon certain precedents.

5. Heard Sri. Nazir Ahmed Khan, learned counsel for the petitioner, learned Government Pleader for Revenue for respondent Nos. 1 and 2 and Sri. Khaja Manzoor Ali, learned counsel for respondent No. 3.

6. It is a matter of record that respondent No. 3 has executed a deed of gift on 19-7-2006 in favour of the petitioner. The document was registered as required under law. There is a clear recital to the effect that the possession of the property is delivered in favour of the petitioner herein. The recital reads;

and handed over vacant possession of schedule property to donee and assure unto and to the use of the donee, the schedule property TO HAVE AND TO HOLD the same for donee''s use and benefit absolutely and unconditionally, "forever".

7. Another recital is to the effect that the petitioner herein shall be entitled to get the relevant entries in the municipal assessment register, electricity and water departments charged in his favour, vis-a-vis the suit schedule property. The petitioner filed copies of certain documents, which disclose that the ownership of the property was transferred in his favour in the municipal records and that he is paying electricity and water bills. In the ration card given for the family of the petitioner, the gifted property is shown as their residence.

8. The procedure prescribed under the Transfer of Property Act (for short ''the Act'') in relation to the gifts does not apply to the gifts to be made by persons

professing Islam. However, there is no prohibition for them, to adopt the procedure prescribed under the Act. In India, they have the option either to follow their personal law, in the matter of making the gifts, or to follow the law contained in the Act.

9. Whether a gift is made either in terms of Section 123 of the Act, or orally by a Mohammedan, the necessary ingredients that must exist to bring about the valid gift are;

(a) making of gift by donor;

(b) acceptance of the same by the donee; and

(c) delivery of possession of the gifted property.

10. The expression of intention by the donor and delivery of possession of the property are evident from the gift deed, dated 19-7-2006. Though respondent No. 3 pleads that the possession of the property is with him, his plea cannot be accepted. Section 90 of the Evidence Act prohibits any oral plea, contrary to the recitals in a written document. The acceptance of the gift is established through mutation of entries in the municipal and other records in favour of the petitioner. Thus, a complete transaction of gift came into existence between respondent No. 3 on the one hand and the petitioner on the other.

11. A party to a transfer can certainly cancel it in case necessary ingredients as provided for under law, are established. Such transaction can be sale or for that matter any conveyance including gift, mortgage, exchange and the like. Though transactions such as sale and gift are brought into existence with unilateral acts of execution of the documents, the legal effect thereof is that the title in respect of the property stands transferred in favour of the transferees name therein, notwithstanding the fact that the transferee may not have subscribed his signature in that documents. From this point of view, the sale deed on the one hand and the gift deed on the other, stand on the same footing.

12. The question as to whether a sale deed which is validly executed can be cancelled by the vendor at a subsequent point of time and whether the very act of registration of such deeds of cancellation can be challenged in a writ petition was dealt with by a Full Bench of this Court in Yanala Malleshwari and Others Vs. Ananthula Sayamma and Others, . The Full Bench took the view that the remedy for an aggrieved party is only to file a suit and the Registering Authority cannot be said to have committed any illegality by registering a deed of cancellation without participation of both the parties. That view, however, was found fault with the Hon''ble Supreme Court in Civil Appeal No. 317 of 2007. Their Lordships took the view that once the title in respect of the property is transferred through a transaction, the same cannot be cancelled without the participation of both the parties. Reference was made to Rule 26(i)(k)(i) of the Rules framed by the Government.

Rule 26(i)(k)(i) of the Rules reads as under :

The registering Officer shall ensure at the time of presentation for registration of cancellation deeds of previously registered deed of conveyances on sale before him that such cancellation deeds are executed by all the executant and claimant parties to the previously registered conveyance on sale and that such cancellation deed is accompanied by a declaration showing mutual consent or orders of a competent Civil or High Court or State or Central Government annulling the transaction contained in the previously registered deed of conveyance on sale.

Provided that the registering officer shall dispense with the execution of cancellation deeds by executant and claimant parties to the previously registered deeds of conveyances on sale before him if the cancellation deed is executed by a Civil Judge or a Government Officer competent to execute Government orders declaring the properties contained in the previously registered conveyances on sale to be Government or Assigned or Endowment lands or properties not registerable by any provision of law.

13. A perusal of the above said Rule discloses that it covers not only the sale deeds, but also transactions of conveyance, which obviously would take in its fold the transactions of gift also. It has already been mentioned that whether it is a sale deed or gift deed, they are executed by the owners of the property and the beneficiaries there under get the title by way of transfer. The only difference is that a sale is supported by consideration whereas in case of gift, consideration in terms of money or other tangible asset is absent. Recently, a learned single Judge of this Court took the view that the observation made by the Hon''ble Supreme Court would apply to the deeds of the gift also.

14. The learned counsel for respondent No. 3 places reliance upon the judgment of this Court in Valluri Anuradha Vs. Sub-Registrar and Others, . In view of the judgment of the Supreme Court in Civil Appeal No. 317 of 2007, the said judgment cannot be said to be good law, any longer.

15. Hence, the writ petition is allowed and the registration of the deed of cancellation, dated 26-11-2010, executed by respondent No. 3 is set aside. It is left open to respondent No. 3 to pursue his remedies in accordance with law. There shall be no order as to costs.