
(1992) 03 GUJ CK 0015
In the Gujarat High Court

Haji Osman Haji Ajij and Others

APPELLANT

Vs

Memon Bai Jenam Kasambhai

RESPONDENT

Date of Decision : 06-03-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 2

Citation : (1992) 2 GLR 1112

Hon'ble Judges : Sharad D. Dave, J;R.D. Vyas, J

Bench : Division Bench

Judgement

S.D. Dave, J.—This First Appeal has been directed against the judgment and decree pronounced by the learned Civil Judge (S.D.), Gondal in Special Civil Suit No. 5 of 1975 dated 1st May, 1981, dismissing the suit of the original plaintiff against the defendants with no order as to cost.

2. The present Appellant No. 1 is the original plaintiff, while the Appellants Nos. 2, 3 & 4 are the original defendants Nos. 2, 3 & 4 respectively. The respondent is the original defendant No. 1.

3. The original plaintiff Haji Osman Chamadia had filed the above said suit in the Court of learned Civil Judge (S.D.) Gondal against the original defendant No. 1-Bai Jenam, his mother and the defendants Nos. 2, 3 and 4 who happens to be his real brother and sisters. According to the plaintiff the defendant No. 1-Bai Jenam happens to be his stepmother and that the father of the plaintiff Haji Ajij Taher Mohmad Chamadia, a resident of the town of Gondal has expired leaving behind him the plaintiff and the defendants as the heirs and the legal representatives. According to the plaintiff, the deceased Haji Ajij Taher Mohmad Chamadia has expired on 17-12-1975 at Gondal and that the plaintiff and the defendants are entitled to various shares according to Mahomedan Personal Law and that, therefore the properties left behind by the deceased, both immovable and movable, were required to be administered. The plaintiff has described 8 lots of immovable properties situated at Gondal, of considerable value. He has also described various movable properties like shares & stocks, securities, household

Articles and gold & silver ornaments. These properties have been described in the plaint rather elaborately, but as we propose to decide and dispose of this appeal on an entirely different ground not connected with the description of the properties, we do not find it necessary to make a detailed reference to the abovesaid properties, both movable and immovable. Suffice it would to notice that the case of the plaintiff is that he, his brother and sisters have the shares in the property according to Mahomedan Law and that the defendant No. 1 the mother has taken in her custody and possession of the properties described in the plaint and therefore the properties required to be administered and the shares of the plaintiff and the defendants Nos. 2, 3 & 4 require to be separated according to Mahomedan Law. The suit came to be filed by the plaintiff on 25-1-1977. The defendant No. 1 the step-mother of the plaintiff has challenged the suit by filing the W.S. at Exh. 23. The backbone of the contention raised by the defendant No. 1 in the W.S. is that the deceased had died on the date as alleged by the plaintiff but before that all the properties in which the share has been claimed by the plaintiff, were gifted to her under Hiba, there was no question of the administration of the properties and the separation of the share of the plaintiff and rest of the defendants. The W.S. which runs in more than 8 pages makes a repeated reference of the case of the defendant No. 1 that all the properties were gifted to her by the deceased during his life time under Hiba and that therefore she is the absolute and sole owner of the properties. It is mainly on this ground that the defendant No. 1 the mother has prayed for the dismissal of the suit of the plaintiff. The defendant Nos. 2 & 3 have filed a supporting W.S. at Exh. 27 while the same has been done by defendant No. 4 by filing the W.S. at Exh. 34. The say of the above said defendants in the two W.S. is that the deceased has died on 17-12-1975 at Gondal leaving behind the properties described in the plaint and that alongwith the plaintiff they are also entitled to their share under the Mahomedan Personal Law. On the basis of the above said pleadings of the parties the learned trial Judge has framed issues at Exh 46 and after a careful analysis of the evidence on record a finding has been recorded by the learned trial Judge that the defendant No. 1 was able to establish that the deceased Haji Ajij Taher Mohmad Chamadia has gifted away all the suit properties in favour of defendant No. 1-Jenambai by way of Hiba according to Mahomedan Law. Reaching the above said conclusion the learned trial Judge has dismissed the suit of the plaintiff, leaving the parties to bear their own cost by the judgment dated 1st May, 1981. The above said judgment rendered by the learned trial Judge and the consequent decree are being challenged in the present appeal before us.

4. Mr. Tushar Mehta the learned Advocate appears for Mr. K.G. Vakharia the learned Counsel for the appellants. Mr. P.V. Hathi the learned Advocate appears on behalf of the respondent. Mr. Mehta the learned Advocate who appears on behalf of the appellants before us has urged that the learned trial Judge has failed to appreciate that if at all there was a gift under Mahomedan Law it was not a gift which is known as Hiba but was a gift made by the deceased when he

was on the death bed. Mr. Mehta therefore has urged that even if the gift was made by the deceased it must have been accepted as a death bed gift and in that position the deceased could not have gifted away anything more than 1/3rd of the estate, after the payment of funeral expenses and debts. The further contention raised by Mr. Mehta is that if at all we agree with the finding of the learned trial Judge, that there was a gift, we should record a finding that the above said gift was not in form of Hiba but was a death bed gift which is popularly known under Mahomedan Law as Marz-ul-Maut. Mr. Mehta on the basis of the above said contentions, has urged that the appeal requires to be allowed to the above said extent. But Mr. Hathi the learned Advocate who appears on behalf of the respondent has urged that the plaintiff had approached the Court with a clear cut case that he and the defendants Nos. 2, 3 & 4 are the sharers in property and they are entitled to their respective shares under Mahomedan Law and that it was never the case of the plaintiff and the rest of the defendants that the deceased had made the death bed gift. Mr. Hathi therefore has urged that now when the case of the defendant No. 1 in defence has been fully accepted by the trial Court it would not be open for the appellant to urge before us that, if at all there was a gift, the same should be treated as a death bed gift. Mr. Hathi therefore has urged that the above said contention now is not open to the learned Advocate Mr. Tushar Mehta.

5. When the reference is made to the plaint at Exh. 1 it becomes abundantly clear that the plaintiff had approached the Court with a clear cut case that his deceased father has expired in the town of Gondal leaving behind extensive immovable and movable properties and that the said properties require to be administered and his share therein requires to be separated and the separated share so going to him requires to be restored to his custody and possession. The case taken up by the defendants Nos. 2, 3 & 4 by two separate W.S. has been referred to above, from which it becomes clear that they had also preferred to support the case of the plaintiff before the trial Court. In other words the rest of the defendants had supported the case of the plaintiff by saying that the deceased has died without disposing of his property and that therefore the property require to be administered. They have also claimed their respective share in the immovable and movables according to the Mahomedan Law. In the W.S. filed by the defendant No. 1-the mother, a clear cut case has been taken by her that the deceased had died in the town of Gondal as urged by the plaintiff but before that all the properties were gifted to under Hiba. It requires to be appreciated that nowhere the plaintiff had stated before the Court that the deceased has in fact disposed of the properties by way of a gift but under or in the form of a death bed gift. In view of this position it is clear that now when the learned trial Judge has come to a positive finding in favour of the defendant No. 1 that all the properties under dispute were gifted away by the deceased in favour of defendant No. 1 by Hiba it is not open to the appellants to contend before this Court that if the view of the Court, is as stated above, then from the evidence on record, an entirely different form of gift, namely, the death bed gift

should be carved out. The plaintiff was in fact required to approach the trial Court with a clear cut case saying that the deceased appears to have made a gift in favour of the defendant No. 1 but that the above said gift is in the form of a death bed gift and therefore it would not take in its sweep anything more than 1/3rd of the estate of the deceased. If this case were really to be taken up by the plaintiff in the pleadings before the trial Court the defendant No. 1 would have been in a real position to combat the above said case by adducing necessary evidence. Moreover if such a case were to be pleaded in the pleadings, and if to be combated by the defendant No. 1, then the Court could have framed the necessary issue in this respect focussing its attention on this vital dispute between the parties. Moreover the parties would have also gone on the trial after having fully understood the case with which they were required to meet. This having not been done and when the trial Court has come to a specific conclusion that all the properties described in the pleadings were gifted to the defendant No. 1 by the deceased under Hiba the appellants cannot now urge that, "well, if there is a gift please treat it not as Hiba but as a death bed gift". In view of this position the contention raised by Mr. Mehta that we should treat the said gift as the death bed gift cannot be accepted.

6. Mr. Mehta has faintly tried to suggest that the learned trial Judge has not framed the necessary issue regarding the nature of the gift. By raising this contention Mr. Mehta wanted to canvass a view before us that the learned trial Judge was required to frame and decide the issue as to whether the alleged gift was in natura of Hiba or the death bed gift. This contention, feebly raised by Mr. Mehta cannot survive even for a moment, because the issue would arise only if there are rival contentions. This position would become clear on a bare look to the provisions contained under Order 14 which is in respect of the settlement of issues. The Rules under this Order would go to show that, an issue would arise when a material proposition of fact or law is affirmed by one party and denied by the other. Material propositions are those propositions of law or fact, which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. Moreover the issues would be of two kinds, namely (a) issues of fact, and (b) issues of law. It is therefore, clear that unless a material proposition of act or law is affirmed by one of the parties and denied by the other the issue would not arise at all. As noticed above, at no juncture it was the case of the plaintiff or the supporting defendants that the gift in fact has been made and that the said gift is not in form of Hiba the usual form of gift under Mahomedan Law but was a death bed gift. If such a contention, were ever to be taken by the plaintiff, in the plaint or by the supporting defendants in the W.S. naturally there would have been a material proposition both of fact and law which could have been denied by the other side. In this situation only, the issue would have arisen for the consideration of the learned trial Judge. We have pointed out more than once that such a clear cut case regarding the death bed gift was never taken up by the

plaintiff and the supporting defendants and therefore there being no contention there could have never been an issue on the point. This contention therefore raised by Mr, Mehta necessarily fails.

7. The last and the third contention raised by Mr. Mehta is that a particular contention not been taken in the Memo of Appeal also can be urged and pressed before the Court while arguing the First Appeal. Mr. Mehta in this respect, has invited our attention to Order 41, "Rule 2 of the Code of Civil Procedure, which is in respect of the grounds in "Appeal: The underlying spirit or the discernible principle of the "Rule is that though ordinarily the appellant shall not be heard in support of any ground or objection not set forth in the Memorandum of Appeal, as an exception to be processed out of a conjoint exercise of extending a leave prayer and the grant of the same by the Court in its judicious discretion, a ground not taken or set forth in the Memorandum of Appeal can be taken up during the hearing of the Appeal after obtaining the leave or the Court. We feel that the provisions of the said Rule 2 of Order 41," on which Mr. Mehta has placed reliance, would not come to his rescue here because of the clear distinction that here the question is not in respect of allowing the appellants to urge before us, a ground which has not been set forth in the Memorandum of the Appeal. On the contrary we are concerned with the hearing of the Appeal wherein no case regarding the alleged gift to be a death bed gift, was ever taken or raised". Through out the course of the trial both in the pleadings and in the evidence the plaintiff with the concurrence of the supporting defendants has maintained that the deceased had died at Gondal leaving behind him the disputed properties without making any disposition and that the properties require to be administered and the shares of the plaintiff and the defendants Nos. 2, 3 and 4 require to be separated and entrusted to the care and custody of the respective sharer. In view of this position as pointed out this not being a question of allowing Mr. Mehta to urge a contention not taken in the Memorandum of Appeal, the provisions contained in Order 41 Rule 2 would in our opinion not assist Mr. Mehta in his submissions before us. Incidentally for clarity sake we may point out that such a vital ground, admittedly, has not been taken even faintly or remotely in the Memo of the Appeal.

8. Before concluding, Mr. Mehta has tried to distinguish between the consequences which would follow from a valid Hiba and a valid Marz-VI-Maut. In a way by adopting this course the learned Advocate, in fact wanted to revert back to the very first contention urged by him and discarded by us. The distinction between the said two forms of gift known to Mahomedan Law is not far to seek. A Hiba is a gift, is a transfer of property made immediately and without any exchange, made by one person to another and accepted by or on behalf of the latter. The disposition of the right title and interest of the donor in favour of the donee accrues and takes effect in presenti. Hiba can be made by any Mahomedan of sound mind not being a minor. Hiba may be in respect of (1) the whole of the donor's property and (2) it may be made even to an heir. The essential or a pre-requisite of a valid Hiba is the complete divesting of the

ownership and dominion, of the donor, over the property which becomes the subject-matter, of the transaction, i.e., Hiba or a gift. But the two aforementioned enablements qua the extent of the donor's property and the other one qua the donee are unknown to death bed gift or Marz-UI-Maut, which cannot take effect beyond a third of the estate of the donor, after payment of not only funeral expenses but debts also, and cannot take effect if made in favour of an heir unless in the first case without the concert of the heirs and in the second case Without the concert of the other heirs. We have a lucid awareness not only of the clear distinction underlying beneath the concepts of Hiba & Marz-UI-Maut but of the very reason why Mr. Mehta wants to plead before us, a case never taken by the appellants so far. If the transaction is to be branded or labelled by us as Marz-UI-Maut and not as Hiba, it would not take any effect at all unless the appellants consent and would not operate, over and above the third of the estate of the deceased, again unless they consent. We would however only say, while concluding, that such a case having never been taken, the appellants cannot take it successfully before us, despite the fact that such an acceptance at our end would tilt the balance fully and completely in favour of the appellants.

Thus having given our anxious thought to the contentions raised by Mr. Mehta before us, we result out the Appeal as having failed. We accordingly dismiss the same with costs, confirming the judgment and the decree under challenge.