

(2019) 12 GUJ CK 0034

In the Gujarat High Court

Case No : R/Special Civil Application No. 19491 Of 2019

Imtiyaz Yusuf Mansuri

APPELLANT

Vs

Muhammed Hanif Abdul Wahi Mansuri

RESPONDENT

Date of Decision : 06-12-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 7 Rule 11D, Order 39, Rule 1, Order 39, Rule 2, Order 43, Rule 1(r)

Citation : (2019) 12 GUJ CK 0034

Hon'ble Judges : Dr. A. P. Thaker, J

Bench : Single Bench

Advocate : M.T.M. Hakim, Saquib S. Ansari, Dhaval D. Vyas

Final Decision : Allowed

Judgement

A.P. Thaker, J

1. At the request of learned advocates for the parties, the matter was heard finally.

2 . Being aggrieved and dissatisfied with the Order dated 16.9.2019 passed in Misc. Civil Appeal No. 51 of 2018 by the learned 8th Additional Sessions Judge, Surat whereby the Appeal was allowed, and the Order dated 4.6.2018, passed by the trial Court below Exh-5 in Regular Civil Suit No. 1091 of 2015, has been set aside and vacated the interim relief granted therein, the plaintiffs have preferred the present petition.

3 . The brief facts stated by the petitioner is that the Petitioner nos. 1 to 9 are the Plaintiffs in the Regular Civil Suit No. 1091 of 2015 and respondents herein and the Petitioner Nos. 10 and 11 are the original defendants in the said Suit. It is contended that the land City Survey No. 1719/B and 1720 of Ward No. 4 of Surat City (hereinafter referred to as "the Suit Property") was of the ownership of one Smt. Jainabbibi Adbul Wahid Mansuri and the parties are legal heirs of the said Smt. Jainabbibi Abdul Wahid Mansuri. It is contended that she acquired the

said property vide registered gift deed dated 13.7.1954 from one Smt. Chandbibi Widow of Abdulrahim Peer Mohammed and since then she became the independent and absolute owner of the said Suit Property. It is also contended that Smt. Jainabbibi Abdul Wahid Mansuri had 5 children, viz. Aminabibi, Hajrabibi, Mehrajbibibi and Khatijabibi and one son viz. Mohammed Hanif. It is contended that out of said children, Khatijabibi did not marry as she was suffering from Polio whereas others were married. It is also contended that Aaminabibi has one son Imtiyaz Yusufbhai Mansuri born on 8.12.1968 and they continued to reside till the Gujarat riots of 2002. That all the government documents of Imtiyaz Yusuf Mansuri are of the address of the Suit property including the death certificate of Shri Yusufbhai Mansuri, husband of Aminabibi, who expired on 16.9.1988.

3.1. It is alleged that on 15.7.1989, Smt. Jainabbibi Adbul Wahid Mansuri executed a Gift Deed in favour of her son Shri Mohammed Hanif Abdul Wahid Mansuri and thereby gifted the said Suit property to him. It is also contended that on the same day i.e. 15.7.1989, the respondent no. 1 also executed a deed of acceptance of the said gift. It is alleged that in pursuance of the aforesaid gift deed, the respondent no. 1 made an application before the City Survey Superintendent for mutation in the Property Card and on 6.10.1989, the said mutation was carried and the name of respondent no. 1 was mutated in the Property Card as owner of the Suit Property. It is contended that though 2 daughters were residing in the said property, neither their consent were obtained nor they were informed about the said gift deed and other 2 daughters were also not informed. It is contended that Smt. Jainabbibi Abdul Wahid Mansuri was severely ill and suffering from stroke and paralysis around the time when the gift deed is alleged to have been executed on 15.7.1989.

3.2. It is contended that on 11.7.1990, Smt. Jainabbibi Adbul Wahid Mansuri expired i.e. shortly and within a year of the execution of the alleged gift deed dated 15.7.1989. It is contended that in the year 2005, the respondent no. 1 tried to sell of this property to some builders based on the aforesaid gift deed dated 15.7.1989. It is contended that due to that, the petitioners became aware about the alleged gift deed dated 15.7.1989. According to the petitioners, they confronted the respondent no. 1 and sought their share in the suit property but the respondent no. 1 declined. It is also contended that respondent no. 1 also put up public notice on the Suit property declaring that the Suit Property is of his sole ownership and no other person should enter the said property. According to the petitioners, therefore, on 24.3.2015, they issued public notice in local newspaper declaring that they are also the co-sharers in the Suit property. It is also contended that thereafter the respondent no. 1 also issued Public Notice.

3.3. It is contended that on 18.4.2015, the Petitioner Nos. 1 to 9 preferred the Suit being Regular Civil Suit No. 1091 of 2015 for administration and partition of the Suit Property as per Muslim Personal Law and also seeking declaration that the alleged gift deed dated 15.7.1989 is null and void and also sought injunction

against the Respondent No. 1 from transferring, mortgaging and/or alienating the Suit property in any manner.

3.4. It is contended that in the Suit, Notices were issued to the defendants therein i.e. Petitioner Nos. 10 and 11 herein whereby the Petitioner Nos. 10 and 11 have filed their Written Statement and admitted the Suit of the plaintiffs - Petitioners whereas respondent no. 2 opposed the suit and filed Written Statement. That, after hearing all the parties, vide order dated 4.6.2018, the trial Court allowed the Application Exh-5 of the Petitioners and thereby restrained the respondents from transferring, mortgaging and/or alienating the Suit property in any manner and order of Status-quo was passed. It is contended that against the aforesaid order the Respondent preferred aforesaid Civil Appeal before the Appellate Court wherein the Appellate Court allowed the Civil Appeal and set aside the impugned order dated 4.6.2018 passed below Exh-5 by the trial Court.

3.5. It is also averred that the learned appellate Court has materially erred in allowing the appeal of the respondents and setting aside the impugned order passed by the learned trial Court. That the appellate Court has not considered the fact that the Gift Deed in question is bogus, concocted and fabricated by the respondent no. 1. It is also contended that the contention of the petitioners that at the time of alleged Gift Deed, the donor was of unsound mind and was suffering from Stroke and Paralysis and was not in position to execute any gift in favour of anyone, is not properly appreciated by the Appellate Court.

3.6. It is also contended that 3 essential conditions of a valid gift under the Muslim law are (i) A declaration of the Gift by the donor; (ii) acceptance of the gift, express or implied, by and on behalf of donee; and (iii) delivery of possession of the subject of the gift by the donor to the donee.

3.7. It is also contended that none of the other legal heirs of the deceased were aware about the said Gift Deed, and the daughter and son-in-law who were residing in the said property were also completely unaware of any such execution of the Gift Deed. According to the petitioners, the condition of the valid gift is not fulfilled in this matter and, therefore, the order passed by learned trial Court granting injunction was proper and the appellate Court has committed serious error of facts and law and, therefore, this Court may set aside the order of the Appellate Court and restore the order of the learned trial Court granting injunction in favour of the petitioner.

4 . Heard Mr. Ansari, learned advocate for the petitioner and Mr. D.D. Vyas, learned advocate for the respondents. Perused the material placed on record and the decision relied on by both the sides.

5. Mr. Ansari, learned advocate for the petitioner has submitted that the alleged gift of the property is challenged by the plaintiffs by filing the suit. He has also submitted that by the impugned gift deed the share of the daughters have been excluded. He has also contended that as per the Muslim Law, the gift made

under Marz-ul-maut cannot take effect beyond a third of donor's estate after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, to the excess taking effect; nor can such a gift take effect if made in favour of an heir unless the other heirs consent thereto after the donor's death. He has also relied for this purpose on Mahomedan Law by Mulla at Para-135. He has submitted that as per the Muslim Law, the gift cannot take effect without consent of the other heirs. He has contended that the gift alleged in this matter is clearly hit by the Muslim Law. He has also submitted that the conditions of the gift under the Mahomedan Law have not been fulfilled in this matter. According to him, learned trial Court has properly considered the aspect of the Suit and has properly granted interim injunction which has been reversed by the appellate Court. According to him, the Order of the appellate Court is illegal and perverse. While referring to the plaint, he has submitted that the gift deed dated 15.7.1989 is not legal one and it is not notarised nor registered one. Further, there was a condition in the gift deed that the donee has been directed to maintain the husband of Jainabbibi as well as respondent no. 5 for their lifetime and, therefore, this is not a gift in the eyes of the Mahomedan Law. According to him, as the defendant no. 1 tried to transfer the property by issuing Public Notice dated 24.3.2015, it came to the plaintiff's knowledge that there was a gift. He has also contended that the Suit has been filed for declaring the gift deed as void as well as restraining defendant nos. 1 to 4 from selling or transferring of the suit property till disposal of the Suit and also for share of the petitioner. He has submitted that this petition may be allowed by setting aside order of the appellate Court and the order of the trial Court may be restored.

6. Per contra, Mr. D.D. Vyas, learned advocate for the respondent nos. 2, 3, 4 and 5 has vehemently submitted that the gift is valid and on the basis of the gift necessary entries have been mutated in the relevant record. He has also referred to the gift deed as well as plaint and has submitted that all the conditions of gift as per Mahomedan Law has been complied with and the donee has taken the possession of the gifted property and his name has been mutated in the relevant government record. He has also referred to the Written Statement filed by the defendant nos. 1 to 5, especially Page-84 that earlier also there was a gift of property and the gift deed cannot be termed as illegal. He has also contended that Smt. Jainabbibi Abdul Wahid Mansuri expired on 11.7.1990 whereas the gift deed was executed on 15.7.1989 in presence of Shri C.C. Jhaveri and defendant no. 1 Abdulwahed Kasambhai Mansuri and other Shri Ishwarlal Ratilal Gandhi. While referring to the affidavit of the Ishwarlal Ratilal Gandhi at page-97, he has submitted that he is the witness of the Gift Deed and from his averment, it is clear that the gift was acted upon and there is no illegality. He has also submitted that there is a delay of 26 years as the suit has been filed in the year 2015 and the delay is not explained. According to Mr. Vyas, learned advocate, the defendant-respondents have not explained the delay in filing the suit and for filing application under Order 39 Rule 1 & 2. While referring to the impugned order of the appellate Court, it is submitted by learned advocate Mr. Vyas that

the ingredients for the legal gift has already been examined by the appellate Court. While referring to Para-7 of the impugned judgment, Mr. Vyas, learned advocate has submitted that there is no perversity in the order of the learned Appellate Court and there is no case for injunction.

6.1. While referring upon the decision in case of Amarben@Samarben Legal Heirs & Wd/o. Dec. Ramjibhai Manekbha v. Laxmanji Bhikaji Thakor & Others of this Court rendered in Appeal from Order 184 of 2013, which is reported in 2014 SCC Online Guj 7158 as well as on the decision in case of Somiben@Chimiben D/o. Naranbhai Kalabhai and Anr. v. V. Ukabhai Naranbhai Patel Karta of H.U.F. And Ors., reported in 2010 (1) GLR 852, the learned advocate for the respondent has submitted to dismiss the present petition and confirm the order of the appellate Court.

7. In rejoinder, Mr. Ansari learned advocate for the petitioner has submitted that no deed could have been executed and there is a question as to the ill-health of the donor and as per the Mahomedan Law the donor cannot gift entire property to anyone of heirs and in this case the son is legal heir and, therefore, the gift given to son by the deceased is not legal and valid and the observation of the learned Appellate Court regarding gift is not sustainable in view of the Mahomedan Law. He has prayed to dismiss the present petition.

8. In the case of Somiben@Chimiben D/o. Naranbhai Kalabhai and Anr. v. V. Ukabhai Naranbhai Patel Karta of H.U.F. And Ors. (supra), while dealing with the provisions contained in Order 39, Rules 1 & 2, and Order 43, Rule 1(r) of the Civil Procedure Code, 1908, it has been observed that if the conduct of the parties is not free from doubt, the Court would not grant any interim relief in their favour. It was also observed therein that if the suit suffers from delay and laches then no interim relief can be granted. It is also observed that even if it is considered to be the suit filed within the period of limitation, while considering the question of granting interim relief, the aspect of delay and laches cannot be lost sight.

8.1. It is also observed that while considering the application for grant of interim, the Court will not only take into consideration the basic elements in relation thereto, viz. existence of prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties. It is also observed therein that the grant of injunction is an equitable relief and person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. However, the Court will not interfere only because the property is a very valuable one.

9. In case of Amarben@Samarben Legal Heirs & Wd/o. Dec. Ramjibhai Manekbha v. Laxmanji Bhikaji Thakor & Others (supra), while referring to the various decisions, the facts which is found that the suit was prima facie barred by law of limitation. Considering that the order of the trial Court rejecting the application

for interim injunction was upheld.

10. Learned advocate for the appellant has contended that the application filed by the defendants under Order 7 Rule 11-D was rejected by the trial court and therefore there is prima- facie case in favour of the plaintiff-appellant and question of delay or laches would not be applicable to this case.

10.1. Considering the Order of the trial Court below Exh-5 in RCS No. 1091 of 2015 (page-122), the trial Court has, while allowing the application for interim injunction has also based its decision on the fact that regarding the sanctity about the controversial Gift Deed and knowledge about the revenue or city survey record are a mixed question of law and facts, which may be determined during the full-fledge trial. Now, on perusal of the impugned order of the appellate Court, which is at page-33 onwards, it is found that the appellate Court has reversed the order of the trial Court on the ground that the mother of the petitioner had earlier challenged the entry in the year 1989 and, therefore, there is a question of limitation and delay and laches. It is also observed that on the basis of the gift deed, the name of the defendant no. 1 was entered into the city survey record in the year 1989 itself and mother of the plaintiff has also filed written objection in 1989 itself during the period when Jenabbibi was alive. While considering this fact it has been observed by the learned appellate Court that the plaintiffs sat over and the injunction is sought for after almost 26 years without explanation and, therefore, on the ground of delay and laches, there is prima facie case in favour of defendants and on this ground he has allowed the appeal filed by the defendants.

11. Considering the contention of the learned advocates for the parties and material placed on record, it appears that there is dispute as to the genuineness of the Gift and as to whether the deceased could have gifted the entire property to legal heirs. At this juncture, it is worthwhile to refer to Mulla's principles of Mahomedan Law regarding Death Bed Gifts and Acknowledgments in Para-135 thereof, which reads as under:

"135. Gift made during marz-ul-maut-A gift made by a Mahomedan during marz-ul-maut or death illness cannot take effect beyond a third of his estate after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, to the excess taking effect; nor can such a gift take effect if made in favour of an heir unless the other heirs consent thereto and after the donor's death."

12. To constitute a malady, marz-ul-maut, there must be (i) proximate danger of death, so that there is a preponderance of apprehension of death, (ii) some degree of subjective apprehension of death in the mind of the sick person, and (iii) some external indicia, chief among which would be inability to attend to ordinary avocations, although his attending his ordinary avocations does not conclusively prove that he was not suffering from marz-ul-maut.

12.1. When a malady is of long continuance and there is no immediate

apprehension of death, it is not a death-illness; so that a gift made by a sick person in such circumstances, if he is in the full possession of his senses, will not be valid. Whether the donor was or was not under the apprehension of death at the time the deed was executed or was on the death bed, is a question essentially of fact.

13. At this juncture, it is pertinent to note that the Rules governing the gift or hiba are as under:

"138. Hiba or gift-A hiba or gift is "a transfer of property, made immediately, and without any exchange," by one person to another, and accepted by or on behalf of the latter.

'Gift' or 'Hiba' literally means the giving away of such a thing from which the person in whose favour the gift is made may draw benefit. The definition of Hiba or Gift has been given in Kanz al Dacqui in the following words: "Hiba is the making of another person owner of the corpus of property without taking its consideration from him."

Thus, gift is the transfer of movable or immovable property with immediate effect and without consideration of one person called the donor to another persons called the donee and the acceptance of the same by one himself or by some other authorised on his behalf, provided that making the gift must totally renounce all his title and rights in the property gifted away of his independent free will."

14 . Thus, regarding gift by Mahomedan Law, the aforesaid principle would be applicable. Now in this case, the parties are Mahomedan and, therefore, the question regarding alleged gift would have to be decided on the facts narrated in the matter. It transpires from the proceedings that there is dispute as to the execution of gift which requires trial.

15. Now, in view of the provisions relating to gift as referred to above, it clearly appears that there are specific Rules relating to gift or hiba made during Marz-ul-maut. It also appears that the plaintiffs have filed the Suit in 2015 on the basis of public notice issued by the defendant no. 1. It is the contention of the plaintiffs that they came to know as to alleged deed after the public notice and as per Mahomedan Law, they are entitled to the share in the said properties. Now, admittedly, the defendant no. 1 has based his title over the properties on the basis of the gift by the deceased Jenabbibi and acceptance of gift by him and also the mutation entry in the property card. The question as to whether the deceased Jenabbibi has executed the gift deed on malady i.e. death illness, is a question which requires to be proved by leading evidence. It also appears that law governing the gift of property by the deceased, it appears that the entire property has been gifted to the defendant. It also appears from the gift deed that the donee has to maintain her husband and her daughter till they are alive. Thus, considering the entire facts and circumstances when there is a question raised against the gift deed itself and the gift deed have been made to one of the heirs,

the same is required to be decided after full-fledge trial. If during pendency of the suit, the property is transferred or alienated by the defendant then there would be multiplicity of proceedings. Therefore, the observation of the learned appellate Court is not sustainable and the observation made by the learned trial Court is in consonance with the material placed on record.

16. In view of the above, the impugned order of the learned trial Court below Exh-5 is required to be restored.

17. For the aforesaid reasons, the present Special Civil Application is required to be allowed and it is allowed. The impugned order of the learned appellate Court passed in Misc. Civil Appeal No. 51 of 2018 dated 16.9.2019 is hereby quashed and set aside and the order dated 4.6.2018 passed below Exh-5 in RCS No. 1091 of 2015 is restored.

18. Considering the question involved in the matter and as the suit is of 2015, the learned trial Court is hereby directed to decide the case as expeditiously as possible preferably within 6 months from the date of receipt of this Order. The parties are directed to co-operate the learned trial Court in disposing of the suit in the time bound period. No order as to costs.