

(1968) 09 CAL CK 0007

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 867 of 1961

Joad Mallick

APPELLANT

Vs

Abu Mallick

RESPONDENT

Date of Decision : 06-09-1968

Acts Referred:

Contract Act, 1872 — Section 11
Transfer of Property Act, 1882 — Section 6, 7

Citation : (1968) 09 CAL CK 0007

Hon'ble Judges : S.K. Datta, J

Bench : Single Bench

Advocate : Guruprosad Ghosh, for the Appellant; Basanta Kumar Panda, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Datta, J.—This appeal is by the Defendant against the judgment of the learned appellate Court affirming the decision of the trial Court in a suit brought by the Plaintiff for declaration of his title to the suit land and for confirmation of his possession thereto, alternatively for recovery of possession thereof if it is found that the Plaintiff is out of possession. The Plaintiff and the Defendant are step-brothers, both are sons of Asgar Mallick. The Plaintiff claimed title to the suit land from his father Asgar who, according to the Plaintiff, acquired the suit land on the basis of a sale deed dated November 30, 1937, (Ex. 1), made in the name of his son, Seraj Mallick, since deceased. The Plaintiff's further case was that Asgar remained in possession of the same till by way of Heba-bil-ewaz dated July 7, 1952, (Ex. 2) he made a gift of the same in favour of the Plaintiff who was the son of his fourth wife. It was alleged that the consideration for the said transfer, as also recited in the deed itself, was the copy of the holy Koran, which was given to him by the Plaintiff. As it transpired that the name of the Defendant was wrongly recorded in respect of the suit land, the Plaintiff instituted the suit for reliefs mentioned above.

2. The Defendant contested the suit stating, inter alia, that the suit land was purchased not by his father Asgar but by him in the benami of his step-brother, Seraj Mallick, that he being the owner thereof had been in possession of the same, the Heba-bil-ewaz executed by Asgar Mallick was collusive, manufactured, fraudulent, illegal, without consideration and ineffective and was never acted upon. Further, the said document was not accepted by any one on behalf of the minor nor was the same legally executed or attested. On the said and other averments the Defendant prayed that the suit be dismissed.

3. The following issues were framed at the trial:

- (1) Has the Plaintiff any cause of action?
- (2) Is the suit maintainable?
- (3) Has the suit been properly valued? Has the Plaintiff paid sufficient Court fees?
- (4) Is the Plaintiff in actual possession of the suit land?
- (5) Is the alleged Heba-bil-ewaz properly executed, attested and completed?
- (6) Was the Plaintiff a minor at the time of execution of the alleged Heba-bil-ewaz? If so, has it been properly executed?
- (7) Is the Plaintiff entitled to the declaration and other reliefs as prayed for?
- (8) To what relief, if any, is the Plaintiff entitled?

4. The learned Munsif held all issues in favour of the Plaintiff and decreed the suit declaring the Plaintiff's title to the suit land and his possession was confirmed. The appeal preferred therefrom was dismissed, and" the learned Judge, in agreement with the learned Munsif, held that Asgar Mallick was the owner of the suit land and the Heba-bil-ewaz in favour of the Plaintiff who was a minor at the time, was valid in law. Against the said decision, the present appeal had been preferred by the Defendant.

5 Mr. Ghosh, appearing for the Defendant-Appellant, has contended that the Heba-bil-ewaz was not a legal or valid document and did not confer any right or interest on the Plaintiff in the suit land. His contention is that the Heba-bil-ewaz combines two gifts together. There is a gift on the part of the donee and there is also another gift on the part of the donor and the two acts combined together make a valid Heba-bil-ewaz, whether the transaction is called a sale or an exchange. There are thus two acts--one on the part of the donor and the other on the part of the donee; that being so, each of the parties must be competent as contracting parties under the Indian Contract Act, 1872, to perform their respective acts and if one of the acts failed the transaction became invalid in law. A minor is incompetent to enter in any contract and the part to be performed by the minor as donee in a transaction of Heba-bil-ewaz as in the instant case could not be performed by the Plaintiff as he was admittedly a minor on the date of the Heba-bil-ewaz and was not legally competent to do the same. Accordingly, even

if he has purported to perform such act in such transaction, the same cannot be taken to be an act legally valid and binding. Mr. Ghosh did not challenge the Heba-bil-ewaz on the other grounds like adequacy of consideration or as to delivery of possession of the suit land after the Heba-bil-ewaz. Mr. Ghosh, in support of his contentions, relied on the decision in *Munshi Sarifuddin Muhammed v. Munshi Mohiuddin Mohammad* 31 C.W.N. 1068 and contended on the basis thereof that before the Heba-bil-ewaz can be a valid and legal transaction, both the parties must be competent to contract as contemplated in the Indian Contract Act, 1872 and if one of the parties was a minor at the time as in the instant case, he was incompetent to enter into any legal or valid transaction. Accordingly, it was submitted that the Heba-bil-ewaz was not a legal or valid or enforceable document and did not confer any title on the Plaintiff.

6. Mr. Panda, appearing for the Plaintiff-Respondent, challenged the submissions made by Mr. Ghosh and contended that in such transaction what is required is a real and bona fide intention to transfer by the donor and there need not be actual transfer of possession. In support of his contention he relied on the decisions in *Ameeroonnissa Khatoon v. Abadoonnissa Khatoon* (1875) 15 B.L.R. 67 : 2 I.A. 87 as also AIR 1932 13 (Privy Council) . Mr. Panda relying on *Mt. Fatma v. Mt. Autun* AIR 1944 Sind 195 further contended that there was nothing in Mohammedan law or outside it which prevents a minor from accepting a gift or, taking possession of property and accordingly, in paying the consideration by moveable property. Further, there was no bar in the; minor being recipient of the benefits under a transfer or being himself a transferee.

7. In the decision reported in *Munshi Sarifuddin Muhammed v. Munshi Mohiuddin Mohammad* 31 C.W.N. 1068 the real nature of Heba-bil-ewaz in India was described in Baillie's Digest (p. 122) as follows:

...Heba-bil-ewaz means, literally a gift for an exchange and it is of two kinds, according as the ewaz, or exchange, is or is not, stipulated at the time of gift.

In both kinds there are two distinct acts, first, the original gift and second, the ewaz or exchange. But in the Heba-bil-ewaz of India, there is only one act, the ewaz or exchange, being involved in the contract of gift as its direct consideration. And all are agreed that if a person should say, I have given this to thee for so much, it would be a sale; for the definition of sale is an exchange of property for property and the exchange may be effected by the word "give as well as by the word "sell". The transaction which goes by the name of Heba-bil-ewaz in India, is therefore, in reality not a proper Heba-bil-ewaz of either kind, but a sale and has all the incidents of latter contract. Accordingly, possession is not required to complete the transfer of it, though absolutely necessary in gift....

8. As stated in Mulla's Principles of Mahomedan Law, in the Heba-bil-ewaz of India which was introduced by the Muslim lawyers of India as a device for effecting a gift of mushaa in property capable of division, two conditions must concur to make a transaction valid, namely, (i) actual payment of consideration

(ewaz) on part of the donee and (ii) a bona fide intention on the part of the donor to divest himself in present and to confer it upon the donee. In the instant case, it is clear from the document itself (Ex. 2) that Asgar decided to make a gift of some properties to the Plaintiff and in pursuance thereof, on receipt of a holy Koran, he by the said document Heba-bil-ewaz dated July 7, 1952, transferred the same unto the Plaintiff. Both the conditions cited above have been duly satisfied. The adequacy of consideration is not material and has not been challenged. The transfer of possession was also not necessary as was held in the cases cited above and also in Chaudhuri Mehdi Hasan v. Muhammad Hasan 33 I.A. 68 : 10 C.W.N. 706 (713). In Ameeroonissa Khatoon v. Abedoonissa Khatoon Supra it was held that where there is on the part of a father or other guardian a real and bona fide intention to make a gift, the law will be satisfied without change of possession and will presume the subsequent holding of the property on behalf of the minor.

9. The Heba-bil-ewaz has been assailed as illegal and invalid not on grounds of adequacy of consideration or delivery of possession. It has been assailed on the ground that the Plaintiff being a minor was not a legally competent person to enter into any contractual relations with Asgar over the Heba-bil-ewaz and the document was accordingly void following the decision in 7 CWN 441 (Privy Council) . This proposition of law, based on admitted facts, though raised in this form for the first time in this appeal now requires consideration.

10. As has been held in 7 CWN 441 (Privy Council) many transactions resulting in the creation of rights over property arise out of contracts and when a minor enters into any such transactions where a contract by him is an essential condition preliminary to the transaction or contractual obligations to be performed by such minor flow from the transaction, it must be regarded as void. See also Munia Konan v. Perumal Konan ILR Mad. 390. u/s 11 of the Indian Contract Act, 1872, a minor cannot effect a binding or valid contract and a contract made with minor is wholly void. While this disability prevents a minor to act as a transferor of immoveable property, by reason of Section 7 of the Transfer of Property Act, 1882, a minor is not incapable of receiving benefits and being a transferee, as he is not "a person legally disqualified to be a transferee" within the meaning of Sub-section (h) of Section 6 of the said Act.

11. In this case, it is clear that the impugned Heba-bil-ewaz was not the result of any contract between Asgar and the Plaintiff. As the deed itself recites, Asgar of his own had already decided to make a gift of some of his properties to the Plaintiff and the Plaintiff was not party to such decision nor is the decision the result of any contract between Asgar and the Plaintiff. And there was no legal disability on the part of the Plaintiff of his being a beneficiary under the Heba-bil-ewaz which also did not involve him in any legal obligation, the transfer being one without any condition or obligation imposed on him.

12. The only question now left is whether the minor Plaintiff was competent to make a gift of the holy Koran to Asgar and whether such gift followed by Heba-

bil-ewaz was the result of any contract between the parties in which case the transaction would be void. As I have already indicated and as recited in the deed, Asgar of his own decided to make a gift of his properties to the Plaintiff and it is clear there is no contract or arrangement with the Plaintiff as the basis of such transfer. If it is so, there is no occasion for the minor to enter into any contractual relation with Asgar in connection with the Heba-bil-ewaz. As to the gift of the holy Koran, it is also from the recital of the deed that such gift was never an essential condition or prerequisite of the transfer provided in the Heba-bil-ewaz. What is recited in the deed is that Asgar had already made the decision to make the gift to the Plaintiff and gift of the holy Koran by the Plaintiff to him was no essential element in his decision for or action of gift to the Plaintiff, though it was the direct consideration of the Heba-bil-ewaz. I, accordingly, hold that there was no occasion or scope for any contractual relationship between Asgar and the Plaintiff in the transaction nor was any obligation imposed on the Plaintiff by the impugned Heba-bil-ewaz.

13. As to the gift of the holy Koran by the Plaintiff to Asgar, it appears to me that there is no fetter in law in the minor's simply parting with a moveable property which is his own. This parting of thing may be a simple transaction by itself or it may be in compliance of contractual obligation; while in the latter case if, however, such gift of immoveable property to the minor is based on a contract with him for his parting with his property as consideration for a subsequent transfer, such a contract would be void. In the earlier case I do not think there is any legal or other impediment standing in the way of the minor's simply parting with a moveable property belonging to him. Here as already stated, there is no such contract between the parties and Asgar transfers his property of his own on receipt of a gift simpliciter from the Plaintiff which Asgar of his own takes as consideration for the Heba-bil-ewaz. In the premises there being no contractual relationship between the parties over the Heba-bil-ewaz, it cannot but be held that the said Heba-bil-ewaz is a legal and valid document and the Plaintiff thereby acquired right, title and interest in the suit land and is entitled to the reliefs claimed by him in suit.

14. As the contentions raised on behalf of the Appellant fail, the appeal is dismissed but in the circumstances there will be no order for costs.

15. Leave under Clause 15 of the Letters Patent is prayed for and is granted.