(2009) 04 KAR CK 0085

In the Karnataka High Court

Case No : Writ Petition No. 10760 of 2008

K.M. Kahdir Ahmed — APPELLANT

Vs

Suriya Parveen Shariff and Not Hussain Shariff, Hasiff Hussain Shariff, Mubeen Tej Shariff and Fayaz Pasha — RESPONDENT

Date of Decision : 21-04-2009

Acts Referred:

Citation : (2009) 04 KAR CK 0085

Hon'ble Judges : B.S. Patil, J

Bench : Single Bench

Advocate : N. Savanur, for the Appellant; K.R. Ashok Kumar, for R-1 to 3 Service of notice on R-4 if dispensed with, for the Respondent

Final Decision : Allowed

Judgement

B.S. Patil, J.—In this Writ Petition, petitioner is challenging the order dated 26.07.2008 passed by the Trial Court in O.S. No. 5372/2005 holding that the document produced by the defendant-petitioner herein styled as Gift Deed (oral ''Hiba") shall be admitted in evidence provided defendants pay required stamp duty on the document with penalty.

2. The suit is filed by respondents-1 to 3 herein seeking a decree of permanent injunction to restrain the defendants from interfering with the peaceful possession and enjoyment of the suit schedule premises by the plaintiffs. The suit schedule property is a house property bearing No. 39 (Old No. 51) situated at N.H.K. Road also known as KPM Road, Kalasipalyam, Bangalore.

3. Defendant No. 2 - petitioner herein has filed his written statement taking up the specific contention that 1st defendant is the son of one Shaik Ali and he acquired the suit schedule property by way of Hiba executed by his father and as a result he became the absolute owner of the suit schedule property by virtue of the gift. The 2nd defendant has denied the averments made by the plaintiffs that they are the legal heirs of Shaik Alia and have succeeded to the suit schedule

property after the death of Shaik AM. It is his further case that he acquired the property from the 1st defendant by way of registered sale deed and got all the revenue records changed in his name.

4. During the course of evidence of P.W. 2, counsel for the defendant wanted to mark the Gift Deed styled as ''Hiba''. Counsel for the plaintiffs raised objection stating that required-stamp duty having not been paid on the document and the document having not been registered the same could not be admitted in evidence.

5. The Trial Court has refused to prmit the marking of the document but has however held that on going through the document it was clear that the Donor who executed the Deed made an ''oral Hiba'' before the witnesses and to evidence of the said ''oral Hiba'' the document in question was executed. Having held so by placing reliance on the judgments in G. Mujeer Ahmed and Anr. v. Mohammed Zafrulla AIR 2000 KAR 318 and Majiboob Sakab v. Syed Ismail and Ors. AIR 1995 SC 2005 it has proceeded to record a finding that an oral gift (Hiba) under a Muslim Law is valid and it need not be in writing and registered. But, the Court below has further gone on to hold that since the document sought to be marked disclosed that it was reduced into writing on a stamp paper of Rs. 61/- which was insufficient, as per the provisions of the Karnataka Stamp Act, the defendants were liable to pay the duly and penalty on the same. Aggrieved by this order, the present writ petition is filed by the 2nd defendant.

6. Learned Counsel appearing for the petitioner has placed reliance on the following decisions:

1) Mt. Bibi Maniran Vs. Mohammad Ishaque, .

2) Md. Hesabuddin and Ors. v. Md. Hzsaruddin and Ors. AIR 1984 Gau 41.

3) Mahboob Sahab Vs. Syed Ismail and Others, .

4) G. Mujeer Ahmed and Anr. v. Mohammed Zafrulla AIR 2000 KAR 318.

7. Counsel appearing for the respondents has placed reliance on a decision of the Division Bench of this Court in the case of Batoola Jan and Anr. v. G. Mohd. Basheer and Ors. ILR 2002 KAR 369.

8. Having heard the learned Counsel for the parties and on careful perusal of the materials on record, it is seen that the Trial Court has recorded a finding on consideration of the recitals of the Gift Deed to the effect that the Donor executed an oral Hiba and in evidence of the said oral Hiba, the document in question was executed. The Court has, therefore, come to the conclusion that the document was not compulsorily registrable and was admissible in evidence.

9. Learned Counsel for the respondents contends that on the face of the document it discloses that the so called oral Hiba and the written document have been executed simultaneously and are part of one and the same transaction and are therefore contemporaneous in nature requiring Registration. This contention

cannot be accepted. A perusal of the document, as rightly held by the Court below, discloses that the Donor has already gifted the schedule property by means of an oral gift to the Donee on 10.01.1972 which has been duly accepted by the Donee before witnesses and the donor has already handed over possession of the schedule property to the Donee and in order to record the said transaction the document is executed though on the same day. In fact, the last paragraph of the document reads as under:

The persons who have witnessed to this oral Gift (HIBA) have also signed to this document evidencing the fact of Gift (HIBA) made and executed by the Donor and accepted by Donee.

10. In view of the above, the contention of the learned Counsel for the respondents that the document itself effects the gift and therefore it is compulsorily registrable cannot be accepted. For the same reason the Division Bench ruling of this Court in ILR 2002 KAR 369 has no application to the facts of the present case as in the said case it is clearly observed that if the gift is reduced into writing and the same is contemporaneous with the Gift it must be registered, whereas, if it is only in the nature of a memorandum recording the transaction already entered into the same does not require registration.

11. In the instant case, the Court below has rightly held that the document only evidences the oral gift that has already been executed and therefore it does not need any registration. Having come to such a conclusion, the Trial Court was in error in holding that die document having not been reduced into writing on the required stamp paper, the defendants were liable to pay the duty with penalty. It is well established that a Hiba even if reduced into writing, if it is only in the nature of a memorandum recording the oral gift already made it need not be in any stamp paper, let alone being compulsorily registrable. Therefore, only because oral Hiba was recorded in a stamp paper it does not mean that the provisions of the Karnataka Stamp Act applies to the same as the document is required to be reduced into writing on a stamp paper bearing the required stamp duty as per the Karnataka Stamp Act. Such an approach of the Court below is patently illegal. When the Court below has held that there was a oral Hiba and the document in question is a mere recording of the oral Hiba evidencing the transaction already entered into, it was not permissible for the Court below to further issue a direction to the defendants to pay the requisite stamp duty along with penalty. Such a direction is illegal and unsustainable. Since the document was not compulsorily registrable and was not required to be induced into writing on any stamp paper as it is only a record of the oral gift that has taken place, the order passed by the Court below directing the defendants to pay the requisite stamp duty along with penalty deserves to be set aside.

12. In the result and for the foregoing, the writ petition is allowed, impugned order is set aside. It is ordered that the document shall be permitted to be marked in evidence in accordance with law.

