

(1939) 01 AHC CK 0035
In the Allahabad High Court

Maqbul Husain and Others

APPELLANT

Vs

Mt. Zain-un-nissa Bibi and Others

RESPONDENT

Date of Decision : 06-01-1939

Acts Referred:

Citation : AIR 1939 All 435 : (1939) 9 AWR 256

Hon'ble Judges : Verma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Verma, J.—This is an appeal by the plaintiffs. Plaintiffs 1 and 2, Maqbul Husain and Iqbal Husain, are the grandsons of plaintiff 3, Mt. Waliya Bibi. The suit was for the possession of a house and a plot of land and for damages. The trial Court decreed the suit in favour of plaintiffs 1 and 2. On appeal by the defendants the lower Appellate Court has dismissed the suit.

2. The case of the plaintiffs was that plaintiff 3, Mt. Waliya Bibi, had inherited the property from her father and had subsequently made a gift of it in favour of her grandsons, plaintiffs 1 and 2 and that the defendants had interfered with the possession of the plaintiffs. A deed of gift bearing date 14th September 1933 was relied upon by the plaintiffs. The defence was that the northern portion of the property in question, namely the house, had belonged to Mir Gulzar Ali, the husband of Mt. Waliya Bibi, and not to the father of the lady, and that on Mir Gulzar Ali's death the property had devolved on the defendants. As to the southern portion of the property in dispute, it was pleaded that it had belonged to one Dwarka Brahman and that the defendants had purchased it from him. On these assertions of fact, it was pleaded by the defendants that Mt. Waliya Bibi never had any right or title to any portion of the property in dispute and was not entitled to make any gift in favour of plaintiffs 1 and 2. The trial Court held in favour of the plaintiffs and, as already stated, passed a decree in favour of plaintiffs 1 and 2, holding that plaintiff 3 had validly gifted the property to her grandsons, the first two plaintiffs.

3. The lower Appellate Court has held against the gift on a point which does not seem to have been specifically raised by the defendants in the trial Court. Observing that it was "one of the cardinal principles of the Muslim law that a gift to be valid, must be accompanied by the delivery of possession," it went on to deduce from certain statements made in para. 8 of the plaint as to the facts giving rise to the cause of action for the suit and the dates on which such cause of action arose, that Mt. Waliya Bibi could not be in possession of the property on 14th September 1933, which was the date on which the deed of gift relied upon had been executed, and held that the gift was therefore invalid under the Mahomedan law and plaintiffs 1 and 2 had acquired no title to the property in question. It may here be pointed out that the lower Appellate Court failed to notice that in para. 6 of the plaint it was alleged that Mt. Waliya Bibi had originally made an oral gift in favour of her grandsons, plaintiffs 1 and 2 prior to 14th September 1933 and had put the donees in possession and that she had executed the deed of gift of 14th September 1933 only as a matter of precaution so that no dispute might arise in future. An argument was pressed upon the lower Appellate Court by the counsel appearing for the plaintiffs that even if the view of the Court that the gift made by Mt. Waliya Bibi was void *ba correct*, a decree may be granted in favour of Mt. Waliya Bibi who was plaintiff 3, but the Court did not accept this contention on the ground that Mt. Waliya Bibi had filed no appeal against the decree of the trial Court which was in favour of plaintiffs 1 and 2 alone. The Court declined to apply the provisions of Order 41, Rule 33, Civil P.C. In the view that we have taken of the case, it is not necessary to deal with this latter point.

4. The contention of the learned Counsel for the plaintiff-appellants is that on the facts of this case the view taken by the lower Appellate Court is erroneous. His argument is that if a property is in the possession of a trespasser, the true owner of the property can validly make a gift of that property provided the donor does all that he or she can to perfect the contemplated gift and to enable the donees to acquire possession of the property. He has cited the decision of their Lordships of the Privy Council in *Mahomed Bukhsh Khan v. Hosseini Bibi* (1888) 15 Cal. 684 in support of his contention. This particular point has been dealt with by their Lordships in the penultimate paragraph of their judgment. The case fully supports the contention of the learned Counsel for the appellants. In *Kalidas Mullick v. Kanhaya Lal* (1885) 11 Cal. 121 their Lordships of the Privy Council observed:

But it must be observed that in this case the dispute as to the validity of the gift is not between the donee and the donor.... The person who disputes it claims adversely to both. The donor has done all that she can to complete the gift and is a party to the suit and admits the gift to be complete.

5. Although this was a case under the Hindu law, it was followed by their Lordships in *Mahomed Bukhsh Khan v. Hosseini Bibi* (1888) 15 Cal. 684. The case before us on this point is on all fours with the case in *Kalidas Mullick v.*

Kanhaya Lal (1885) 11 Cal. 121 and, if anything, is stronger than the case in Mahomed Bukhsh Khan v. Hosseini Bibi (1888) 15 Cal. 684 because in that case the donor was disputing the gift whereas in the case before us the donor has joined the donees in bringing the suit. Reference may also be made to the case in AIR 1927 261 (Oudh) . In our judgment the decision of the lower Appellate Court is incorrect. For the reasons given above, we allow this appeal, set aside the decree of the Court below and restore that of the trial Court. The appellants will have their costs of this appeal as well as of the lower Appellate Court.