

(1970) 03 SC CK 0071

In the Supreme Court Of India

Case No : Special Leave Petition No.

Mir Muzafaruddin Khan and Others

APPELLANT

Vs

Syed Arifuddin Khan and Others

RESPONDENT

Date of Decision : 25-03-1970

Acts Referred:

Citation : (1971) 3 SCC 810

Hon'ble Judges : K. S. Hegde, J; J. C. Shah, J; A. N. Grover, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

A.N.Grover, J.—His is an appeal by certificate from a judgment and decree of the Andhra Pradesh High court. The suit out of which the appeal arises relates to the properties which originally belonged to Nawab Zainulabud Din Khan, a retired Revenue Officer, who died at Hyderabad on 18/12/1953. The following pedigree table will be helpful in understanding the relationship between the parties :

2. In 1954 Syed Arifuddin who claimed to be the son of Syed Zainulabudin Khan from his wile Mehrunnissa Begam instituted a suit in forma pauperis impleading Khaderunnissa Begam defendant No. 1 who was the daughter and Asmutunnisa Begam defendant No. 2 who was the widow of the deceased as parties. It was stated that his deceased father had left movable and immovable properties set out in lists A, B, and C valued approximately at Rs. 1,61,516-10-8. Out of these defendant No. 1 was entitled to 1/3 share, defendant No. 2 to 1/8 share and to the balance of the property the plaintiff was entitled. Subsequently defendants 3 to 6 applied to the court to be impleaded as defendants as they also claimed interest in the suit properties. The application was granted and the plaintiff was directed to implead them as defendants. The first defendant who is the real sister of the plaintiff admitted the correctness of the case set up by the plaintiff. The second defendant denied that the plaintiff was the son of Syed Zainulabudin Khan as he was born two years after the mother had been divorced by him. Defendants 3, 5 and 6 the sons of Syed Posha Mohiuddin Khan who was the

brother of Syed Zainulabudin Khan and defendant 4 son of defendant 3 admitted the relationship of the first and the second defendants to the deceased. They, however, maintained that the plaintiff was not the son and was not thus entitled to any share in his estate. It is unnecessary to refer to all the pleas contained in their joint written statement about the various properties. The main controversy has now centered on one property called "Somajiguda House" which was shown as Item No. 1 in Schedule "A". It was alleged by these defendants that this had been gifted away by Syed Zainulabudin Khan in his lifetime to defendant No. 4.

3. The Trial court held, *inter alia*, that the house "Somajiguda" had been gifted by Syed Zainulabudin Khan to Mir Dawar Ali Khan defendant No. 4 during his lifetime. On the question of legitimacy of the plaintiff the Trial court found in his favour. The High court reversed the decision of the Trial court on the issue relating to the gift of the aforesaid property. It concurred in the finding of the Trial court that the plaintiff was the son of Syed Zainulabudin Khan and was born on 13/05/1949.

4. We do not consider it necessary to refer to the other points as well as the properties which were in dispute before the courts below as the learned counsel for the appellants has confined his arguments principally to the question of gift alleged to have been made by Syed Zainulabudin Khan in favour of defendant No. 4. He also made an attempt to assail the decision on the legitimacy of the plaintiff and faintly submitted that an old Citroen Car which was being claimed by the appellants should have been held to be the property of defendant No. 3 as it had been given to him by the deceased during his life-time.

5. The gift is alleged to have been made orally on 25/07/1952, by Syed Zainulabudin Khan in favour of defendant No. 4 between 4 to 5 p. m. Certain witnesses, namely, Mir Raza Ali D. W. 5 and Zahur Nawaz Jung D. W. 6 were stated to be present at that time. Mir Muzaffuruddin Khan the father of the donee who was a minor is alleged to have accepted the gift on his behalf. It is said that the possession of the property which had been gifted was delivered by the donor by opening the house which was lying vacant and delivering the key to Syed Muzaffuruddin Khan. On 29/11/1952, Syed Zainulabudin Khan executed a document Ext. C-20. After stating that the house in Somajiguda had been acquired by him and that its value was about Rs. 50,000.00 he declared that he had ceased to have any title or ownership in the said property because in view of natural love and affection he had "offered to gift away by way of Hiba without any consideration" to his grandson Mir Dawar Ali Khan son of Syed Muzaffuruddin Khan and that the latter had accepted and taken possession of the property gifted on behalf of the minor. The memorandum had been executed by way of a declaration and recital of "past facts". D. W. 1 Asmuthunissa Begam supported the version about the gift having been made. Other witnesses were also produced whose evidence has been considered by the High court. But the documentary evidence appear to negative the case of the defendants that a valid gift had been made by Syed Zainulabudin in favour of defendant No. 4. In the

first place it is difficult to understand why Syed Zainulabudin did not execute a proper document and merely made an oral gift in July, 1952 when after some months he actually executed a document declaring that a gift had been made by him. But even in that declaration he did not make any mention of the date on which the oral gift was stated to have been made. Exhibits P-15 and P-21 showed that even after the so-called gift Syed Zainulabudin Khan was himself managing the property as his own. In Ext. P-15 which was a tenancy agreement, dated 22/05/1953, Syed Zainulabudin Khan stated that he was the exclusive owner of the house. Exhibit P-21 was a letter written by him to the Superintendent central Storage. That also showed that he claimed the rent of the house in question as an owner. No mutation was got effected in the municipal records about the change of ownership. Our attention was invited to a letter, dated 23/3/1954, from the office of the Income Tax Officer to defendant 3 in which there was some mention of a copy of a certain document filed by Syed Zainulabuddin Khan during his life-time on 9/03/1953 before the income-tax authorities. By looking at Ext. C-14 which is a letter, dated 9/02/1954 from defendant 3 to the Income Tax Officer this document was a mere "Hiba agreement". It would seem that this document, was the same as Ext. C-20, dated 20/11/1952, containing the declaration about a gift having been made. No attempt was made to get the document mentioned in Ext. C-13 produced nor was any other evidence adduced to show that the copy related to some document other than Ext. C-20. In our opinion the High court was justified in coming to the conclusion that the gift even if made orally, as alleged, was never completed in accordance with the rules of Mohammedan Law. It is essential to the validity of a gift under Mohammedan Law that there should be a delivery of such possession as the subject of the gift is susceptible of. In other words the taking of possession of the subject-matter of the gift by the donee either actually or constructively is necessary to complete a gift. The High court rightly found that there had been no delivery of possession by the donor to the donee, in the present case, of the property stated to have been gifted by Syed Zainulabudin Khan to defendant No. 4. As stated before the donor continued receiving rents and profits of the aforesaid property during his lifetime and no mutation was effected in the municipal records in favour of the donee. It is also not disputed that the municipal taxes and other similar dues continued to be paid by the donor. Even if there was some declaration of gift it did not have the effect of a valid gift in favour of the donee as one of the essential conditions for completing the gift was not satisfied. It cannot be forgotten that the donor was a retired Tahsildar (Revenue Official). He was likely to be familiar with the formalities which were required under his personal law to make a valid gift. It is inconceivable that he did not comply with all the necessary requirements if he intended or as a matter of fact made a completed gift in favour of defendant No 4.

6. The argument about the plaintiff not being a legitimate son of Syed Zainulabudin Khan has hardly any substance. There is a concurrent finding of

both the courts that the plaintiff was born during the continuance of a valid marriage between Syed Zainulabudin Khan and Mehrunnissa Begam. The plaintiff was born on 13/05/1949, and the divorce between Syed Zainulabudin Khan and Mehrunnissa Begam took place on 30/05/1949. S. 112 of the Evidence Act provides that the fact that any person was born during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when lie could have been begotten. According to the case of the defendants Syed Zainulabudin Khan, during his own life-time, had disowned the plaintiff as his son and had divorced Mehrunnissa Begam only 17 days after his birth on the ground that she was leading an immoral life. The courts below accepted the evidence about the date of birth of the plaintiff. As no satisfactory evidence had been produced that Syed Zainulabudin had no access to Mehrunnisia Begain till she was divorced the provisions of S. 112 were fully applicable. Even otherwise it was found that Mehrunnissa Begaro was living with Syed Zainulabudin Khan at the time when the plaintiff was begotten. As- mutunissa Begam who had supported the defendants on various matters did not deny that the plaintiff was the legitimate son of Syed Zainulabudin. We are satisfied that the decision of the courts below on the question of legitimacy of the plaintiff was correct. Finally no serious attempt was made to persuade us to hold that the old Citroen Car had been gifted by Syed Zainulabudin Khan during his lifetime to defendant No. 3.

7. The appeal fails and it is dismissed with costs.