(2000) 09 AHC CK 0071

In the Allahabad High Court

Case No : Writ Petition No. 5911 of 1988 (M/S.)

Mohd. Ali and Another APPELLANT

Vs

Board of Revenue,U.P.Lucknow and Others RESPONDENT

Date of Decision : 18-09-2000

Acts Referred:

Shariat Act, 1937 — Section 2
Transfer of Property Act, 1882 — Section 129

Citation : (2000) 09 AHC CK 0071

Hon'ble Judges : Khem Karan, J

Final Decision : Allowed

Judgement

Khem Karan, J.—Impugned in this writ petition, is the order dated 25488 (Annexure 2) passed by the Board of Revenue (O.P. No. 1) under Section 218 of U.P. Land Revenue Act, by which it set at naught the mutation proceedings, initiated on the basis of oral gift, by the petitioners. An important legal point involved in this petition is whether a Mohammedan can make an oral gift of his agricultural land, governed by the UPZA and LR Act.

2. Brief facts, giving rise to this petition are that the petitioners moved for mutation before Tahsildar Mawana of district Meerut, on the basis of oral gift, said to have been made by Smt. Zubeda Begum (O.P. No. 3) in respect of an agricultural land, mentioned in para 1 of the writ petition. Tahsildar allowed this mutation application vide his order dated 21284. Smt. Zubeda Begum moved for setting aside this order and for hearing her in the matter. Vide order dated 25684, Tahsildar Mawana recalled his order dated 21284 and restored the mutation proceedings to their original number. Aggrieved by this order dated 25684, the present petitioners preferred a revision before the Addl. Commissioner, who vide his order dated 10884, took the view that the order dated 25684 was not justified in the facts and circumstances of the case and so made a reference to the Board of Revenue under Section 218 of Land Revenue Act, for setting aside the said order and for restoring the order dated 21284 of Tahsildar.

3. Both the parties put in appearance before the Board of Revenue and after hearing the parties'' Counsel, the Board of Revenue, relying on its own decision in Masood Mujaffar/Javed Mujaffar v. Hasan Mujaffar, LCD 1985 (3) at page 435, quashed the entire mutation proceedings, taking the view that oral gift of an agricultural land was not permissible in view of Section 2 of Shariat Act, 1937 and also on the ground that if permitted compliance of the rest of the provisions of UPZA and LR Act imposing certain restrictions on such transfer, will not be possible. The Opposite Party No. 3 has filed a counteraffidavit supporting the view taken by the Board of Revenue and taking other pleas to oppose the prayer made in the writ petition.

4. Sri Mohd. Arif Khan, learned Counsel for the petitioners has submitted that it stands well settled that a Mohammedan can make oral gift of his movable and immovable property, as per the Rule of Mohammedan Law and since gift is also one of the mode of transfer and since by virtue of Section 121 of the Transfer of Property Act, the provisions contained in Sections 122 to 128 of that Act do not affect the Rule of the Mohammedan Law relating to the gift and since no specific mode of transfer is prescribed under the UPZA and LR Act, so a bhumidhar belonging to a Mohammedan community is free to transfer his holding under Section 152 of the UPZA and LR Act by making an oral gift. He submits that Section 2 of the Shariat Act, 1937, in terms does not affect that Rule of Mohammedan Law on the subject of gift. He has referred to a number of judicial pronouncements and the same are Aminabai v. Khammnnisa, AIR 1974 Madras 54; Kulsum Bibi v. Shyam Sunder, AIR 1936 Alld. 600; Ghulam Ahmad v. Mohd. Siddiq and others, AIR 1974 Jammu and Kashmir 59 (Full Bench); Chhota Uddandu v.Masthan Bi, AIR 1975 Andhra Pradesh page 271, Mst. Tabera v. Ayodhha Prasad, AIR 1929 Patna page417; and Jawwad Hussain v. Dy. Director Consolidation, Lucknow Law Journal 1982 page 26.

5. On the other hand, learned Counsel for Opposite Party No. 3 has submitted that Section 2 of Shariat Act, 1937, relied on by the Board of Revenue, clearly excludes agricultural land from the application of the Rules of Mohammedan Law. He has also argued that in case an oral gift of an agricultural land is permitted in the case of Mohammedans, an anomalous situation will be created, so much so, one section of a Bhumidhar with transferable rights will be having the benefit of transferring the land by oral gift and the rest of the bhumidars, with transferable rights but not belonging to the Muslim community will not enjoy that benefit. He has gone to the extent to say that to uphold the contention of Sri Mohd. Arif Khan would amount to make a discrimination between the bhumidhars with transferable rights. He has also submitted that a bhumidnar under the UPZA and LR Act is neither Muslim nor Hindu nor Christian and all of them stand on the same footing, so far as their right to transfer the holding is concerned. He submits that to import Personal Law into the UPZA and LR Act will be against the spirit of the Law contained under the UPZA and LR Act. An attempt has also been made to say that introduction of transfer by oral gift will create various complications as noted by the Board of Revenue in Noor Mohd. v. Smt. Khatoon,

RD 1976 page 288, and also in Masood Mujaffar''s case (supra).

6. As regards the contention of Sri MOhd. Arif Khan that under Mohammedan Law, oral gift of a property movable or immovable is permissible in accordance with the Rules of Mohammedan Law and in view of Section 129 of the Transfer of Property Act, the provisions contained in Sections 122 to 128 of the same Act of 1882, will not affect such a Rule of the Mohammedan Law, is concerned, there appears to be much force in it, in view of the law cited by him. Under the Mohammedan Law, essentials of a valid gift are (i) a declaration of gift by the donor, (ii) an acceptance of the gift expressed or implied by or on behalf of the donee, and (iii) delivery of possession of the subject of gift by the donor to the donee.

7. There is nothing in the Mohammedan Law that for a valid gift, a writing is necessary. In other words, there can be a valid gift in the manner stated above even without executing a writing but once a Mohammedan makes a gift by executing a writing, provisions relating to the registration of such gifts will come into play, as has been held by the full Bench of Jammu and Kashmir High Court in Ghulam Ahmad''s case (supra). This Court has taken a view in Jawwad Hussain''s case (supra) that a Mohammedan can make an oral gift of his agricultural land in accordance with the Rues of Mohammedan Law, because according to Section 129 of the Transfer of Property Act, the provisions contained in Chapter VII of the said Act, do not affect any Rule of Mohammedan Law and because the UPZA and LR Act does not prescribe any special mode of gift. No doubt Section 2 of the Shariat Act, 1937 was not under consideration in Jawwad Hussain''s case or in any of the cases cited by Sri Mohd. Arif Khan. So the crux of the matter is whether Section 2 of the Shariat Act does in any way affect the Rule of Mohammedan Law so far as agricultural, land is concerned. Section 2 of the Shariat Act, 1937 reads as under:

?Notwithstanding any custom or usage to the contrary, in all questions (save question relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law. marriage, dissolution of marriage including talaq, ila, zihar, lian, khula and mubara ''at (h), maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institution and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)?

8. A plain reading of the said provision makes it clear that the questions regarding the subjects (excepting agricultural land) enumerated therein, have to be examined and decided as per the Muslim Personal Law if the parties are Muslims, and to that extent any custom or usage to the contrary will have no effect. In other words according to Section 2 of the Shariat Act in deciding the questions relating to an agricultural land, Rule of Mohammedan Law may be superseded by any custom or usage. The contention of Sri Khan is that Section 2

does not abrogate the Rule of Mohammedan Law relating to gift of an agricultural land. He says that Section 2 was enacted to give effect to the Rule of Mohammedan Law in respect of the subjects mentioned therein and the purpose of Section 2 was not to make the personal law inapplicable in respect of the subjects relating to agricultural land.

9. The contention of the learned Counsel for Opposite Party No. 3 is. that Section 2 is clear on the point that all questions excepting the question relating to an agricultural land were to be decided in accordance with Mohammedan Law and the question relating to Agricultural Land was not to be decided according to Muslim Personal Law (Shariat).

10. I have considered the respective submissions made by the learned Counsel for the petitioners bad Opposite Party No. 3 and I am of the view that Section 2 of the Shariat Act, 1937 cannot be so construed, as to say that Muslim Personal Law was not to apply to questions relating to agricultural land. The purpose behind enacting Section 2 was to make it clear that the custom or usage to the contrary will not supersede the Muslim Personal Law for deciding questions relating to the subjects (excepting agricultural land) enumerated therein. In other words custom or usage contrary to the Rules of Mohammedan Law could affect the Rule of Mohammedan Law relating to Agricultural Land. I do not think Section 2 of the Shariat Act can be pressed into service so as to say that it excludes the Rule of Mohammedan Lawrelating to the gift of agricultural land.

11. No doubt if there is anything in UPZA and LR Act or any tenancy law which prescribes the mode of making of transfer or which prescribes a mode of gift of an agricultural land, the general rule of Mohammedan Law on the subject of gift shall stand superseded to that extent but no such provision has been brought to the notice of the Court.

12. The reasoning given by the Board of Revenue in the judgments cited above or the arguments advanced by the learned Counsel for Opposite Party No. 3, though attractive on the face, but I find it difficult to accept the same to exclude the said Rule of the Mohammedan Law in respect of agricultural land governed by the UPZA and LR Act. The argument that if one set of bhumidhar with transferable rights is permitted to make an oral gift of his holding and the other set is not permitted to do so, will amount to discrimination between bhumidhar and bhumidhar, does not appeal to me because there is already such a difference in respect of the rest of the property. In other words, there is no dispute that a person belonging to Muslim community can make an oral gift of his property not governed by the UPZA and LR Act whereas persons belonging to the rest of the ''communities have no such facility. Section 129 of Transfer of Property Act clearly says that nothing contained in that chapter will affect the Rule of Mohammedan Law relating to the gift.

13. The argument that if oral gift of agricultural land is permitted, compliance of rest of the provisions of UPZA and LR Act could not be secured or the argument

that unscrupulous persons may stake a claim and drag an honest person into litigation, cannot be the basis for holding that Mohammedan cannot make an oral gift of his agricultural land. It is for the legislature to take care of all this and the Courts have only to interpret the law and they have not to enact the law.

14. So, I am of the view that in absence of any mode of gift in the UPZA and LR Act and in view of Section 129 of the Transfer of Property Act, a bhumidhar belonging to muslim community can transfer his holding by making an oral gift, according to Mohammedan Law and Section 2 of the Shariat Act, 1937 docs not affect this Rule of the Mohammedan Law. So, the view taken by the Board of Revenue is not legally sustainable.

15. The writ petition is allowed and the decision of the Board of Revenue contained in Annexure 2 is quashed and the matter is being remitted to it to decide the same afresh. This Court has not expressed any opinion on the point whether Smt. Zubeda Begum made any oral gift of her agricultural land in favour of the petitioners, whether the order of mutation dated 21284 was liable to be recalled or whether the order dated 25684 was just and proper. The Board of Revenue will examine the rest of the questions raised before it according to law and in the light of this judgment. Petition allowed.