
(1972) 01 PAT CK 0019
In the Patna High Court
Case No : A.F.O.D. No. 33 of 1963

Syed Md. Saleem Hashmi

APPELLANT

Vs

Syed Abdul Fateh and Others

RESPONDENT

Date of Decision : 13-01-1972

Acts Referred:

Citation : AIR 1972 Patna 279 : (1972) 5 PLJR 140

Hon'ble Judges : Shiveshwar Prasad Sinha, J; Shambhu Prasad Singh, J

Bench : Division Bench

Advocate : S.S. Asghar Hussain and Md. Khaleel, for the Appellant; Jugal Kishore Prasad, for No. 2 and M. Ashan Shahabuddin, for the Respondent

Final Decision : Dismissed

Judgement

Shambhu Prasad Singh, J.—This appeal by the plaintiff arises out of a suit for partition of the properties of one Syed Md. Kalim who died on 21st of June, 1958 and owed allegiance to Hanag School of Sunni Muslim Law. He left behind five sons and one daughter. He was married twice. Plaintiff is one of his sons from the first wife. Defendants Nos. 1 to 4 are his sons and defendant No. 5 is his daughter from his second wife, Mosst. Zumran. Three schedules were appended to the plaint. According to the plaintiffs case, schedule A described exclusive immovable properties of Syed Md. Kalim. Schedule B described his exclusive movable properties and schedule G described other immovable properties in which Syed Md. Kalim had 3 annas 11 dams 2 kauris and odd share; defendants 6 to 16 being his co-sharers. The suit had to be instituted as the defendants were not willing to have the properties amicably partitioned in spite of demand of the plaintiff. Plaintiff claimed 2 annas 18 dams and odd share in the properties of his father.

2. There are six items of properties in schedule A to the plaint. Item Nos. 1 and 2 are two buildings together with land in mohalla Sabjibagh in Patna. Item No. 3 is a house at Yahyapur, police station Maner in the district of Patna. Item Nos. 4 and 5 are kasht raiyati lands in the same village and Item No. 6 is kasht raiyati

land in village Ghyaspur.

3. Three written statements were filed, one by defendant No. 4, another by defendant No. 5 and the third by defendants Nos. 2 and 3. With regard to Item No. 1 of schedule A, the case of defendants 4 and 5 is that Syed Md. Kalim made an oral gift of that property to them; two-third share to defendant No. 4 and one-third to defendant No. 5. Defendants 2 and 3 did not make out any specific case in respect of this property. So far Item No. 2 of schedule A is concerned, the case of defendant No. 4 is that it was not a property of Syed Md. Kalim, but of Bibi Zumran, mother of defendants 1 to 5, and on her death Syed Md. Kalim got only a share in it and that he made an oral gift of his share in that property to defendant No. 5. The case of defendant No. 5 in respect of this property is that Bibi Zumran in her life time made an oral gift of this property to her and the plaintiff or defendants 1 to 4 had no share in it. Defendants 2 and 3 aver that after the death of Bibi Zumran, defendants 1 to 5 and Syed Md. Kalim came in possession of the property according to their share: Syed Md. Kalim getting one-fourth share. The case of defendant No. 4 in respect of Items 3 to 6 of schedule A property is that Item No. 3 was exclusive property of Bibi Zumran and other items were acquisition either of Bibi Zumran or this defendant. Defendant No. 5 pleads that the aforesaid four items of schedule A properties were inherited by the plaintiff and defendants Nos. 1 to 5 in proportion to their respective legal shares over which they are in joint possession. Similar is the case of defendants 2 and 3 in respect of these four items of properties. Defendants 2 to 5 all have denied that Syed Md. Kalim left any movable property as described in schedule B to the plaint. They have also raised various pleas, such as nonjoinder of necessary parties, non-inclusion of all the properties, want of proper valuation and details of properties described in schedule C to defeat the claim of the plaintiff in respect thereof.

4. The court below has accepted the case of the defendants with regard to schedule B properties. It has also accepted the case of defendants 4 and 5 in respect of Item No. 1 of schedule A properties and dismissed the suit so far they are concerned. It has accepted the case of the plaintiff so far Item Nos. 3, 4 and 5 of schedule A properties and schedule G properties are concerned and decreed the suit in respect thereof according to the plaintiff's claim. As to Items Nos. 2 and 6 of schedule A properties, it has held that they were properties of Bibi Zumran and on her death Syed Md. Kalim got only one-fourth share in them and the plaintiff was entitled to a decree of the share as claimed by him in respect of the four annas interest of Syed Md. Kalim in that property.

5. Defendant-respondent No. 10 died during the pendency of the appeal and his heirs and legal representatives were not substituted in time. Thus the appeal abated so far they are concerned. The question whether the whole appeal became incompetent on that account was left open by Order No. 60 for decision at the time or the hearing of the appeal itself. While the appeal was being heard by us, an affidavit was filed by defendant-respondent No. 4 that defendant-

respondents Nos. 6, 9, 11 and 13 also died during the pendency of the appeal and their heirs and legal representatives were not substituted in time. This allegation was not refuted on behalf of the plaintiff appellant and it was urged on behalf of defendant No. 4 that the whole appeal had become incompetent because of non-substitution of the heirs and legal representatives of the aforesaid respondents. As stated earlier, these respondents who are dead were not concerned with the properties of schedules A and B, but only those of schedule C to the plaint. The suit was decreed in respect of schedule C properties as claimed by the appellant. The appeal not being in respect of schedule G properties, these respondents were not necessary parties to it and it cannot be held to have become incompetent as a whole because of non-substitution of their heirs and legal representatives.

6. Mr. S. S. Asghar Hussain, learned counsel for the appellant, did not press the appeal in respect of item Nos. 2 and 6 of schedule A properties. He pressed the appeal only in respect of item No. 1 of that schedule. The only question which arises for decision in this appeal, therefore, is whether there was an oral gift of this property by Syed Md. Kalim to defendants 4 and 5.

7. Mohamedan law permits an oral gift, but to make a gift valid the following three essentials must co-exist: (i) a declaration of gift by the donor, (ii) acceptance of the gift express or implied, by or on behalf of the donee, and (iii) delivery of possession of the subject of the gift by the donor to the donee. Delivery of possession need not in all cases be actual. It should be delivery of such possession as the subject of the gift is susceptible. Defendants 4 and 5 examined witnesses to prove declaration of gift by Syed Md. Kalim and acceptance of gift by them as well as their possession of the property. To prove their possession they have also filed documentary evidence. The gift, according to them, was made on 10th of February, 1952. On 19th of February, 1952, only eight days thereafter, they filed a petition (Ext. I) for mutation of their names in the municipal records in place of Syed Md. Kalim. On 25th March, 1952, the "Special Officer incharge of Patna City Municipality issued a notice, Ext. J (1), to Syed Md. Kalim calling upon him to show cause as to whether he had any objection to the names of defendants 4 and 5 being recorded in his place in respect of holding No. 67, i.e., item No. 1 of schedule A property. On 6th of May, 1952, Syed Md. Kalim filed a consent petition (Ext. H) stating that he had no objection to the names of defendants Nos. 4 and 5 being recorded. His endorsement on the said petition has been marked Ext. B and the signature of his lawyer Abdul Moin, Ext. G (1). The case of the appellant is that Ext. H was a collusive document and Ext. B is not the endorsement of Syed Md. Kalim. The court below has not accepted this case of the appellant Mr. Asghar Hussain argued at great length that the finding of the court below on this point was not correct and Ext. B was not a genuine endorsement of Syed Md. Kalim. The signature (Ext. B) was proved by defendant No. 4 who examined himself as D.W. 12. It was not expressly suggested to him that the signature (Ext. B) was not a genuine signature of Syed Md. Kalim. Only a vague suggestion was made that

Syed Md. Kalim did not receive any notice of the petition for mutation filed by the witness and the entire transaction was forged. No such suggestion was made to other D.Ws. Had the appellant made a definite suggestion in the court below to any of the D.Ws. who were examined before the witnesses for the plaintiff, defendants 4 and 5 would have taken steps to get Ext. B compared with signature of Syed Md. Kalim on other documents, genuineness whereof could not be doubted. So that defendants 4 and 5 might not get the signature (Ext. B) compared with, some other signatures of Syed Md. Kalim, the plaintiff who examined himself as P.W. 7 denied that Ext. D, registered patta kabuliat dated 1st of February, 1951 bore signature of his father. He also denied that Ext. G (9) an endorsement on an affidavit dated 21st of May, 1957 purporting to be of Syed Md. Kalim was his. Another witness P.W. 8 for the appellant besides denying that the, said patta kabuliat and the affidavit bore the signatures of Syed Md. Kalim also denied that a vakalatnama (Ext. C) bore his signature. Mr. Asghar Hussain was not able to place any material before us why signatures of Syed Md. Kalim could be forged on the said patta kabuliat and affidavit in the years 1951 and 1957 respectively. It is obvious from these circumstances that the appellant was afraid of getting the signatures (Ext. B) compared with other signatures of Syed Md. Kalim which could not but be genuine. Thus, the only document left on the record, which, according to the appellant, could bear the signature of Syed Md. Kalim was a postal acknowledgment of the year 1924. Though this document is now 47 years old, the ink of the writing which purports to be the signature of Syed Md. Kalim appears to be fresh. The paper below the signature appears to be also a bit rough and we were not satisfied about the genuineness of the signature purporting to be of Syed Md. Kalim on this document. Thus, there was no reliable document having the signature" of Syed Md. Kalim admitted by the appellant to be his signature with which Ext. B could be compared in the court below or by us as requested by Mr. Asghar Hussain. We find, therefore, no reason to differ from the finding of the court below about the genuineness of Exts. H and B.

8. The document (Ext. H) with signature (Ext. B) of Syed Md. Kalim on it goes a long way in proving the case of defendants 4 and 5 that there was an oral gift by Syed Md. Kalim in their favour in respect of item No. 1 of Schedule A property, they accepted the gift and came in possession thereof, because Syed Md. Kalim accepts in Ext. H that there was such a gift and he delivered possession of the gifted property to the donees. The fact that the donees were given delivery of possession of the gifted property also shows that they accepted the gift.

9. It is also the case of the appellant that Syed Md. Kalim was too old and not in a position to understand what he was doing and the gift was invalid on that account. It is, however, not their case that defendants 4 and 5 exercised any undue influence or coercion over Syed Md. Kalim in the matter of making the gift to them. Syed Md. Kalim died in 1958, more than six years after making of the gift. It cannot, therefore, be said that his condition of health was very bad in 1952. In the plaint itself the appellant alleged that Syed Md. Kalim took with him

a sum of Rs. 34,000/- in cash while he was proceeding to Gaya on 20-6-1958. Had Syed Md. Kalim been very weak either mentally or physically, it is not likely that he would have got that amount with him and taken it to Gaya with him. According to the evidence of the appellant, Syed Md. Kalim used to be treated sometimes by Hakim Idris and at the last stage he was treated by Dr. Hai, Neither the Hakim nor the doctor has been examined in the case and there appears no substance in this part of the case of the appellant.

10. Witnesses examined OH behalf of defendants 4 and 5 to prove the gift are Abdul Quayum (D.W. 3), brother of Bibi Zumran, defendant No. 5 herself (examined on commission), Syed Hamid Hussain (D.W. 7), a relation of Syed Md. Kalim and defendant No. 4 himself (D.W. 12). They have stated in their evidence that in their presence in the very house which "was gifted, Syed Md. Kalim made a declaration that he was making a gift of it to defendants 4 and 5 and they accepted the gift by accepting a bundle of papers which the donor took out from underneath the pillow of his bed and mad" over to defendant No. 4. It is true that defendants Nos. 4 & 5 are highly interested in the result of the case and D.W. 3 is their close relation, but in the circumstances of the case, I find no reason to differ from the court below in the matter of accepting their evidence as to the gift as true. Defendants 4 to 5 have also produced documentary evidence in support of their possession, such as Exts. K series, counterfoils of rent receipts granted by defendant No. 4 to different tenants bearing endorsements, Exts. A series, of the tenants on their back, Exts. L series, Municipal receipts Exts. N series, receipts of electrical energy of the premises, Exts. O series, letters of Patna Electric Supply Company and P series, electric consumption bills. They have also examined D.Ws. 2 and 5, a tenant and an employee of another tenant, in support of their possession since after the gift. Taken together with Exts. 1, J (1) and H, the evidence above referred to leave no room for doubt that Syed Md. Kalim did make an oral gift of item No. 1 of schedule A property in favour of defendants 4 and 5.

11. The evidence led on behalf of the appellant is negative in character. No P.W. claims that he was present on the date and time when and the place where the gift, according to the case of defendants 4 and 5, was made and that no gift was really made. No one of them can claim that Syed Md. Kalim could not have made the gift without consulting him. Their evidence that Syed Md. Kalim continued to be in possession of the property can also not be accepted in view of the documentary evidence led on behalf of defendants 4 and 5 and discussed earlier. Therefore, on the evidence led on behalf of the appellant, it cannot be held that the case of gift of item No. 1 of schedule A property as made out by defendants 4 and 5 is not true.

12. Mr. Asghar Hussain also challenged the validity of the gift on the ground that as the donor used to stay in the very house which was gifted and did not vacate it but continued to live therein, there was no delivery of possession as required by Mahomedan law in case of gifts. As observed earlier, under the Mahomedan

law it is not necessary that there must be actual delivery of possession to make a gift valid. Delivery of such possession as the subject of the gift is susceptible is sufficient to validate the gift. But in the instant case, the documentary evidence led on behalf of defendants 4 and 5, already discussed, shows that there was actual delivery of possession. Mere fact that the donor continued to live in the house is not enough to hold that there was no delivery of possession. There was an overt act on behalf of the donor and the donee, i.e., handing over a bundle of papers by the former to the latter at the time of the gift itself. Further the donor consented to the mutation of the donees' name in the municipal records. Mr. Asghar Hussain submitted that a gift of immovable property of which the donor is in actual possession is not complete unless the donor physically departs from the premises with all his goods and chattels and the donee formally enters into possession. This rule of Mahomedan law, however, is subject to certain exceptions. No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift and in such a case the gift may be completed by some overt act by the donor indicating a clear indication on his part to transfer possession and to divest himself of all control over the subject of the gift. As observed by West, J. in *Sk. Ibrahim v. Sk. Suleman* ILR (1885) Bom 146 when a person is present on premises proposed to be delivered to him a declaration of the person previously possessed puts him into possession.... without any physical departure or formal entry. Mr. Asghar Hussain contended that this exception applies only to gift of immovable property by husband to wife and not where donor and donee are related otherwise. In support of this contention he relied on the decision in *Mohammad Sadiq Ali Khan v. Fakr Jahan Begam* 59L.R. IndAp 1 : AIR 1932 PG 13 wherein while discussing the aforesaid exception in relation to a gift by a husband to his wife it was observed:

"It is not necessary for their Lordships to decide in the present case whether this principle is of universal application between Mahomedan donors and donees, but they think that as between a husband and his wife who are living together it is undoubtedly a reasonable interpretation of the requirements of the law."

This decision is no authority for the proposition that the aforesaid exception to the general rule that the donor must physically depart from the premises gifted with all his goods and chattels is not applicable to gifts by a Mahomedan to his relations other than wife but residing in the same premises. In the case of *Mt. Kanizan Vs. Mt. Latifan and Others*, , a Bench decision of this Court, the exception was applied to a gift by the father to his daughter. In the instant case, the son defendant No. 4 was residing with the father in the house and the daughter, defendant No. 5, also occasionally used to reside, there and was present there at the time of the gift. To me there appears no reason why the aforesaid exception should not be applied to the facts of the present case.

13. Mr. Asghar Hussain placed reliance on a decision of a learned Single Judge of Allahabad High Court in *Mt. Hajra v. Dost Mohd.* AIR 1947 All 180, where the

exception was not applied to a case of a gift by the maternal uncle to the sister's son. The facts of the case show that the donor and the donee of that case were not residing in the premises gifted. The decision of that case is of no help to the appellant. Mr. Hussain also relied on a decision of the Judicial Committee in AIR 1928 106 (Privy Council) . In that case a gift by the grand-father to his minor grand-sons without actual delivery of possession was held to be invalid. The donees being minors could not themselves have accepted the gift which could be accepted only by their guardian. When the father was alive the grand father himself could not act as guardian of his minor sons and it was not possible to hold that he himself could have accepted the gift as guardian of the donees. There being no evidence that the father as guardian of his sons, the donees, accepted the gift and got possession either actual or constructive the gift had to be held to be invalid. The decision in this case, therefore, is also of no avail to the appellant. Mr. Hussain also relied on certain passages on Tyabji's Muslim Law (1968 Edition). Referring to Musa Miya's case the learned author has submitted that the exception ought not to be extended to cases other than gifts by husband to the wife. That view did not appeal to this Court in Mt. Kanizan Vs. Mt. Latifan and Others, . Further Tyabji himself has stated that where the intention of a donor is unequivocally manifested by some overt act the gift is valid even without actual physical departure of the donor from and formal entry of the donee to the property gifted and the evidence in the instant case does show that by his conduct the donor unequivocally manifested his intention to transfer possession to the donees. In my opinion, therefore there is no substance in the aforesaid contention of Mr. Hussain and the gift cannot be held to be invalid because the donor continued to stay in the house even after the gift.

14. For the foregoing reasons, I find no merit in the appeal and it is, accordingly, dismissed, but, in the circumstances of the case, without costs.

S. P. Sinha, J.

15. I agree.