(2010) 03 AHC CK 0251

In the Allahabad High Court

Case No : Writ - B No''s. 37674 and 37675 of 2006

Tahseen Khan APPELLANT

Vs

Board of Revenue and Others RESPONDENT

Date of Decision : 26-03-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 100(4), 80
Muslim Personal Law (Shariat) Application Act, 1937 — Section 2
Transfer of Property Act, 1882 — Section 129, 52
Uttar Pradesh Panchayat Raj Act, 1947 — Section 106
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 229B, 34

Citation : (2010) 03 AHC CK 0251

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Advocate : K.R. Sirohi, for the Appellant; C.S.C., N.K. Srivastava, N.K. Sharma, Pratima Srivastava, Sankatha Rai, V.K. Singh, Vijai Kumar Rai and Vinod Kumar Rai, for the Respondent

Final Decision : Dismissed

Judgement

Prakash Krishna, J.—These two writ petitions were heard together and are being disposed of by a common judgment as was done by all the three Courts below. The essential facts are identical and common questions of law are involved.

2. One Mohd. Safi and Tehseen Khan (the petitioner) were the recorded co-tenure holders of the land pertaining to Khata No. 123 of Khatauni 1384-89 Fasli which comprised of Plot Nos. 114, 503 and 685 of Village Ahar Bangar, Tehsil Anoopshahar, District Bulandshahar.

3. The present writ petitions have been filed by the defendants of two suits Being Suit Nos. 196 of 1998 Imtiaz Khan v. State of U.P. and Ors. and 197 of 1998 Mumtaj Khan v. State of U.P. and Ors. both u/s 229B of the U.P.Z.A. and L.R. Act against the present petitioner for declaration of their right over the property in dispute in pursuance of the sale deeds dated 19.8.1993 in respect of the plot No.

503 area 2-5-0 bighas and the sale deed dated 7th of April, 1994 in respect of the said plot No. 503 area 8-1-7? bighas executed by Mohd. Safi in their favour on the allegations that they have purchased the plots in question after payment of consideration to Mohd. Safi. They came to know that the defendants got their names mutated in the revenue record fraudulently. The suits were contested by the present petitioner.

4. According to the petitioner (Tehseen Khan), Mohd. Safi by way of oral gift/hiba gifted his share in his favour. In pursuance of the said gift (hiba), proceedings for recording the name in the revenue record u/s 34 of the U.P. Land Revenue Act was initiated by him. His name was mutated in the revenue record by the order of Tehsildar dated 28th of May, 1992. Mohd. Safi filed a recall application which was allowed by the order dated 27th of July, 1993 and the order dated 28th of May, 1992 was recalled. The matter ultimately reached to the Board of Revenue and the Board of Revenue by its order dated 1st of June, 1996 has held that the order dated 28th of May, 1992 passed in favour of the petitioner is valid.

5. On the basis of the pleadings of the parties as many as ten issues were framed by the trial court. The suits were decreed by the judgment and decree dated 14th of March, 1992 on the findings that the plaintiff respondents are entitled for declaration of their Bhumidhari with transferable right in view of the sale deeds executed in their favour. The plea of hiba as was set out by the petitioner was negatived. It was held that the defendant petitioner has failed to prove the oral hiba, the suit is not bad for want of proper notice u/s 80 C.P.C.. The suit is not barred u/s 52 of the Transfer of Property Act. Mohd. Safi had a right to execute the sale deeds dated 19th of August, 1993 and 7th of April, 1994. The suit is not bad for non joinder of necessary parties or for want of notice u/s 106 of the Panchayat Raj Act and it is within time.

6. The matter was carried in first appeal being first appeal Nos. 13 of 2001- 2002 and 14 of 2001-2002 by the present petitioner before the Additional Commissioner, Meerut Division, Meerut, who by judgment and order dated 4th of April, 2003 allowed both the appeals and dismissed the suits on the findings that the finding recorded by the trial court on the question of maintainability of suit for want of proper notices u/s 80 C.P.C. and 106 of the Panchayat Raj Act is not correct. Under Mohammedan Law, a Muslim is competent to make oral hiba (gift) in respect of his agricultural property and in the year 1993-94 no land was available to Mohd. Safi to execute the sale deeds and as such the plaintiffs have not acquired any right in the disputed plots. The First Appellate Court also observed that since the very institution of the suit is bad for want of legal notices, it is not desirable to remand the matter back to the trial court. Resultantly, both the suits were dismissed.

7. The plaintiffs filed second Appeal Nos. 36/2/M/ 2002-2003 Mumtaj and Ors. v. Tehseen and Ors. and Second Appeal No. 37/2/M/2002-2003 Imtiaz v. Tahseen Khan and Ors. before the Board of Revenue, U.P. at Allahabad, u/s 100 of C.P.C.. These appeals have been allowed by a common judgment and order dated 15th

of June, 2006 on the findings that the suits were maintainable and were not barred by Section 80 of C.P.C. or by provisions of 106 of the Panchayat Raj Act. On the question of applicability of Mohammedan Law in respect of agricultural property it has been held that the Muslim Personal Law is not applicable and as such oral gift allegedly made by Mohd. Safi in favour of the defendant petitioner herein is not valid. A further finding that no such hiba or gift was made by Mohd. Safi in his life time and the sale deeds in favour of the plaintiff respondents are valid, has been recorded.

8. Heard Sri Amit Malik, Advocate, holding brief of Sri K.R. Sirohi for the petitioner and Sri Sankatha Rai along with Sri Vinod Kumar Rai and Vijay Kumar Rai, Advocates for the respondents.

9. The first and foremost contention of the petitioner is that having not framed any substantial question of law as required u/s 100 C.P.C., the impugned judgment of the Board of Revenue is vitiated. To buttress the said submission reliance was placed upon a judgment of the Supreme Court in the case of Ramavilasom Grandhasala and Others Vs. N.S.S. Karayogam, . In this case, the Supreme Court has observed that it has been held by it on more than one occasion that under Sub Section (4) of Section 100 C.P.C., the High Court is required to frame substantial questions of law and only then it acquires jurisdiction to decide second appeal on merits. In that case, the High Court decided the appeal without framing any substantial question of law and this was considered itself a sufficient ground to set aside the judgment under appeal.

10. The learned Counsel for the respondents, on the other hand, has referred the cases of Kannan (Dead) through L.Rs and Ors. v. V.S. Pandurangam (Dead) through L.Rs. and Ors. 2008 (70) ALR 692 and Nangali Amma Bhavani Amma v. Gopal Krishnan Nair and Ors., (2004) 8 SCC 785. In the case of Kannan (supra) it has been observed that merely because no substantial question of law has been formulated by the High Court that does not mean that the judgment of the High Court automatically becomes a nullity or that it must necessarily be set aside by the Apex Court on that ground alone. The appellant must also show prejudice to him on this account. More or less, the same view has been expressed in the case of Nangali Amma Bhavani Amma (supra) wherein it has been laid down that although High Court had not framed substantial question of law in the strict sense, nevertheless it was found from para 3 of the impugned judgment that the High Court had indicated the question of law which arose out of the decision of the First Appellate Court and which required determination u/s 100 of C.P.C.. This was held to be substantial compliance with the requirement of Section 100 of C.P.C. and non framing of substantial question of law on these facts was not considered to be a ground to set aside the decision of the High court.

11. Now, the question of applicability of the aforesaid pronouncements of the Apex Court is involved in the fact situation as exists in the present case. The learned Counsel for the respondents submits that in the memo of second appeal

the substantial questions of law were framed and in any case, a reading of the judgment of the Board of Revenue delivered in the second appeal sufficiently indicates the substantial question of law in issue in the appeal. In para 6 of the judgment, the Board of Revenue has noticed the points of disagreement by the First Appellate Court with the findings of the Trial Court and indicated in para 7 thereof that the above questions of law are involved in the appeal. The First Appellate Court disagreed with the view of the Trial Court on the questions (1) Whether the suit is defective as all the tenure holders of plot No. 503 have not been impleaded in the suit?, (2) Whether the suit is validly constituted for want of proper notices u/s 80 of C.P.C. and Section 106 of the Panchayat Raj Act?, (3) Whether a Muslim Tenure holder can gift his agricultural holding by way of oral gift? and (4) Whether mutation having been affected in favour of Tahseen Khan (petitioner) on account of oral gift, Mohd. Safi (whose gift is under challenge) could execute the sale deeds in question? Thereafter, in para 7 of the judgment the Board of Revenue observed that these are the legal issues between the parties with regard to which, the parties advanced their arguments and are involved in the appeal. On a reading of the judgment as a whole and paragraphs -- 6 and 7 in particular, I am of the view that even though formally no substantial questions of law as required u/s 100(4) of C.P.C in stricto sense have been framed in the judgment but nonetheless the parties were aware about the legal questions involved in the appeal. The learned Counsel for the petitioner could not show that any prejudice has been caused for not formulating the substantial questions of law in the appeal. The fact that on a reading of the judgment of the Board of Revenue, it gives sufficient indication of the questions of law involved in the appeal, the non framing of substantial questions of law in the facts of the present case will not in any manner vitiate the judgment of the Board of Revenue. The ratio decendi of the Apex Court in the case of Kannan (supra) and Nangali Amma Bhavani Amma (supra) are fully applicable. This disposes of the first submission of the learned Counsel for the petitioner.

13. With regard to the validity and legality of the findings on the points i.e. non impleadment of other co-tenure holders of the plot No. 503 in the suit and with regard to the notices u/s 80 C.P.C. and 106 the Panchayat Raj Act are concerned, suffice it to say that the learned Counsel for the petitioner did not advance any argument on these points. No attempt was made by him to challenge the findings recorded by the Trial Court or by the Board of Revenue in second appeal holding that the suit as framed is maintainable and the defects, if any, in the notices u/s 80 of C.P.C. and 106 of the Panchayat Raj Act will not come in the way of the plaintiffs. Apart from the above, the objections with regard to the defect in the aforesaid notices could have been raised by the State Government or the persons who may be affected for want of these notices and not by the defendant petitioner. It is not necessary to dwell on these issues any further as the petitioner has felt satisfied with the findings recorded thereon by the Board of Revenue and those findings in absence of any challenge during the course of argument have attained finality.

14. The main thrust of the argument of the petitioner is that Mohd. Safi rightly and validly by oral gift (hiba) gifted his share in the property in question in favour of the petitioner namely Tahseen Khan. The mutation in pursuance of the said hiba having taken place in favour of the defendant petitioner, Mohd. Safi could not have executed the sale deeds afterwards in respect of his share in favour of the plaintiff respondents herein. This argument has two facets. The first is whether a Muslim tenure holder can gift his agricultural holding by oral gift. In other words, whether the principles of Muslim Law or Islamic Law are applicable to agricultural holdings. The Hon''ble ExChief Justice of India Hidayatullah in his Preface of Sixteenth Edition of Mulla Principles of Mahomedan Law has observed that the expressions ''Mahomedan'' and ''Mahomedanism'' are not correct and, in a sense, are even objectionable. The proper expressions are Islamic Law and Muslim Law.

15. Elaborating the argument, the learned Counsel for the petitioner submits that Muslim Personal Law (Shariat) Application Act, 1937 does not bar oral hiba by a Muslim. Reliance has been placed upon a judgment of this Court in Mohd. Ali and Anr. v. Board of Revenue, U.P. Lucknow and Ors. 2001 (92) RD 282. As against this, Sri Sankatha Rai, learned senior counsel appearing for the contesting respondents, submits that the Personal Law is not applicable to the agricultural lands. He referred a Division Bench Decision of this Court in the case of Mahendra Singh v. Attar Singh and Ors. 1967 RD 191, a case relating to Hindu Law.

16. Considered the respective submissions of the learned Counsel for the parties. Undoubtedly, in the case of Mohd. Ali (supra), it has been held after taking into consideration the Section 2 of Shariat Act, 1937 that Section 2 of Shariat Act 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 of Shariat Act, 1937 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. It has been held that Section 2 of Shariat Act cannot be pressed into service so as to say that it excludes the Rule of Mohammedan Law relating to the gift of agricultural land. Ultimately, in para 12 of the report the Court concluded that in view of the provisions of the U.P.Z.A. & L.R. Act and Section 129 of the Transfer of Property Act, a Bhumidhar belonging to Muslim community can transfer his holdings by making an oral gift, according to Mohammedan Law and Section 2 of the Shariat Act, 1937 does not affect this Rule of the Mohammedan Law. The above ratio as laid down fully supports the petitioner''s stand. However, it may be noted that the Court was not called upon to decide the effect, if any, of the new rights i.e. Bhumidhari, Sirdari, Assami etc. that were created by the U.P.Z.A. & L.R. Act. The said aspect of the case was not argued, considered and decided therein. The Division Bench Decision in the case of Mahendra Singh (supra) relied upon by the respondents

proceeds on the footing that Bhumidhari rights are special rights created by the U.P.Z.A. & L.R. Act and the notions of the Hindu Law or Mohammedan Law cannot be imported into the rights created under the said Act. It was held that the principles of coparcenary property are inapplicable to Bhumidhari rights. Noticeably, the observations with regard to the applicability of Mohammedan Law to agricultural land were incidentally as the said issue was not involved therein. The observations made in the judgment are more or less in the nature of obiter dicta. Nonetheless, the Division Bench Decision in the case of Mahendra Singh has got its own significance and importance and cannot be brushed aside. Be that as it may, it is not necessary for this Court to enter into the said controversy and the matter is left to be decided at appropriate time. As the aforesaid issue even if decided either way, is not going to affect the ultimate decision of the present writ petition.

17. Now, the question which falls for determination is whether Mohd. Safi orally has gifted his share in the property to the petitioner, as claimed by the petitioner. Indisputably, there is no written document evidencing the hiba in favour of the petitioner. It is also not in dispute that the petitioner and Mohd. Safi were co-tenure holders of the plot in question. The petitioner in his written statement has pleaded that his name was mutated by Tehsildar in pursuance of the oral gift by the order dated 28th of May, 1992. To recall the said order, an application was filed by Mohd. Safi which was allowed by Tehsildar by the order dated 27th of July, 1993 and the order dated 28th of May, 1992 was recalled. The order dated 27th of July, 1993 was challenged in appeal which was dismissed by the Collector by the order dated 31st of May, 1994. The order of the Collector was challenged by way of revision No. 191 LR 1993-94 which was allowed by the order dated 1st of June, 1996 and consequently, the order of Collector dated 31st of March, 1994 and 28th of May, 1992 were held to be not valid. Mohd. Safi, the vendor, had no authority to execute the sale deeds in question and the suit is barred by Section 52 of the Transfer of Property Act and as such the suit is not maintainable. This is all so far as the pleadings of the petitioner defendant is concerned. In substance, the defendant petitioner has placed reliance upon the order of the Board of Revenue in mutation proceeding only. In other words, the written statement of the petitioner which runs into 21 paras in one suit and 22 paras in another suit, does not contain any plea regarding the oral hiba in his favour, what to say about the material facts relating to the ingredients of hiba. Date, time, place or year of the alleged hiba has not been disclosed in the written statement. Nor there is any such averment that he is in occupation of the property in dispute being a donee or he had accepted the hiba. In the absence of any pleading of hiba, no evidence could have been given with regard to the hiba, yet the evidence adduced with regard to the hiba has been considered.

18. The defendant petitioner has stated in his oral deposition that Mohd. Safi by oral gift about 11 years ago gifted his share to him while sitting in the middle of the land in dispute in the presence of Dallu, Khan Chand, Kahna, Parma and his brother in law, Kallu. The petitioner namely Tahseen Khan himself and other

neighbours were present at the time of hiba. According to the deposition of the petitioner, Mohd. Safi had suggested the petitioner that the agricultural operations should be done by him (petitioner) and also he be served by the petitioner but nothing was said regarding hiba. He further deposed that he gave me the land in question by hiba and did not take any money for it. Hiba was oral and it was not reduced in writing. After the oral hiba, Mohd. Safi had no right to execute the sale deeds and in Revenue records in place of the name of mohd. Safi my name has been mutated. The relevant extract from his deposition is reproduced below:

Mohd. Safi Ne Kaha Tha Ki Tumhin Joto Bovo Tatha Meri Ahal Takauri Karo. Mohd. Safi Ne hiba Ke Bare Mein Kuchh Nahin Kaha. Mujhe Unnhone Jamin Dene Ko Kaha Tha. Yah Jamin Mohd. Safi Ne Mujhe hiba Kee Thi, Paise Se Nahin Dee Thi, Mujhe hiba Jubani - Jubani Hi Dee Thi, Likha Padhi Nahin Huee. Mohd. Safi Ko hiba Jubani Karane Ke Bad Bainama Karane Ka Adhikar Nahin Hua. Mohd. Safi Ki Jagah Rajasva Abhilekhon Mein Mera Naam Chadh Chuka Hai. Munshi Ji Ne Manshukhi Ka Dava Nahin Kar Rakha Hai, Phir Kaha Chal Raha hai. Ish Samay Khet Mein Eenkh hai, Makka Hai, Dhan Hai Tatha Jwaar Hai. Mumtaj Vgairah Koi Kabja Nahin hai.

19. The question does arise as to whether on taking the statement of the petitioner as it is, can it be said that it is a case of an oral hiba in his favour by Mohd. Safi? On a reading of the statement of the petitioner as a whole, the statement itself shows only this much that in the presence of certain persons Mohd. Safi asked the petitioner to carry on the agricultural operations and also to serve him (Mohd. Safi). The crucial portion of the statement of the petitioner has already been reproduced above. The statement of the petitioner has been read by the Trial Court who reached to the conclusion that the oral hiba is not proved. I see no reason to defer. The statement of the petitioner at the most shows that the petitioner was permitted to carry on the agricultural operations on the land in the share of Mohd. Safi. It does not indicate that there was a definite intention on the part of Mohd. Safi to divest himself from the ownership of the land in question. At the most the statement of the petitioner shows that some sort of leave and licence was granted by Mohd. Safi in favour of the petitioner permitting the latter to carry out the agricultural operations. The overt action and conduct of Mohd. Safi to file an application to recall the mutation order passed in favour of the petitioner by the Tehsildar and to contest the case in appeal before the Collector and also before the Board of Revenue fortify the above inference that Mohd. Safi never intended to part with the land in question by way of oral hiba for all times to come. In other words, he never intended to make an oral Hibba; in absence of any cogent material on record to show that Mohd. Safi ever intended to gift the property in question by oral hiba in favour of the petitioner, is sufficient to defeat the case of the petitioner.

20. The Principles of Mohammedan Law by Mulla prescribes three essentials of a gift. They are - (1) A declaration of gift by the donor, (2) Acceptance of gift,

expressed or implied, by or on behalf of donee and (3) Delivery of possession of subject of the gift by the donor to the donee. Unless these conditions are complied with, gift is incomplete. Delivery of possession of immovable property has been considered to be essential for completing the gift under the Muslim Personal Law. The Apex Court in a recent decision of Abdul Rahim and Others Vs. SK. Abdul Zabar and Others, has laid down the conditions to make a valid and complete gift under the Muslim Law. They are as follows:

(a) The donor should be sane and major and must be the owner of the property which he is gifting.

(b) The thing gifted should be in existence at the time of hiba.

(c) If the thing gifted is divisible, it should be separated and made distinct.

(d) The thing gifted should be such property to benefit from which is lawful under the Shariat.

(e) The thing gifted should not be accompanied by things not gifted i.e. should be free from things which have not been gifted.

(f) The thing gifted should come in the possession of the donee himself, or of his representative, guardian or executor.

21. In this very case, it has been observed in para 12 that a gift indisputably becomes complete when a person transfers with immediate effect the ownership of his movable or immovable property to another person, and that other person himself or someone else with his consent takes possession of the property gifted. Under the Muslim Law it is a contract which takes effect through offer and acceptance. In this very case, the Apex Court has approved the following observation of a Learned Single Judge of Orissa High Court in Abu Khan . Moriam Bibi (1974) 440 CLT 1306 (Para 24) held as follows:

''A person is said to be in possession of a thing, or of immovable property, when he is so placed with reference to it that he can exercise exclusive control over it, for the purpose of deriving from it such benefit as it is capable of rendering, or as is usually derived from it.''

Thus, possession can be shown not only by acts of enjoyment of the land itself but also by ascertaining as to in whom the actual control of the thing is to be attributed or the advantages of possession are to be credited, even though some other person is in apparent occupation of the land. In one case, it would be actual possession and in the other case, it would be constructive possession.

22. Applying the above ratio to the facts of the present case, it is crystal clear that the petitioner who claims hiba in his favour has utterly failed to prove it. It is a case of total lack of evidence to show that Mohd. Safi even made a gift to the petitioner. As discussed herein above, at the most Mohd. Safi permitted the petitioner to cultivate the former''s share of land also. In the absence of any evidence worth the name that Mohd. Safi ever made a declaration of gift/hiba to

the petitioner, the first ingredient of gift/hiba is not established. Evidence of delivery of possession by Mohd. Safi in favour of the petitioner is totally lacking. The very fact that Mohd. Safi contested the case of mutation though unsuccessfully upto the stage of Board of Revenue, negates the theory of oral hiba as set up by the petitioner. The pleading as set out by the petitioner in his written statement has already been noted above. Except the decision of mutation case in his favour by the Board of Revenue, as a matter of fact, there is total lack of pleading of gift therein. It was for the petitioner to have pleaded and proved the ingredients of a valid hiba in the suit itself. It is an acknowledged legal position that mutation proceedings are for recording of name in Revenue Records and are summary in nature, and the authorities are not expected to decide the question of title or validity of hiba, gift deed, exchange deed, Will etc.. The orders passed in these proceedings are always subject to the final outcome of a duly constituted suit or proceedings by a competent Court of Law. In this regard, the Trial Court who had dismissed the suit after the threadbare examination of evidence, has reached to the conclusion that on the date of sale deeds in favour of plaintiffs, Mohd. Safi was in possession of the land in question. He validly executed the sale deeds in favour of the plaintiff respondents. The Trial Court considered the oral testimony of the petitioner herein in great detail and rejected it by giving cogent and sufficient reasons. It also rejected the statement of Parma Singh being an interested witness. The suit was decreed consequently. The said decree was reversed by the First Appellate Court on the finding that the suit was not properly constituted as certain persons were not impleaded as a party and it was instituted without giving proper notices u/s 80 of C.P.C. and 106 of the U.P. Panchayat Raj Act. It also took the view that the original sale deeds were not filed and that the Shariat Act, 1937 does not bar oral hiba. Noticeably, the judgment of the First Appellate Court contains 12 paragraphs. The Appellate Court has not ventured to examine the findings recorded by the Trial Court holding that the alleged hiba in favour of the defendant is not a valid hiba even if Muslim Personal Law is applicable to agricultural land. The Trial Court preferred not to place reliance on the evidence of the defendant and after making an analytical analysis of the pleadings and evidence of the parties reached to the conclusion that the defendant has not been able to prove the hiba of the disputed land in his favour in accordance with law. In view of the findings recorded by the Trial Court and the fact that the question of not properly framing the suit, having not been raised before me, the irresistible conclusion is that the suits giving rise to the present writ petitions instituted by the vendees of Mohd. Safi are liable to be decreed. The learned Counsel for the petitioner could not point out any portion from the judgment and order of the First Appellate Court that the hiba in favour of the petitioner was held to be valid on merits.

23. As noticed herein above, all the other pleas which are more or less in the nature of technical objections have not been pressed before me by the learned Counsel for the petitioner and have been negatived by the Board of Revenue. No other point was pressed.

14. In view of the above discussion, I am in agreement with the judgment of the Board of Revenue decreeing the suits. The Board of Revenue rightly set aside the judgment and decrees of the First Appellate Court and restored the judgment and decrees of the Trial Court.

15. In the result, both the writ petitions are hereby dismissed with cost of Rs. 5,000/- (Rupees Five Thousand) in each petition.

