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**(2012) 01 AHC CK 0434**  
**In the Allahabad High Court**  
**Case No : Miscellaneous Single No. 1703 of 1994**

Warasat Ali

APPELLANT

Vs

State of U.P.and others

RESPONDENT

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**Date of Decision :** 03-01-2012

**Acts Referred:**

Stamp Act, 1899 — Section 33, 38, 47A  
Transfer of Property Act, 1882 — Section 122, 123, 129

**Citation :** (2012) 01 AHC CK 0434

**Hon'ble Judges :** Rajiv Sharma, J

**Final Decision :** Allowed

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## Judgement

Rajiv Sharma, J.—This writ petition has been preferred against the order dated 29.6.1993 passed in Case No. 185 under Section 33/38 Indian Stamps Act.

2. Counsel for the petitioner submits that in the year 1979, one Mashhoor Ahmad, who was a very rich and renowned person of the locality gifted a piece of land situated in town Mohammadi to the petitioner and on being gifted the aforesaid plot, the petitioner constructed his residential house. Petitioner also moved an application before the Municipal Board, Mohammadi for mutation, which was allowed and necessary tax was also deposited by the petitioner. The Collector stampopposite party no.2 issued a notice requiring the petitioner to show cause why the proceedings under Section 33/38/47A of the Indian Stamps Act may be not be initiated to which petitioner filed a reply indicating therein that no instrument or deed of transfer was executed, thus there was no occasion to pay stamp duty. The petitioner also placed reliance on Section 122, 123 and 129 of Transfer of Property Act. It was also been asserted that the peice of land was given by an oral gift in accordance with law and for initiation of proceedings under the aforesaid Sections of Indian Stamp Act it is condition precedent that there must have been an instrument. Not only this, the oral gift was made in the year 1979 and as such the proceedings are beyond the prescribed period of limitation.

3. The Sub Divisional Officer/Stamp Collector being not satisfied with the reply so tendered by the petitioner passed the impugned order and held that in order to avoid stamp duty, documents for registration has not been presented though the property has been purchased.

4. Hence this writ petition.

5. State Counsel while justifying the order passed by Stamp Collector stated that the application in writing filed by the petitioner for mutation before the Municipal Authority has been treated to be an instrument of gift supporting original gift in his favour and as such it will make the petitioner liable to pay stamp duty. He further added that the stamp duty is due not under the provisions of Transfer of Property Act but under the Registration Act, the same is liable to be paid. Further, an oral gift as soon as recorded or stated or declared in writing becomes chargeable under the Stamp Act.

6. Under Mohammedan Law writing is not essential for the validity of a gift either of movable or immovable property. There are three essential ingredients of a gift under Mohammedan Law, namely (I) a declaration of gift by the donor; (ii) an acceptance of the gift express, 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. The deed of gift is immaterial for creation of gift under the Mohammedan Law. A Gift under the Mohammedan Law is not valid, if the above mentioned ingredients are not fulfilled, even if there be a deed of gift or even a registered deed of gift.

7. Section 122129 (Chapter VII) of the Transfer of Property Act deals with gifts. By Section 123 of the Act, it has been provided that a gift of immovable property must be effected by a registered instrument signed by the donor and attested by at least two witnesses, and that a gift of movable property may be effected either by a registered instrument signed as aforesaid or by delivery. But the provisions of Section 123 of the Act do not apply to Mohammedan Law. It is settled by law that the rules of Mohammedan Law regarding gifts are based on reasonable classification and S. 129 of the Transfer of Property Act exempting Mohammedans from certain provisions of T.P. Act is not hit by Article 14 of the Constitution.

8. In HafeezaBibi vs. ShaikhFarid (dead); 2011(5) SCC 654, the Apex Court in paragraph 29 of the report held as under:

29. In our opinion, merely because the gift is reduce to writing by a Mohammedan instead of it having made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammedan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammedan law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting valid gift, the transaction of gift would not be rendered invalid because it has been written

on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in Mohammedan Law.?

9. In view of the above, in the instant case, the gift of a piece of land was made by the donor out of his own free will and affection, which was accepted by the petitioner and delivery of possession was also given, hence it is a valid gift.

10. Before proceeding further, it would be apt to refer the relevant provisions of Transfer of Property Act and Indian Stamp Act.

Section 123 of the Transfer of Property Act, 1882 lays down the manner in which gift of immovable property may be effected. It reads thus:

S. 123. Transfer how effected: For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.. Such delivery may be made in the same way as goods sold may be delivered.?

In Section 129 of the T.P.Act, an exception has been carved out with regard to the gifts by a Mohammedan. It reads as follows:

S. 129. Saving of donations mortis causa and Mohammedan Law: Nothing in this chapter relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Mohammedan law.?

Section 17 of the Registration Act, 1908 which makes registration of certain documents compulsory, reads as follows:

(1) The following documents shall be registered, if the property to which they relate is situated in a district in which, and if they have been executed on or after the date on which Act No. XVI of 1864, or the Indian Registration Act, 1866 or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:

- (a) instruments of gift of immovable property:
- (b)...
- (c)...

Section 49 of the Registration Act deals with the effect of nonregistration of documents required to be registered. It reads thus:

S. 49 Effect of nonregistration of documents required to be registered: No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall (a) affect any immovable property

comprised therein or (b) confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered: provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument.?

11. In the case of Nasib Ali vs. Wajid Ali AIR 1927 Cal 197, the contention raised before the Division Bench of the Calcutta High Court was that the deed of gift, not being registered under the Registration Act, is not admissible in evidence. The Calcutta High Court held that a deed of gift by a Mohammedan is not an instrument effecting, creating or making of the gift but a mere piece of evidence.

12. In the case of Md. Hesabuddin and others v. Md. Hesaruddin and others AIR 1984 Gauhati 41, the question with regard to gift of immovable property written on ordinary unstamped paper arose before the Gauhati High Court. That was a case where a Mohammedan mother made a gift of land in favour of her son by a gift deed written on ordinary unstamped paper. The Gauhati High Court held that it cannot be taken as sine qua non in all cases that wherever there is a writing about a Mohammedan gift of immovable property, there must be registration thereof.

13. Aforesaid views of the Calcutta High Court and Gauhati High Court have been approved by the Apex Court recently in HafeezaBibi vs. ShaikhFarid (dead); 2011 (5) SCC 654 and it was held that a deed of gift execute by Mohammedan is not the instrument effecting, creating or making of the gift but a mere piece of evidence, such writing is not a document of title but a piece of evidence. The Apex Court further observed that Section 129 of the T.P. Act preserves the rule of Mohammedan Law and excludes the applicability of Section 123 of the T.P. Act to a gift of an immovable property by a Mohammedan.

14. In view of the above, the assertion of the respondents that the application for mutation given by the petitioner is an instrument is wholly misconceived. Respondents have also failed to show any document that infact the property was purchased by the petitioner. The question of paying the stamp duty does not arise in the present case because Section 33 of the Indian Stamp Act, 1899 provides that stamp duty shall be recoverable only in case of a registered instrument as deed. Since the transfer of immovable property in the present case, was made by way of an oral gift and no deed or instrument in writing was executed, Section 33 of the Act, will not be attracted. Moreover, the application of the petitioner for mutation, as averred above, cannot be treated as instrument or deed.

15. For the reasons aforesaid, the impugned order dated 29.6.1993 passed by the Sub Divisional Officer/Stamp Collector, MohammadiKheri contained in Annexure1

to the writ petition cannot be sustained and is hereby set aside. Consequent to the quashing of the order dated 29.6.1993 any subsequent proceedings arising out of the said order shall also stand quashed.

16. Writ Petition stands allowed in above terms.