*** THE HONOURABLE SMT. JUSTICE M.G. PRIYADARSINI**

+ A.S.No.307 OF 2022

% 22.01.2024

Between:

Atherullah Khan @ Razzak and another **Appellant**

Vs.

Abdul Fatah Faziur Rahman Khan and 2 others

Respondents

! Counsel for Appellant : Sri Ravichettu Guru Prasad

^ Counsel for Respondents : B. Danunjaya

<GIST:

> HEAD NOTE:

? Cases referred :

1. (2011) 2 WLC 503
2. 2010 (1) ALD 805
3. AIR 1973 Gauhati 96
4. AIR 1932 Calcutta 497
5. (2009) 6 SCC 160
6. AIR 1971 SC 361
7. AIR 2001 GUJ 271
8. Civil Appeal Nos.4883-4884 of 2017 decided on 03.11.2020
9. 2018 (5) ALT 511 (S.B.)

THE HONOURABLE SMT. JUSTICE M.G. PRIYADARSINI

A.S.No.307 OF 2022

JUDGMENT:

The present appeal is directed by the defendants against the judgment and decree dated 18.10.2022 in O.S.No.88 of 2013 (hereinafter will be referred as 'impugned judgment') on the file of learned IV Additional District Judge, Mahabubnagar (hereinafter will be referred as 'trial Court'), whereby the suit of the plaintiff to declare him as owner of the suit schedule property and recovery of possession, was decreed.

2. For the sake of convenience, hereinafter, the parties will be referred as per their array before the learned IV Additional District Judge, Mahabubnagar.

3. The brief facts of the case, which necessitated the defendants to file the present appeal are that the sole plaintiff filed suit for declaration and recovery of possession in respect the suit schedule property against defendant Nos.1 to 4. The brief averments of the plaint are as under:

a) The father of the plaintiff and father of defendant No.1 are real brothers. The father of plaintiff was a Government Teacher and whereas the father of the defendant No.1 was a un-employee having

no skill in any field. The father of the plaintiff purchased and extent of 540 square yards under registered sale deed bearing document No.585 of 1960 dated 16.09.1960 from the registered owner and constructed a house along with mulgies with two shutters on the said plot on the northern side abutting to Hyderabad Road. The municipal authorities have assessed the said house to tax and allotted house No.1-5-37. Since defendant No.1 had no employment, the father of the plaintiff used to look after the family of defendant No.1 also. The father of the plaintiff let out said mulgies to tenants, who used to do grocery business for some period and other tenants used to run hotel business. In the year 1972 the father of the defendant No.1 passed away, as such the father of the plaintiff permitted defendant No.1 and his mother, sisters to stay in the portion of the house behind said muilgies with separate mess. The said portion of the house and mulgies to an extent of 115.56 square yards (suit schedule property) is in possession of defendant No.1. In the year 1990 out of love and affection, the father of the plaintiff with an intention to give some work to defendant No.1, who was without work, permitted defendant No.1 to establish a hotel and flower business and accordingly the defendant No.1 was doing the same in the said mulgies.

b) In the year 2009 the father of the plaintiff passed away and thereafter defendant No.1 started acting adversely as such in the month of January, 2010 and March, 2010 the plaintiff demanded the defendant No.1 and his family members to vacate the suit schedule property but the defendant No.1 dodged the matter on lame excuses. In the meanwhile, defendant No.1 let out suit schedule property on monthly rent without any authority and interest to defendant Nos.3 and 4, who maintained a hotel in the name and style of "Ganesh Tiffin Centre" and also constructed a big furnace in Udipi style for said business due to which lot of heat is being produced. The residence of the plaintiff is becoming hot and they are unable to enjoy their property. Accordingly, the plaintiff approached the municipal authorities to take action against defendant Nos.1, 3 and 4 but of no use, as such the plaintiff approached District Collector, who directed the municipal authorities to take action. Defendant Nos.3 and 4 filed O.S.No.39 of 2013 and obtained interim orders against plaintiff and defendant No.1 vide I.a.No.146 of 2013 and the said interim order was made absolute on 20.08.2013.

c) The defendant No.1 started tea stall under the name and style of Savera Tea Point and closed the passage on the eastern

side of the said premises and the said passage is the only ingress and egress to the house of the plaintiff from the main road. Thus, the plaintiff made a complaint to the Municipal Authorities against defendant No.1, who filed O.S.No.40 of 2013 against Municipality and obtained interim order dated 06.04.2013 vide I.a.No.153 of 2013.

d) On enquiry, the plaintiff came to know that in the year 2012 the defendant No.1 created a registered gift deed alleging that his mother gifted the suit schedule property to him on 16.05.2002 vide registered document bearing No. 1982 of 2002 and thereafter obtained a rectification deed bearing document No.3759 of 2002 through his mother on 17.09.2022. The father of the plaintiff never gifted any property to the mother of the defendant No.1 so that she can gift the same to the defendant No.1 under registered gift deed, as such, the said documents are null and void and not binding on the plaintiff.

e) Defendant No.1 in collusion with defendant No.2 created a sale deed dated 08.11.2012 to an extent of 57.77 square yards in favour of defendant No.2. The father of the plaintiff is the absolute owner of the premises as he has purchased property and whereas defendants are in permissible possession, as such

defendant No.1 or his mother has no right to execute any document and even if they execute any document the same are not binding on the plaintiff. By virtue of said documents, a cloud is created over the title of the plaintiff. Hence, the suit.

4. The defendant No.1 filed written statement and the brief averments of which are as under:

a) The plaintiff intentionally did not plead about the death of their grandfather, who died in the year 1972. The father of the plaintiff and father of defendant No.1 along with their father had joint family properties at Thornai Village, Medak District and they used to get agricultural income. In the year 1964, the father of the defendant No.1 and father of plaintiff along with their father sold said agricultural joint family properties and acquired some other properties. Since the father of the plaintiff was the elder member of the family, all the properties were registered in the name of father of the plaintiff. Though the father of the plaintiff has purchased open plot to an extent of 540 square yards on 16.09.1960 under registered sale deed bearing document No.595 of 1960, the said property is not self acquired property of father of the plaintiff and in fact, the father of the defendant No.1 is also having share in it. The father of

the defendant No.1 used to do hotel business and kirana business in Mahabubnagar from 1962 onwards and had sufficient income and he used to maintain his family, as such the contention of the plaintiff that his father maintained the family of defendant No.1 is not true.

b) The property purchased by the father of the plaintiff during the life time of their grandfather is joint family property. Initially the house was not constructed and only mulgies were constructed with joint funds and subsequently house was constructed on the backside of the said mulgies by using joint family funds of father of the plaintiff and father of defendant No.1.

c) From the date of construction, the father of the defendant No.1 used to do business in the said mulgies and thereafter the defendant no.1 joined with his father and continued the said business. The defendant No.1 and his family members resided in the said house portion in the capacity of co-owners. Initially mess of both families were one and the same but in the year 1984 they have separate mess.

d) The brother of the defendant No.1 got employment in

Karnataka RTC and they being absolute owners of the said portion of the house made additional construction over the said mulgies with their own funds and converted the same into residential portion. The defendant No.1 used to stay in the ground floor initially and after establishing the hotel business, he constructed residential portion over the mulgies and they started residing in the same. Though the plaintiff is having a brother and three sisters, the plaintiff suppressed the same and not made his sibilings as parties to the suit, as such the suit is not maintainable.

e) The mother of the defendant No.1 being absolute owner under love and affection gifted the suit premises to defendant No.1 and as some mistake crept in the same, it was rectified under rectification deed and thereby the defendant No.1 being the absolute owner let out the premises to defendant Nos.3 and 4. Since the plaintiff made several complaints to municipal authorities and obstructed defendant nos.3 and 4 from doing business, the defendant Nos.3 and 4 obtained injunction against the plaintiff.

f) Originally the father of the plaintiff and father of the defendant No.1 and their father jointly resided in Basappa

Compound, later shifted near to Kousar Masjid, New Town Mahaboob Nagar and with join family funds they have purchased open plot and constructed mulgies. Therefore, the father of the plaintiff intended to give share to father of defendant No.1 but as he died in the year 1973 itself and since his mother is alive, the father of the plaintiff orally gifted the suit schedule property to his mother. Thereafter, they being the absolute owners, made additional construction over the said mulgies by investing huge funds and used the same for residential purpose. The name of the mother of the defendant No.1 was mutated in the municipal records in the year 1984 and thereafter the name of the defendant No.1 was mutated in the municipal records.

g) Though the plaintiff and his family members are very much aware of the recording his name as well as name of his mother in the municipal records, they never raised any objection. Even as per the pleadings of plaintiff, the defendant No.1 is in possession of the suit schedule property from the year 1990, as such the present suit is barred by law.

h) Defendant No.1 being an absolute owner of the suit schedule property, sold part of the suit schedule property to

defendant No.2 under registered sale deed for valuable consideration. Finally the defendant No.1 prayed to dismiss the suit as the same is barred by limitation.

5. Defendant No.2 filed written statement, which is in similar lines to that of the written statement filed by defendant No.1. As per the information of defendant No.2, defendant No.1 enjoyed the said premises as an absolute owner and prior to him, mother of the defendant No.1 enjoyed the same. The defendant No.2 purchased portion of the suit schedule property under registered sale deed and enjoying the same. The plaintiff never objected defendant No.1 from enjoying the said property as an absolute owner. The plaintiff is having brother and sisters, whereas the present suit is filed without impelading them and without obtaining any permission from them, as such the suit is bad for non joinder of necessary parties. Defendant No.1 offered to sell part of the suit schedule property for his family necessities, as such he purchased the part of the suit schedule property to an extent of 57.77 square yards consisting of ground floor + first floor situated at new Town Road, Mahabubnagar for total consideration of Rs.7,36,000/- through registered sale deed bearing document No.10102 of 2012 dated

08.11.2012 and since then he is in possession enjoyment of the same and his name was also mutated in the revenue records. The defendant No.2 is a *bona fide* purchaser and he is not connected with the disputes between plaintiff and defendant No.1 and thus, prayed to dismiss the suit.

6. Defendant No.3 filed written statement by contending that the suit of the plaintiff is not maintainable as the plaintiff has no title over the suit schedule property. Defendant Nos.3 and 4 obtained premises from defendant No.1 on lease for a period of two years and thereafter defendant no.1 informed him that he sold the property to defendant No.2. Therefore, the defendant No.3 obtained fresh lease from defendant no.2 and started hotel business. The plaintiff made several complaints, as such he was compelled to file a suit against plaintiff and defendant No.1 and obtained the interim order. The defendant No.3 continued in the said premises for certain period and recently defendant No.4 left the hotel business, as such he alone is continuing the said business.

7. Defendant No.4 did not appear before the Court despite receive of summons, as such he was set *ex parte*.

8. Based on the pleadings, the learned trial Court has framed the following issues:

I) Whether the plaintiff is entitled for declaration of title of the suit property?

II) Whether the plaintiff is entitled for recovery of possession of the suit property?

III) Whether the plaintiff is entitled for mesne profits?

IV) Whether the suit is bad for non joinder of necessary parties?

V) To what relief?

9. On 22.01.2018 the following additional issues were framed by the learned trial Court":

I) Whether defendant No.2 is a bona fide purchaser of the part of the suit schedule property under document No.10102 of 2012 dated 08.11.2012?

II) Whether the suit is barred by limitation?

10. Before the trial Court, the plaintiff got examined himself as PW1 and got marked Exs.A1 to A19 and on behalf of defendants, DWs 1 and 2 were examined but no documentary evidence was adduced. On hearing the rival contentions, the learned trial Court decreed the suit with costs. Aggrieved by the same, the defendant Nos.1 and 2 preferred the present appeal to set aside the impugned judgment.

11. Heard both sides and perused the record including the grounds of appeal.

12. There is no dispute with regard to the relationship between the parties and there is also no dispute with regard to the identity of the suit schedule property and as to who is in possession of the same. Though the plaintiff alleged to have purchased 540 square yards, the dispute is with regard to 115.57 square yards i.e., the suit schedule property. The defendant Nos.3 and 4 are the tenants in respect of part of suit schedule property having obtained lease of the property from defendant No.1 and they are not claiming any rights over the part of suit schedule property, however, since, the plaintiff is seeking eviction of defendant Nos.3 and 4 from part of suit schedule property, they were made as parties to the suit. Moreover, even as per the version of defendant No.1 in his evidence, his tenants i.e., defendant Nos.3 and 4 have vacated the part of suit schedule property. The defendant No.1 sold part of suit schedule property to an extent of 57.77 square yards to defendant No.2. Since the defendant No.2 is claiming rights in respect of part of suit schedule property from defendant No.1, the title and bona fide ownership of defendant No.2 is subject to the adjudication of dispute between the plaintiff and defendant No.1. Once, defendant No.1 is

able to establish that he is the absolute owner of the suit schedule property, then certainly, defendant No.2 is entitled to claim ownership over the part of the suit schedule property. Thus, it is just and appropriate to resolve the dispute between plaintiff and defendant No.1 initially and then to resolve the other ancillary disputes connected to the suit.

13. The contention of the plaintiff is that the suit schedule property is self acquired property of his father and on the other hand the contention of the defendant No.1 is that the suit schedule property is purchased jointly by the grandfather, father of the plaintiff and father of defendant No.1 out of the joint family funds, as such the father of the plaintiff is not the absolute owner of the property. Admittedly the land of 540 square yards was registered in the name of father of PW1 vide document No.585 of 1960. If at all the said property was purchased out of joint family funds, then certainly the property ought to have been shared equally among the two brothers i.e., father of PW1 and father of DW1. Defendant No.1, who was examined as DW1 admitted in his cross examination that father of PW1 orally gifted the mulgies in favour of his mother in 1984. If really the property of 540 square yards was purchased out of the joint family funds, there was necessity for the father of PW1 to

orally gift the part of the said property in the name of mother of DW1 after 24 years of the purchase of 540 square yards of land, more particularly, the suit schedule property i.e., 115.56 square yards which is not the half share of 540 square years. There is no explanation on the part of defendant No.1 as to why the landed property of 540 square yards was not divided into equal shares between father of PW1 and father of DW1, more particularly when it is contended by the defendant No.1 that the said property was purchased by selling the joint ancestral family properties. Furthermore, it is the contention of the defendant No.1 that since the father of PW1 was elder member of the family, the said property of 540 square yards was registered in his name. But as per the version of DW1, the said property was purchased by grandfather of DW1, father of PW1 and father of DW1. Thus, the elder member of the family is none other than grandfather of PW1 and DW1 but not father of PW1. In such circumstances, as per the contention of the defendant No.1, the property ought to have registered in the name of elder member of the family i.e., the grandfather of PW1 and DW1 but in the name of father of PW1. Since the landed property of 540 square yards was self acquired property of father of PW1, the same was registered in the name of father of PW1.

14. It is the contention of the appellant/defendant No.1 that the suit schedule property was orally gifted by father of PW1 in favour of mother of defendant No.1/DW1 and that the said gift is valid because it satisfied all the requirements that are required to be considered as a valid "hiba". In **Hafeeza Bibi and others v. Shaikh Farid (dead) by LRs and others**[1], wherein the Honourable Supreme Court observed as under:

> *"34. Now, as regards the facts of the present case, the gift was made by Shaik Dawood by a written deed dated February 5, 1968 in favour of his son Mohammed Yakub in respect of the properties `A' schedule and `B' schedule appended thereto. The gift - as is recited in the deed - was based on love and affection for Mohammed Yakub as after the death of donor's wife, he has been looking after and helping him. Can it be said that because a declaration is reduced to writing, it must have been registered? We think not. The acceptance of the gift by Mohammed Yakub is also evidenced as he signed the deed. Mohammed Yakub was residing in the `B' schedule property consisting of a house and a kitchen room appurtenant thereto and, thus, was in physical possession of residential house with the donor. The trial court on consideration of the entire evidence on record has recorded a categorical finding that Shaik Dawood (donor), executed the gift deed dated February 5, 1968 in favour of donee (Mohammed Yakub), the donee accepted the gift and the donor handed over the properties covered by the gift deed to the donee. The trial court further held that all the three essentials of a valid gift under the Mohammadan Law were satisfied. The view of the trial court is in accord with the legal position stated by us above. The gift deed dated February 5, 1968 is a form of declaration by the donor and not an instrument of gift as contemplated under Section 17 of the Registration Act. As all the three essential requisites are satisfied by the gift deed dated February 5, 1968, the gift in favour of defendant 2 became complete and irrevocable."*

15. In **Katwal Abdul Hakeem Sab (died) by LRs v. Nasyam Sufiya and others**[2] the High Court for the Andhra Pradesh

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[1] (2011) 2 WLC 503
[2] 2010 (1) ALD 805

observed as under:

> *"14. Oral gift is a typical facility which is available exclusively to Muslims . In the ordinary course, a gift is required to be made through a registered document as provided for under Section 123 of the Transfer of Property Act. When such a vital requirement as to registration is relaxed, the proof in the form of oral evidence must be unequivocal and clinching. The benefit of any doubt or contraction has to be given in favour of the person , who is adversely affected in the event of the plea or oral gift being accepted. Any relapse in this regard is likely to provide handle to an individual to trample the rights of other persons to succeed in accordance with law. Therefore, the plea raised by the 1st defendant , as regards oral gift was rightly repelled by the trial Court and lower appellate Court."*

16. In **Sitesh Chandra Choudhury V. Poziruddin ahmed and others**[3] the High Court of Gauhati held as under:

> *"The alleged donor and the donees admittedly were Mahomedans and governed by the Mahomedan personal law. In order to prove a valid gift under the Mahomedan Law, the plaintiff must prove the three essentials of a gift namely, (i) a declaration of gift by the donor, (ii) an 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."*

17. In **Sultan Miya V. Ajibakhatoon Bibi and others**[4] the High Court of Calcutta observed that the three requirements under the Mahomedan law for the validity of gift are (1) there must be clear and unambiguous intention of the donor to make a gift; (2) there must be acceptance of the gift express or implied on the part of the donee and (3) there must be delivery of possession of the property which is the subject-matter of the gift. It was further observed that if any one of the three formalities is not gone through although there may be a written

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[3] AIR 1973 Gauhati 96
[4] AIR 1932 Calcutta 497

instrument of gift, it is nevertheless invalid under the Mahomedan law.

18. In **Abdul Rahim and others v. SK. Abdul Zabar and others**[5] the Honourable Supreme Court observed as under:

> *"12. In Maqbool Alam Khan vs. Mst. Khodaija & ors. [(1966) 3 SCR 479], it was held:*
>
> *"The Prophet has said: "A gift is not valid without seisin". The Rule of law is:*
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> *"Gifts are rendered valid by tender, acceptance and seisin.--Tender and acceptance are necessary because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts; and seisin is necessary in order to establish a right of property in the gift, because a right of property, according to our doctors, is not established in the thing given merely by means of the contract, without seisin." [See Hamilton's Hedaya (Grady's Edn.), p. 482] Previously, the Rule of law was thought to be so strict that it was said that land in the possession of a usurper (or wrongdoer) or of a lessee or a mortgagee cannot be given away, see Dorrul Mokhtar, Book on Gift, p. 635 cited in Mullic Abdool Guffoor v. Muleka. But the view now prevails that there can be a valid gift of property in the possession of a lessee or a mortgagee and a gift may be sufficiently made by delivering constructive possession of the property to the donee. Some authorities still take the view that a property in the possession of a usurper cannot be given away, but this view appears to us to be too rigid. The donor may lawfully make a gift of a property in the possession of a trespasser. Such a gift is valid, provided the donor either obtains and gives possession of the property to the donee or does all that he can to put it within the power of the donee to obtain possession."*

19. There is absolutely no doubt with regard to the principle laid down in the above said decisions. But in order to prove the oral gift, it is settled law that in terms of declaration of oral gift,

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[5] (2009) 6 SCC 160

it must be demonstrated that the donor made a public statement in the "presence of witnesses" or otherwise that he gifted the property to the donee and that he divested himself of ownership of the property by handing possession to the donee. The offer to make a gift must be clearly consensual and conveyed purposefully, with no ambiguity. One of the most important parts is that this declaration, from the donor's perspective, must not be tainted by a *mala fide* intent to defraud, but must be genuine and *bona fide*. The declaration requires witnesses or testimonies stating the donor's gifting of the property to the donee, and it cannot be made in segregation without them.

20. In **Mohammad Mustafa v. Abu Bakr and others**[6] the Honourable Supreme Court observed that any gift given under duress, undue persuasion, or deception cannot be considered a declaration and the gift was void. The delivery of possession, on the other hand, is an important part of a gift under Muslim law. According to section 123 of the Transfer of Property Act, an unregistered gift of immoveable property is void in law and cannot convey title to the donee. Because of the provisions of

[6] AIR 1971 SC 361

section 123, no spoken gift of immovable property can be made. Without a formal instrument, just delivering possession does not confer any title. However, an oral gift is acceptable under Muslim law. But in order to consider a gift to be lawful, the giver must relinquish full ownership and jurisdiction over the subject of the gift. The basics of a gift, according to Mohammedan law, are the donor's statement of gift, the donee's acceptance of the present, and the conveyance of possession of everything the subject of the gift is capable of. The provisions of section 123 of the Transfer of Property Act have no bearing on this rule of Mohammedan law, and hence a registered instrument is not required to verify a gift of immovable property. Possession may not always imply actual physical possession, but rather possession of the property's ability to be given. In terms of declaration, it must be demonstrated that the donor made a public statement in the "presence of witnesses" or otherwise that he gifted the property to the donee and that he divested himself of ownership of the property by handing possession to the donee. Under these conditions, a Mohammedan can make an oral gift of his immovable gift. Because possession is required for the validity of a gift, it follows that if possession is not delivered, the gift is invalid. A

legitimate gift can be influenced by delivery of possession under Mohammedan law, and if delivery of possession occurs, the presence of an unregistered document of gift does not render the gift void. A gift might be given orally or in writing. If the declaration, valid acceptance followed by the prompt delivery of possessions, fulfilled all the fundamental requirements of a valid donation, i.e. there was no reduction of any of the aspects to writing, it shall remain entirely valid.

21. In the event of a dispute over the gift's legitimacy the High Court of Gujarat in **Fatmabibi v. Abdul Rehman Abdul Karim**[7] observed that the gift met just one criteria, namely, a statement, and that the gift was invalid because the other two conditions, namely, acceptance and delivery of ownership, were not met. An oral gift must be conclusively established explicitly in the event of a disagreement. Here, the three essential components of a lawful gift, namely declaration, acceptance, and delivery of ownership, as well as other criteria, must be proven. It must be shown that the donee does not own the donated property at the time of the dispute, but that the donee must immediately return it.

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[7] AIR 2001 GUJ 271

22. Thus, from the above discussion, it is clear that when there is a dispute with regard to the legitimacy of an oral gift ('hiba'), the donee need to establish that all the three conditions for a valid 'hiba' are satisfied. In the case on hand, there is no dispute with regard to the delivery of possession because admittedly the defendant No.1 is in possession of the alleged gifted property but whether it is for permissive possession or actual possession will be adjudicated in the upcoming paragraphs. There is also no dispute with regard to the acceptance of the property by the donee as it is the specific case of the defendant No.1 that his mother has accepted the gift and been in possession of the said property since 1984. But one of the most crucial conditions of valid "hiba" is declaration. Whether the donor has made a declaration in the presence of any witness is a crucial aspect that needs to be adjudicated. DW1 admitted that his elder brother told him about the oral gift. But his elder brother was not examined before this Court and moreover, for the first time, the defendant No.1 has stated about his brother informing about the oral gift to his mother and this aspect was not pleaded either in the written statement or in the chief examination affidavit. Admittedly, none of the eyewitnesses were examined to establish that the donor has

made a declaration in respect of oral gift made by him in favour of mother of DW1. When the donee failed to establish any one of the conditions required for considering a gift as valid "hiba" as per the decision of **Sultan Miya** case, the said gift cannot be considered as valid 'hiba'.

23. When the alleged oral gift by father of PW1 in favour of mother of DW1 was not proved, the subsequent gift deed by mother of DW1 in favour of DW1 in respect of suit schedule property cannot be considered as valid gift and thereby the defendant No.1 cannot be held as owner of the suit schedule property.

24. The following are some of the grounds raised by appellant/defendant No.1 in this appeal:

> "6. The lower court has failed to consider that the defendant's (ought to be plaintiff's) father who was the Govt.employee did not purchase the plot admeasuring 540 square yards vide sale deed doc no.585/ 1960 out of his salary has (ought to be "as') his salary was meagre.
> 7. The lower court has failed to consider that in the year 1964 when the appellant's and respondent's grandfather sold away the ancestral agricultural land, the said amount was used to clear the debts taken for the purpose of disputed property. The appellant's father was subsequently in full time at hotel and kirana business in the said common property.
> 8. The lower court has failed to consider that the house that was constructed on the said property and development of the property was done at later stage with the balance money that was received from sale consideration of the agricultural land.
> 9. The lower court has failed to consider that in the narration of the sale deed of the doc.no.585/1960 the sale consideration of the plot which was Rs.1500/- was received in instalments that is Rs.1,210/- was received in net cash and the remaining amount of Rs:290/- will be received before the sub

> registrar Mahabubnagar. which clearly shows that the plaintiff in the OS 88/2013 did not have complete amount to purchase the said plot and it goes to prove that they had to generate the money and hence sell the common agriculture land to clear the debt that was created for the purchase of the disputed plot."

25. In **Biraji @ Brijraji and another v. Surya Pratap and others**[8] the Apex Court observed that in the absence of pleadings submitted at the appropriate stage within the stipulated time, any amount of evidence submitted later on, will not be taken into consideration by the Court. The above grounds were not pleaded by the defendant No.1 in the written statement, as such, the appellant is not entitled to plead the above grounds at this appellate stage. Even otherwise, as per ground No.9, the plaintiff has no complete amount to purchase the said plot and had to generate the money. If the said plea is considered to be true and correct, an inference can be drawn that out of Rs.1500/-, Rs.1210/- was contributed from plaintiff side and there is no contribution at all from the side of the defendants.

26. It is the contention of the appellant/defendant No.1 that his family along with their grandfather stayed in the suit schedule property as co-owners and not as tenants though the said property was registered in the name of father of plaintiff. On the other hand,

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[8] Civil Appeal Nos.4883-4884 of 2017 decided on 03.11.2020

it is the contention of the plaintiff that since the father of the defendant No.1 had no source of income, the father of plaintiff has permitted the family of defendants stay in the suit schedule property. As seen from the record, the defendant Nos.3 and 4, who were alleged to be tenants of mulgies forming part of suit schedule property, filed suit for injunction against plaintiff and defendant No.1. If at all the defendant No.1 alone is the exclusive owner of the suit schedule property, there is no necessity for the tenants to file suit against plaintiff as well as defendant No.1 and they could have filed suit only against the defendant No.1. If at all the father of the defendant No.1 was the exclusive owner of the suit schedule property, there could have been some document to establish that father of defendant No.1 is the owner of the suit schedule property but no documentary evidence was adduced on behalf of the defendants. Even if we presume that father of defendant No.1 was the absolute owner of the suit schedule property, there was no necessity for the father of the plaintiff to offer the suit schedule property to the mother of defendant No.1 in the form of alleged oral "hiba".

27. The learned counsel for the appellant by referring to Section 41 of the Transfer of Property Act contended that as the former

owner has expressly indicated transferee to be the owner of the property in question and the said transferee transfers the same for consideration, in my opinion such a matter would be one where the property has marketable title vesting in the donee with valid rights passing to any transferee from him. It is pertinent to note that as stated supra, the defendant No.1 failed to establish the prime conditions to consider a valid 'hiba' i.e., the declaration as to when, where and in whose presence the declaration was made by father of the plaintiff in favour of mother of defendant No.1, the question of expressly indicating transfer to be the owner of the property does not arise. Moreover, there is no material before this Court to establish that the transferee transferred the property for consideration. There is no whisper either in the written statement or in the chief examination of DW1 that there was any consideration at the time of transfer of alleged property.

28. It is the contention of the defendant No.1 that father of plaintiff died in the year 2009 and there was already a registered gift deed in the name of Smt. Anwari Begum i.e., mother of DW1 but on the other hand, it is contended that the gift made by father of plaintiff was oral gift. It is further contention of defendant No.1 that father of the plaintiff never opposed or made efforts to cancel the gift.

It is pertinent to note that when the alleged gift was 'oral gift' more particularly when the defendant No.1 failed to establish the conditions for considering the said oral gift as valid "hiba", the question of cancelling the alleged gift does not arise.

29. It is the contention of the defendant No.1 in one of the grounds that the appellants were in possession of the suit schedule property since 1960 and filing of the suit in the year 2013 after lapse of 53 years is barred by limitation. It is to be seen that defendant No.1 admitted in the cross examination as DW1 that his grandfather and father sold their land in Tornal Village of Medak District in 1964 and settled in Mahabubnagar. When the father of defendant No.1 settled at Mahabubnagar in the year 1964, the question of family of defendant No.1 being in possession of the suit schedule property since 1960 does not arise. Moreover, the trial Court in the impugned judgment elaborately discussed about the limitation aspect and arrived to the conclusion that as per Article 65 of the Limitation Act the suit is filed within 12 years i.e., either from 2010 (date of knowledge of plaintiff about the alleged gift deed executed by mother of defendant No.1 in favour of defendant No.1) or 2002 (date of execution of alleged gift deed executed by mother of defendant No.1 in favour of defendant No.1). There is no material placed by the

appellant to show that the plaintiff is having knowledge about the alleged gift deed even prior to 2002.

30. It is the contention of the plaintiff that the possession of defendants in the suit schedule property is permissive in nature and not otherwise. As per Ex.A10 i.e., order dated 20.08.2013 in I.A.No.146 of 2013 in O.S.No.39 of 2013, the plaintiff was shown as respondent No.3, wherein the plaintiff herein filed counter and contended that in the year 1966 his father's younger brother Mohd. Ibrahim Khan came from Bidar and he is none other than father of first respondent (defendant No.1 herein) and started residing in the house of father of respondent No.3. It was further stated that in the year 1972 the father of first respondent passed away and the mother of first respondent continued to reside in that room along with first respondent. It was further stated that respondent No.1 did not evict the suit schedule property by making false promises and let out the schedule property to the petitioners (defendant Nos.3 and 4 herein), who constructed kitchen batti towards residential room of third respondent on the southern side of the suit schedule premises, due to which entire room and surrounding area became heated with high degree and apart from that the petitioners have closed the four feet lane which leads to the resident of respondent No.3. Thus, the

above counter averments disclose that though the defendant No.1 was allowed permissive possession in respect of suit schedule property for considerable period, since the tenants i.e., defendant Nos.3 and 4, who were inducted into the suit schedule property by way of lease through defendant No.1, have made it difficult to the plaintiff to lead a normal and peaceful file. Perhaps that might be the reason as to why the plaintiff is not allowing the defendants to continue in the suit schedule property.

31. As per Ex.A13 i.e., notice, the Commissioner, Mahabubnagar Municipality has directed the defendant No.1 to furnish ownership documents, link documents etc., within 15 days from the date of receipt of the notice. It was further observed in the said notice that H.No.1-5-37/1 is standing in the name of father of plaintiff i.e., Mohd.Ismail Khan.

32. As per Ex.A15 i.e., Endorsement dated 28.08.2017 made by Office of the Mahabubnagar Municipality, the defendant No.1 stated in the enquiry that property gifted to him by his paternal uncle late Sri Md. Ismail Khan by writing on a cigarette pocket case and also his paternal brother Sri A.K.Habeeb – ur – Rahman Khan elder son of Late Sri Md. Ismail Khan gifted the said property by writing on a piece of paper. On one hand, the defendant No.1 is contending that

the gift was an oral one and on the other hand as per Ex.A15 the gift was made on a cigarette pocket, which is quite contrary to the version adopted by the defendant No.1 in the written statement and chief examination affidavit of DW1.

33. It is the contention of the defendant No.1 that the trial Court failed to consider Ex.A8 i.e., ownership certificate issued by the Municipal Authorities don 29.08.2002 based on the gift deed. The plaintiff in support of his contention relied upon Ex. A19 i.e., Proceedings dated 28.12.2017 issued by the Commissioner, Mahabubnagar Municipality, wherein it was stated that defendant No.1 has not submitted any document through his mother got the possession of the said property. It was further observed that as per the gift deed bearing document No.1982/2002, dated 16.05.2002 (gift deed executed by mother of the defendant No.1 in favour of defendant No.1) the total extent area in respect of house No.1-5-37/1 is 115.56 square yards but as per the field verification report (Ex.A16) the total extent area is 92 square yards and as per the Memo No.293/2013 dated 24.01.2013 (Ex.A17) there is no link document to document No.1982/2002. Accordingly, the Proceedings No.A1/7514/2014, dated 28.04.2016 that were issued in the name of defendant No.1 in respect of H.No.1-5-37/1 and part of said house

No.1-5-37/1/A were suspended and the ownership was restored in the name of Sri Late Md. Ismail Khan.

34. It is the contention of the defendant No.1 that Exs.A12 to A19 are fabricated document. It is pertinent to note that the plaintiff has filed originals of Exs.A13 to A19. But no efforts were initiated by the defendants to establish that the said documents were forged and fabricated. Except contending that the said documents are forged and fabricated, the defendants have not placed any material before this Court to substantiate their contentions.

35. In one of the grounds of appeal, the appellant-defendant No.1 contended that the family of the plaintiff and defendant No.1 has common mess/kitchen in the house until 1984. From this contention, it is very much clear that the father of the plaintiff had permitted the family of his brother i.e., father of the defendant No.1 to stay in a portion of the house as father of defendant No.1 was not having any source of income. Though the defendant No.1 contended that his father used to run hotel business, there is no material placed before the Court to substantiate the said contention.

36. The appellant-defendant No.1 contended that father of plaintiff in order to avoid insecurity of the family of defendant No.1 over the

suit schedule property by any of his LRs, has orally gifted a part of the property in the name of mother of defendant No.1. If at all the father of defendant No.1 was co-owner of the property purchased by father of the plaintiff, then what made the mother of defendant No.1 to accept the suit schedule property, which is not equal share of the property purchased by the father of the plaintiff. If at all the property was purchased by sale of joint family properties and the family of defendant No.1 were deprived of their legitimate share, then certainly they would have filed a suit before competent civil court and seek the remedy. It is not even the case of defendant No.1 that they were aggrieved by the improper distribution of the property purchased by sale of joint family properties.

37. In **Uppara Anjinappa (died) and others v. T. Khasim Sab (died) per LR and others**[9] this Court observed that the plea of adverse possession is a double edged sword and any plea of adverse possession contains an admission that the opposite party is the owner of the property but the said title of the opposite party has been extinguished because of the open hostile possession with animus by the claimant for the statutory period, therefore, by pleading adverse possession a party admits the title of the opposite

[9] 2018 (5) ALT 511 (S.B.)

party which however is said to be extinguished. In the case on hand, the defendant No.1 is taking the plea of adverse possession by contending that their family has been in continuous possession of the suit schedule property for the last three decades. But in view of the principle laid down in the above said decision, by pleading adverse possession, a party admits the title of the opposite party, which however, is said to be extinguished. In the case on hand, the defendant No.1 in the cross examination as DW1 admitted that his grandfather and father sold their land in Tornal Village of Medak District in 1964 and settled in Mahabubnagar. But even as per the version of the defendant No.1 it is the father of the plaintiff, who has purchased an extent of 540 square yards in the year 1960 itself. It is not the contention of the defendant No.1 that right from the date of purchase of 540 square yards they are in possession of the suit schedule property, which is part and parcel of above mentioned extent of 540 square yards. Thus, it is the family of the plaintiff, who were in possession of 540 square yards of land including the suit schedule property right from the date of purchase. Moreover, the plaintiff has submitted that the possession of the family of the defendant No.1 in respect of suit schedule property is 'permissive'; the defendant No.1 without any right or authenticity has alienated part of suit schedule property to defendant No.2; part of suit

schedule property was leased to defendant Nos.3 and 4, who alleged to have fixed kitchen batti in the leased portion (mulgi) that resulted in severe heat in the residential portion of the plaintiff; the defendants also alleged to have closed the way through which the plaintiff can reach his residential portion; and unable to bear the same, the plaintiff was constrained to file the suit.

38. It is the contention of the appellant that the trial Court failed to consider Exs.A3 and A4. A perusal of Ex.A4 clearly discloses that the donor i.e., mother of defendant No.1 declared that she is the owner and possessor of ancestral house and she did not whisper anything in Ex.A4 about the oral gift alleged to have been declared by the father of plaintiff in favour of mother of the defendant No.1. There is no averment in Ex.A4 about the link document or the mode of acquiring the said property by mother of defendant No.1.

39. Thus, viewed from any angle, the defendant No.1 neither established that his father is the absolute owner of the suit schedule property nor established that the suit schedule property was orally gifted by father of plaintiff to the mother of defendant No.1 and more particularly the defendant No.1 has taken multiple pleas, which are contrary to his other pleas. The defendant No.1 in support of his contentions, has not produced any documentary evidence except

examining himself and defendant No.2, who is the subsequent purchaser of part of suit schedule property from defendant No.1. Since the defendant No.1 failed to establish his ownership over the suit schedule property, the defendant No.2 cannot claim right or ownership over the part of suit schedule property. Though the defendant No.1 took several pleas, no scrap of paper is filed to substantiate those pleas.

40. In view of the above facts and circumstances, this Court is of the considered view that the trial Court after considering all the relevant aspects has arrived to a right conclusion in decreeing the suit in favour of the plaintiff and against the defendants. Thus, there is no necessity to interfere with the findings of the trial Court. Hence, the appeal is devoid of merits and it is liable to be dismissed.

41. Accordingly, this appeal is dismissed. There shall be no order as to costs.

As a sequel, pending miscellaneous applications, if any, shall stand closed.

JUSTICE M.G. PRIYADARSINI

Date: 23.02.2024
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