Abdul Khader (died) per LRs. Vs Muzaffaruddin (died) per LRs. and Others

Court: Andhra Pradesh High Court

Date of Decision: May 31, 2010

Acts Referred: Mahomedan Law â€" Section 164

Citation: (2010) 5 ALT 313

Hon'ble Judges: Vilas V. Afzulpurkar, J

Bench: Single Bench

Advocate: K. Prathap Reddy, for S. Niranjan Reddy, for the Appellant; Basith Ali Yavar, for M.A. Rasheed Qureshi, for Respondents 1, 8 to 11, 13, 14, 16, 18, 19 and 20, for the Respondent

Final Decision: Allowed

Judgement

Vilas V. Afzulpurkar, J.
Plaintiffs in OS. No. 147 of 1993 on the file of the VI-Addl. Senior Civil Judge, City Civil Court, Hyderabad are

the appellants. They filed the said suit seeking to pass a preliminary decree for partition and separate possession in respect of Matruka property

bearing H. No. 17-1-238 to 241, admeasuring 1640 sq. yards situated at Hat Mama Bhaktawar, near Santhoshnagar colony, Hyderabad. The

suit was dismissed under the impugned judgment and decree dated 30.11.2000. The parties are referred to as they are arrayed in the suit.

2. The facts, which are borne out by the record, are as follows,

The original plaintiff and the defendants 1 to 4 are brothers being the sons of late Sharfuddin and late Mahboob Bee. Late Sharfuddin was the

owner of the suit house bearing No. 17-1-238 to 241 as well as other two houses, with which we are not concerned in this suit. It is alleged in the

plaint that late Sharfuddin executed a gift deed dated 3.9.1953 whereby the suit schedule house was gifted to his wife Mahboob Bee, out of love

and affection and for the services rendered by her, and towards her life maintenance. The other two houses were exclusively gifted to the first

plaintiff and the first defendant. Sharfuddin died on 11.1.1966, whereas his wife Mahboob Bee died on 20.6.1988. The plaintiff, therefore, alleges

that after the death of Mahboob Bee, the life interest created for Mahboob Bee with respect to the suit schedule house came to an end and

thereby the first plaintiff and the first defendant are entitled to equally share the Matruka property. The plaintiff alleges that on 1.2.1993 he

demanded the defendants to make partition of the suit schedule house and for separate possession and as the same having been denied, the

present suit was filed for partition and separate possession, on 11.2.1993.

3. The defendants 1 to 4 resisted the suit by filing their written statement claiming that under the registered gift deed dated 3.9.1953 Mahboob Bee

became exclusive owner of the suit schedule house and under the same document the first defendant was exclusively gifted another house bearing

H. No. 17-1-385 to 387. It is further alleged that Mahboob Bee during her life time executed a registered sale deed dated 27.8.1970 in favour of

wife of first defendant and as such there is no Matruka property left by her, when she died on 20.6.1988. It is alleged that the plaintiff being aware

of the sale made by Mahboob Bee in favour of wife of first defendant, did not challenge the same and only in the year 1993 he filed the present suit

for partition suppressing the said sale.

4. The original plaintiff and the first defendant died pending the suit and the plaintiffs 1 to 6 are the legal heirs of original plaintiff, whereas the

defendants 9 to 29 were impleaded as legal heirs of first defendant.

5. The plaintiff No. 3 examined himself as P.W.1 and a close relative of the plaintiff as P.W.2. Similarly the defendant No. 24 was examined as

D.W.I and the defendant No. 9 as D.W.2 who is the wife of first defendant. On behalf of the plaintiff, Exs.A1 to 7 were marked and crucial

document among them is Ex.A6- copy of registered gift deed executed by late Sharfuddin dated 3.9.1953 which is in Urdu and the English thereof

was marked as Ex.A7. The defendants also filed and marked original gift deed as Ex.B1 which is in Urdu and its English translation as Ex.B2. The

registered sale deed dated 27.8.1970 under which D.W.2 purchased the suit house is marked as Ex.B3 and English translation thereof is marked

as Ex.B4. The trial Court framed the following issues,

(1) Whether the plaintiff is entitled for preliminary decree for partition and separate possession of the suit property?

(2) Whether the suit property is not Matruka property of late Mahboob Bee and not liable for partition as contended by the defendants 1 and 2?

(3) To what relief?

The trial Court came to the conclusion that the translations of Ex.A7 and Ex.B2 do not tally with each other and as per Ex.B2-the translation, there

is no life interest created in late Mahboob Bee. The trial Court also held that even if any conditions or restrictions are placed on Mahboob Bee, as

a donee under Ex.B1, based upon Section 164 of the Mulla''s Principles of Mahomedan Law, the said condition is void and thereby Mahboob

Bee acquired an absolute interest in the said gifted property i.e., the suit schedule property. The trial Court also held that since late Mahboob Bee

sold the said house to D.W.2 under Ex.B3, the plaintiff is not entitled to claim that there is any Matruka property left by late Mahboob Bee and

consequently the suit was dismissed.

6. In this appeal Sri K. Prathap Reddy, learned senior counsel appearing for the plaintiffs/appellants contended that the trial court''s findings are

perverse and contrary to the record and suffer from misreading of Ex.B1. He also submitted that under Mohammedan Law there is no prohibition

for gifting of the usufructs while making a gift. He submits that Mohammedan Law recognizes the principle that a property can be gifted to a donee

by reserving the usufructs either in the donor or gifting the usufructs alone to a donee. The learned senior counsel submits that Section 164 of the

Mulla''s Principles of Mahomedan Law, relied upon by the trial Court, is misapplied to the present case by thinking as if there is a gift of corpus

and he fairly submits that even if Ex.B1 is treated as a gift of corpus so far as Mahboob Bee is concerned, and if there is any condition for

restriction on it''s enjoyment by the donee, to that extent, the condition would become void, however that is not the case at present and a fair

reading of Ex.B1-gift deed clearly shows that Sharfuddin intended to gift life interest only to Mahboob Bee and as such the gift is clearly valid. He

relied upon a decision of the Privy Council reported in AIR 1948 134 (Privy Council) as well as on the decision of a Division Bench of this Court

reported in Shaik Mastan Be and Ors. v. Shaik Bikari Saheb and Ors. 1958 (2) An.W.R. 473.

7. Sri Basith Ali Yavar, learned Counsel appearing for the respondents submits that Ex.B1-gift deed is clear and unambiguous, inasmuch as the

intention of the donor was clear from the fact that out of three houses referred to in Ex.B1, he gifted one house to his wife Mahboob Bee and one

house each to his both sons i.e., the first plaintiff and the first defendant. The learned Counsel also states that there is nothing in Ex.B1 to indicate

that only life interest was gifted to late Mahboob Bee. He, therefore, submits that any recital in the gift deed putting restriction on the enjoyment of

the property by Mahboob Bee would be rendered void to the extent of such restriction. The learned Counsel submits that the trial Court has rightly

appreciated the said fact that during her life time itself Mahboob Bee sold the suit schedule house to D.W.2 and the plaintiff never objected nor

instituted any proceedings questioning the same. The learned Counsel, therefore, supported the trial Court''s judgment and contended that the suit

is not maintainable as the sale deed-Ex.B3 in favour of D.W.2 is not challenged in the suit.

8. While hearing of this appeal, I found that there are two translations of Ex.B1. While Ex.B1 is original document in Urdu, Ex.A6 is a copy of

Ex.B1. Ex.A7 is English translation of Ex.B1 filed by the plaintiff along with Ex.A6, whereas Ex.B2 is the English translation of Ex.B1 filed by the

defendants along with the original document-Ex.B1. Since there is a variation in the said two English translations, the trial Court has chosen to

follow Ex.B2-English translation, while interpreting Ex.B1-gift deed. During the hearing of this appeal, when I was confronted with these two

contradictory translations, I requested both the learned Counsel to prepare an agreed translation of Ex.B1. The learned Counsel for the

respondents has filed an English translation of Ex.B1, which was not accepted by the learned Counsel for the appellants. Thereupon, I directed the

Registry to get Ex.B1 translated through Translation and Printing Department of the High Court and it was accordingly prepared and examined by

both the learned Counsel who have made detailed submissions in the appeal, as briefly mentioned above. Thus the problem relating to true

translation mentioned above is required to be resolved. As mentioned above, though there was oral evidence led by both the parties, but

controversy centers around the true and correct interpretation of Ex.B1, dated 3.9.1953 and both the learned Counsel rightly did not place any

reliance on the said oral evidence and have concentrated primarily on Ex.B1 and the meaning it conveys.

9. The questions, therefore, that fall for consideration are (1) the effect of purport of Section 164 of Mulla''s Principles of Mahomedan Law? and

(2) whether Ex.B1-gift deed falls within the provisions of the said Section 164?

10. Section 164 of Mulla''s Principles of Mahomedan Law reads as under,

164. Gift with a condition,- When a gift is made subject to a condition which derogates from the completeness of the grant, the condition is void,

and the gift will take effect as if no conditions were attached to it (s).

The Muslim personal law relating to gifts was very elaborately considered by the Privy Council in Nawazish Ali Khan v. Raza Khan (1st supra)

and it will be useful to extract the paragraphs 19 and 21 of the said judgment for the purpose of appreciating the issued involved,

19. ...In their Lordships opinion this view of the matter introduces into Muslim law legal terms and conceptions of ownership familiar enough in

English law, but wholly alien to Muslim law. In general, Muslim law draws no distinction between real and personal property, and their Lordships

know of no authoritative work on Muslim law, whether the Hedaya or Baillie or more modern works, and no decision of this Board which affirms

that Muslim law recognises the splitting up of ownership of land into estates, distinguished in point of quality like legal and equitable estates, or in

point of duration like estates in fee simple, in tail, for life, or in remainder. What Muslim law does recognise and insist upon, is the distinction

between the corpus of the property itself (ayn) and the usufruct in the property (manafi). Over the corpus of property the law recognises only

absolute dominion, heritable and unrestricted in point of time; and where a gift of the corpus seeks to impose a condition inconsistent with such

absolute dominion the condition is rejected as repugnant; but interests limited in point of time can be created in the usufruct of the property and the

dominion over the corpus takes effect subject to any such limited interests.

....

This distinction runs all through the Muslim law of gifts - gifts of the corpus (hiba), gifts of the usufruct (ariyat) and usufructuary bequests. No doubt

where the use of a house is given to a man for his life he may, not inaptly, be termed a tenant for life, and the owner of the house, waiting to enjoy it

until the termination of the limited interest, may be said, not inaccurately, to possess a vested remainder. But though the same terms may be used in

English and Muslim law, to describe much the same things, the two systems of law are based on quite"" different conceptions of ownerships. English

law recognises ownership of land limited in duration; Muslim law admits only ownership unlimited in duration, but recognises interests of limited

duration in the use of property.

....

Their Lordships think that there is no difference between the several Schools of Muslim law in their fundamental conception of property and

ownership. A limited interest takes effect out of the usufruct under any of the schools. Their Lordships feel no doubt that in dealing with a gift under

Muslim law, the first duty of the Court is to construe the gift. If it is a gift of the corpus, then any condition which derogates from absolute dominion

over the subject of the gift will be rejected as repugnant; but if upon construction the gift is held to be one of a limited interest the gift can take

effect out of the usufruct, leaving the ownership of the corpus unaffected except to the extent to which its enjoyment is postponed for the duration

of the limited interest.

11. In a decision of this Court reported in Shaik Mastan Be and Ors. v. Shaik Bikari Saheb and Ors. (2nd supra) a similar question was

considered and it was held that the intention of the donor has to be ascertained from the document as to whether he intended to gift only life time

interest in the property to the donee and for that purpose a reading of the entire document is essential. This Court further held as follows,

After considering all these cases it is clear that a Sunni under Hanafi Mohammedan Law cannot without consideration convey ownership of the

property with limitations for the life of the donee. But where the ownership is vested in somebody and only the enjoyment of the property is

conveyed or received, the rules does not apply. Therefore limitation on the enjoyment of property is permissible though it is not allowed on

ownership. This separate enjoyment is known as ariat and therefore if the reservations in favour of the donor under Exhibits B1 and B2 be of this

kind, they would be valid.

The passages in Exhibits B1 and B2, which persuade us to hold their having conveyed immediate rights in the donees can be shortly stated. The

relevant part of Exhibit Bl reads as follows:

I have...conveyed to you under dakhal the hereunder schedule mentioned immovable property...belonging to me and created rights to your in the

property now itself.

Similarly, the relevant passage in Exhibit B2 reads thus:

I have...conveyed to you under dakhal the hereunder schedule mentioned immovable property...belonging to me and created rights to you in the

property now itself.

In our opinion, the intention indicated by these parts in the two documents is that the donees were being then vested with the rights, which the

owner had. Therefore, what the donor preserved for herself was the retention of the properties which, according to the later passages in the

documents were for enjoying the produce till her life-time. Mastan Bi, in her cross-examination as P.W.1, admits that the 1st defendant and farm

servants plough the lands and that the 3rd defendant was paying the kist. She further admits that she herself had not leased the lands to other

persons. Also Madhav Rao, D.W.I states that the 1st defendant was cultivating the lands. D.W.2 who is the 3rd defendant swears that the 1st and

the 2nd defendants were in possession of 8 1/2 acres. Exhibits B9 and B10 are certified copies of the application for transfer of pattas in favour of

the donees. Exhibits B5 to B8 are abstracts of cultivation accounts for Faslis 1358, 1359, 1360 and 1361 respectively showing that defendants

Nos. 1 to 3 were in possession of Survey No. 110. In addition, Exhibit B11 shows the 1st defendant as having raised tobacco on acre 1-50 cents

in 1950-51. In these circumstances, we have no doubt that Mastan Bi conveyed ownership of the properties, which she got from her brother to

her nephew and niece on the dates of Exhibits B1 and Exhibit B2 and also delivered possession to the donees. It is equally clear that she reserved

only rights in the usufructs for herself during her life, because she had in both the documents stipulated that she shall not effect any alienation and

create any right and interest in respect of the property in any manner during her life. Then Mastan Bi in her cross-examination as PW.1 admits that

if the 1st and 2nd defendants maintain her, they should enjoy the property. That was the arrangement. It follows that the donor reserved to herself

enjoyment of the produce of the properties and vested ownership in the donees. That beding the nature of the arrangement. It follows that the

donor reserved to herself enjoyment of the produce of the properties and vested ownership in the donees. That being the nature of the

arrangement, the limitation on the produce being enjoyed for life-time, would not be void.

12. In the light of the above legal position, if we consider Ex.B1 with the help of its translations on record, the following position emerges. As per

Ex.A7 the relevant recitals are as follows,

...Since I have reached the age of my normal life, and there is no guarantee of life, as such I wish to gift with possession these houses, out of natural

love and affection and in lieu of obedience and for purposes of welfare and life-time maintenance of my wife, Smt. Mahboob Bi, in favour of my

own two sons Sri Abdul Qadar, age (35) years and Muzaffaruddin, age (24) years, excepting them there is no other lawful heir to me. That I have

the full right and authority to gift the above said property. Accordingly the house bearing No. IIS-9-238 to IIS-9-241 situated at Hat Mama

Bakathwar valued O.S. Rs. 150/- (Rupees One hundred fifty only) is gifted by way of Gift Settlement, in favour of my wife Smt. Mahboob Bi till

her life time and the house No. IIS-9-251 to IIS-9-253 situated at Hat Mama Bakthawar valued O.S. Rs. 150/- (Rupees One hundred fifty only)

is gifted in favour of my son Abdul Qadar and the house No. I-4-385 to 387 situated at Imliban valued O.S. Rs. 200/- (Rupees two hundred only)

is gifted in favour of my son Muzaffaruddin....

13. Similarly, as per Ex.B2-translation the relevant portion is as follows,

...As I have become old aged and I reached to an age where there is no hope of my life and death position, therefore, in view of natural love and

faithful services rendered by my wife Smt. Mahboob Bee and my two sons namely Abdul Quader, aged 35 years, and Muzaffaruddin, aged 24

years, for looking after me and maintaining me with love and affection and except them nobody is there as my legal heirs and successors. As such I

have full, sole and absolute right to gift them with possession during my life time, my below mentioned owned and possessed property, in the

manner hereunder, The house bearing Nos. IIS-9-238 to IIS-9-241 situated at Mama Baqtawar Haat, valued O.S. Rs. 150/-in favour of my wife

Smt. Mahboob Bee; the house bearing Nos. IIS-9-251 to IIS-9-253 situated at Mama Baqtawar Haat, valued O.S. Rs. 150/-in favour of my son

Abdul Quader; and the house bearing Nos. I-4-385 to 387 situated at Imlibun valued O.S. Rs. 200/- to and in favour of my another son

Muzaffaruddin....

14. As per the translation supplied by the Registry of this Court, the relevant portion is as follows,

...Since I have become aged, and there is no hope of life, therefore I am intending to gift with possession of my houses, in view of natural love and

affection and faithful services for purpose of maintenance in favour of my wife Smt. Mahboob Bee to the extent of this document and two own

sons of this Executant namely Abdul Khader, aged 35 years, and Muzaffaruddin, aged 24 years, except themselves nobody can be legal heir, in

my life time, of which I have complete rights. Therefore, duly obtaining legal opinion having gifted away with possession the house bearing Nos.

IIS-9-238 to IIS-9-241, situated at locality Hatt Mama Bakhtawar, value Rs. 150/- O.S. (Osmania Sikka), to the extent of this document in

favour of this executant''s wife Smt. Mahaboob Bee, house bearing No. IIS-9-251 to IIS-9-253 situated at locality Hatt Mama Bakhtwar, valued

Rs. 150/- O.S. in favour of this executant''s son Abdul Khader, house bearing No. I-4-385 to 387, situated at locality Imli Ban, valued Rs. 200/-

O.S. in favour of this Executant''s son Muzafaruddin....

15. A conjoint reading of all the translations of Ex.B1 shows that Sharfuddin had recorded natural love and affection as well as services rendered

by his wife and gifted the house property to her for making provision for her life time maintenance. The translations of Exs.A7 and B2 are similar to

that extent, except the word ''life time maintenance'' is missing in Ex.B2-translation. The translation supplied by the Registry specifically states that

apart from the natural love and affection, faithful services, ''for the purpose of maintenance'' the gift was made in favour of Mahboob Bee. The

Urdu text used the word ''parvarish'' and ''Tajist''. While parvarish means nourishment, sustenance, protection, patronage, rearing, fostering,

upbringing etc., Tajist means, for the purpose. The said two words, therefore, unmistakably point out that Sharfuddin wanted to make provision for

life time maintenance of his wife and for her sustenance and in recognition of services rendered by her and out of natural love and affection, the said

gift deed was made. It is also very striking to note that in all the three translations it is mentioned that the donor had gifted the suit schedule house to

Mahboob Bee as well as to his both sons viz., Abdul Khader and Muzaffaruddin. Exs.A7 and Ex.B2-translations show that the gift was made by

Sharfuddin in favour of Mahboob Bee as well as to his sons. The translation supplied by the Registry also confirms to the same. A reading of the

entire text of Ex.Bl-gift deed would unmistakably point out that while gifting two other house properties to each of his two sons, the suit schedule

property was gifted by Sharfuddin to his wife Mahboob Bee for her life time maintenance and for her protection as well as to his two sons

together. The Privy Council in Nawazish Ali Khan v. Raza Khan (1st supra) succinctly stated that gifts of the usufruct (ariyat) is recognized under

Muslim law and such gift is not a gift of corpus. Further there was no necessity for the donor to write the names of his two sons also while making

the gift to his wife Mahboob Bee if really corpus was gifted to late Mahboob Bee. The trial Court has completely missed the aforesaid aspect and

proceeded on the footing as if it is a gift of corpus to Mahboob Bee. It is no doubt true that if any condition is attached to a gift of corpus, which

runs inconsistent with or in derogation of gift, such condition is held to be void as per Section 164 of the Mulla"s Principles of Mahomedan Law.

To my mind, a fair reading of the document Ex.B1 with the help of translations on record, shows that the gift deed-Ex.B1 in respect of suit

schedule property was in two parts, while usufruct was gifted to Mahboob Bee, the corpus was gifted to both of his sons. When once we reached

to the conclusion that the gift to Mahboob Bee was only of usufruct and not corpus, Section 164 of the Mulla"s Principles of Mahomedan Law by

itself will have no application to the facts of the present case. Consequently after the death of Mahboob Bee on 20.6.1988, the suit schedule house

stands gifted to both the sons, each having an equal share. The conclusion of the trial Court that there was no Matruka property left by Mahboob

Bee is, therefore, unsustainable. Equally inconsequential the further contention of the defendants that Mahboob Bee exercised her right and sold the

property to D.W.2 under Ex.B3. Once it is found that Mahboob Bee had only life interest and was entitled to the usufruct only for her life

sustenance, it cannot be said that she had a right to alienate the property. As noticed above, Mahboob Bee died on 20.6.1988 and the present suit

for partition was filed on 11.2.1993 within about five years of her death. Once the plaintiff is held to be entitled to seek a decree for partition, any

unauthorized alienation made by Mahboob Bee has to yield to the said partition. It is not necessary for the plaintiff to separately question the

alienation made by Mahboob Bee under Ex.B3 in favour of D.W.2. In my view, therefore, the points 1 and 2 deserve to be answered in favour of

the plaintiffs/appellants and consequently the judgment of the trial Court is liable to be reversed.

16. Accordingly the appeal is allowed, the judgment and decree passed by the trial Court are set aside and the suit filed by the plaintiffs/appellants

shall stand decreed as prayed for. No costs.