

**(2003) 04 MAD CK 0217**

**Madras High Court**

**Case No:** A.S. No. 25 of 1982

Amino Bibi (Died) and 6 Others

APPELLANT

Vs

Ummu Salma Bibi(died) and 10  
Others

RESPONDENT

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**Date of Decision:** April 10, 2003

**Acts Referred:**

- Land Acquisition Act, 1894 - Section 30

**Hon'ble Judges:** Prabha Sridevan, J; P. Shanmugam, J

**Bench:** Division Bench

**Advocate:** Chitra Sampath for Mr. T.R. Rajaraman, for the Appellant; S. Gopalarathnam, for Mr. B. Ravindran for R1, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Prabha Sridevan, J.

The plaintiff who filed the suit for partition has filed this appeal. The facts of the matter are as follows:

One Naina Mohammad Sahib had three wives. Through his first wife, he had a son and a daughter Habeeb Sahib and Amina Bibi. The plaintiff is Amina Bibi and the first and the contesting defendant is the wife of Habeeb Sahib who is no more. After the death of their mother, Naina Mohammad Sahib took a second wife. She also died. And then, he married one Fathima Bibi. Naina Mohammad Sahib died on 05-01-1949 and at that time, his heirs as per Muslim Law were his wife Fathima Bibi and his children Habeeb Sahib and Amina Bibi. The wife took one eighth share and the son and daughter took fourteen upon twenty four share and seven upon twenty four share respectively in the estate of Naina Mohammad Sahib. The aforesaid Fathima Bibi and Amina Bibi filed O.S. No. 28 of 1942 which was subsequently transferred and renumbered as O.S. No. 41 of 1956 for partition of their shares. The suit was decreed, an appeal was filed, which was also dismissed. Pending the

appeal, Habeeb Sahib was appointed as a receiver in respect of shares of his sister and step-mother. Thereafter, the parties arrived at a compromise. A final decree was passed on 29-03-1953 in terms of the compromise, specific properties to the parties and the parties also took possession by filing execution petitions. On 17-09-1959, Habeeb Sahib executed a gift deed in favour of his wife, the first defendant, giving his undivided 14/24 share in all the items of properties. Habeeb Sahib had no children. The plaintiff, who is the appellant herein claimed that the gift was void and that until the final decree, her brother was not entitled to specific properties and therefore, possession could not have been given pursuant to the gift deed and the legal proceedings were conducted by Habeeb Sahib in his own name, which would go to show that the deed of gift never came into effect and therefore, according to the plaintiff, she and the first defendant being Habeeb Sahib's only heirs, the wife would take 1/4th share, the sister would be entitled to half share and in the absence of other heirs, the other quarter share would also go to them. Therefore, the suit was filed claiming 3/4th share. The first defendant resisted the suit stating that her husband was in "khass" possession of the property, the deed of gift came into effect and that possession was given by her husband and she had also accepted it and that during his life time he never denied the settlement deed on the contrary he confirmed it by his conduct. Therefore, the first defendant prayed that the suit should be dismissed. The Trial Court framed several issues and came to the conclusion that the gift was valid and that the documentary evidence would show that the first defendant had been in possession and enjoyment of the said properties and that all her acts of ownership had been confirmed by her husband, the settlor and dismissed the suit.

The learned counsel for the appellants raised the following questions:

- (1) Whether the gift of an undivided share can be held to be valid if possession is not given and
- (2) whether the Doctrine of Mushaa will not be attracted to the present case?

According to the learned counsel until the compromise decree specific properties had not been given and the compromise decree was only on 29-03-1963. Therefore, on the date of the settlement deed dated 17-09-1959 (Ex-B29 = Ex-A1), the settlor, Habeeb Sahib was not in possession of identified property for him to hand over possession.

2. On the contrary, the learned Senior Counsel appearing for the respondents would submit that when a Mohammedan dies his heirs succeed to his estate as tenants in common to their respective shares. Therefore, on 05-01-1949, Habeeb Sahib became entitled to 14/24 share in the properties and the fact that specific properties were not allotted to each of the heirs will not make a difference to the right of Habeeb Sahib to enjoy his properties or to transfer his share passing a clear title to the transferee. Exs-B30 to B32 were also pointed out to show that even the

appellant had recognized the entitlement of her sister-in-law (first respondent). These exhibits are proceedings u/s 30 of the Land Acquisition Act where both the appellant and the first respondent (the settlee) were claimants and at that point of time the appellant did nothing to challenge the first respondent's right to claim compensation as the settlee under ExA1. It was also submitted that Exs-B1 and B2 are rent deeds entered into between the first respondent and third parties in the years 1968-70 wherein the deceased Habeeb Sahib had attested and this would go to show that he had confirmed the fact that he had settled the property and handed over possession. It was also submitted that Ex-A1 shows clearly that possession had been given to the first respondent and this statement will bind not only the settlor but also all the persons who claim under him which will include the appellants. For all these reasons it was prayed that there was no merit in the appeal.

3. Under Mohammedan Law, the wife's share in her husband's property is one fourth when there were no children and one eighth share if there are children. In this case, Habeeb Sahib and Fathima Bibi had no children but for the settlement deed, the first defendant would have got only one fourth share. There is no dispute that Naina Mohammed Sahib left considerable properties and the appellant had inherited 7/24th share in her father's property. A reading of the settlement deed shows why Habeeb Sahib held compelled to execute the settlement deed.

Therefore, the reason for executing the settlement deed and the factum of settlement has been clearly spoken to. Ten days after Ex-A1, the first defendant had executed a General Power of Attorney dated 27-09-1959 marked as Ex-B45. In this, the first respondent has referred to the settlement as follows:

She had appointed her husband as the Power of Attorney to conduct the Court cases and to execute sale, mortgage or "bogyam" in respect of the property. Therefore, the intention of the parties was clear. The husband wanted to ensure that his wife was not deprived of his estate by virtue of the laws of inheritance applicable to them and at the same time the wife ensured that the husband would enjoy the properties without any restrictions as if he was the owner by appointing him as her Power Agent. Exs-B1 and B2 also clearly show that Habeeb Sahib had confirmed the right, title and interest of his wife by attesting the title deeds. Under Mohammedan Law, when the gift was between the husband and wife the actual vacation by one party and taking of separate possession by the other is not necessary.

4. In AIR 1932 13 (Privy Council) it was held that if the settlement deed recorded declaration of delivery of possession and the deed was handed over, it would be sufficient to establish transfer of possession. It was open to the plaintiff to say that notwithstanding the declaration of delivery, possession was not actually handed over. But in this case, where the donor has declared that possession has been handed over and the appellant herein has come-forward with a claim of her share in her estate, the appellant should have got into the box to prove that delivery was not given to prove her case.

5. Next we come to the question whether the gift was hit by the Doctrine of Mushaa. According to the Mohammedan Law, when undivided shares are subject matter of the gift and it is not possible to ascertain with precision the property that would pass on to the donee, then the gift was hit by the Doctrine of Mushaa. A Division Bench of this Court in [Kairum Bi and Others Vs. Mariam Bi and Another](#), has held as follows:

"The reason for the rule that the gift of an undivided share (mushaa) is bad is to be found in the desire to avoid what has been described as confusion. If the property is capable of separate possession but nevertheless the donor does not separate what he intends to give from his other possessions, one cannot find out what he intended to give and there is bound to be confusion. The reason of the rule is wholly absent in a case where the donor gave away the entirety of her interest in the estate."

The judgment in AIR 1930 71 (Oudh) was referred to in this Division Bench in which it is held as follows:

"...We may legitimately ask as was asked by Lord Macnaughten in the case of Mahomed Buksh Khan V. Hossein Bibi, ILR 15 Cal 684: 15 Ind App 81 (PC), what confusion can it introduce if the owner of a definite share in immovable property makes a gift of that share in favour of another person and has himself nothing left in that property after the gift? It seems to us that the only answer that can be given to this question is in the negative."

6. In the present case, Habeeb Sahib had given his entire 14/24th share in his father's estate under Ex-A 1, and possession of such nature as he was capable of giving at this stage had also been delivered. The fact that subsequent to Ex-A1, the allotment of shares was made and delivery was taken by the husband by filing execution petitions will not make a difference to the right under the settlement. The possession which he had over the undivided share got crystallized into the specific shares after the compromise decree and the subsequent proceedings. The fact that Habeeb Sahib is named in the Court cases also does not in any way nullify the legal effect of the settlement deeds since the preliminary decree was prior to the settlement deed. Further under the Power of Attorney, Ummu Salina Bibi had given her husband the right to act on her behalf in all the court proceedings,

7. When there is no dispute regarding the right of Habeeb Sahib to represent his wife in the proceedings at any point subsequent to the compromise decree, and when Habeeb Sahib attested the rent deed in which the first defendant has been referred to as the owner of the property, the doubt raised by the appellants deserves to be rejected. The Court below had rightly considered the questions from the proper perspective and no interference is required. The appeal is therefore, dismissed.