(2009) 02 CAL CK 0036

Calcutta High Court

Case No: F.A. No. 116 of 1993

Musst. Kulson Mallick and Another		APPELLANT
	Vs	
Manowara Mallick and Others		RESPONDENT

Date of Decision: Feb. 3, 2009

Hon'ble Judges: Prasenjit Mandal, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: D.P. Adhikary and G.H. Mallick, for the Appellant; Priyabrata Mukherjee, Murari Chakraborty and Sumit Kumar Roy, for the Respondent

Final Decision: Allowed

Judgement

Prasenjit Mandai, J.

The Judgment of the Court was delivered by:

1. This appeal is directed against the judgment and decree dated 31st August, 1991 passed by the learned Assistant District Judge, Ninth Court, Alipore, District South 24-Parganas in Title Suit No. 77 of 1984 whereby the learned Assistant District Judge has dismissed the suit.

2. The short facts leading to the filing of the appeal are that defendant No. 1/respondent No. 1 herein became the owner of the suit property as described in the schedule of the plaint by way of a decree of partition. The plaintiff No. 1 /appellant No. 1 herein is the wife of the defendant No. 1 and they were issueless. They adopted the plaintiff No. 2, nephew of the defendant No. 1, as their son when the plaintiff No. 2 was three/four days of age. The plaintiff No. 2 was brought up by them. There was a partnership firm between the plaintiff No. 2 and the defendant No. 1 under the name and style of National Brick Works and a partnership deed was created to the effect that the plaintiff No. 1 would get 25%, the plaintiff No. 2 would get 50% and the defendant No. 1 would get 25%. On 25.07.1983 the defendant No. 1 made an oral gift in respect of the suit property in favour of the plaintiffs and

subsequently a deed of gift was made. Thus, the plaintiffs became the absolute owners of the suit property. The defendant No. 1 mixed with girls of ill-reputation and the plaintiff No. 1 protested in vain. Thereafter, the defendant No. 1 left the plaintiffs and begun to reside with one girl named Manowara Khatun. Thereafter in 1984, the plaintiffs were surprised by a notice in the Statesman Patrika to the effect that the suit property would be sold by the defendant No. 1 and so advertisement was made to receive protest, if any, within 10 days from the date of publication of the advertisement. Thus, the plaintiffs came to know that the defendant No. 1 was going to sell the suit property and so they have filed the suit for declaration of their right, title and interest in the suit property as well as permanent injunction restraining the defendants from interfering with the possession of the plaintiffs in respect of the suit property.

3. On the other hand, the defendant No. 1, (since deceased) contended inter alia that he was the absolute owner of the suit property and that he was the sole proprietor of the brick field business. The plaintiff No. 1 is his wife; but they had no issue. They did not adopt the plaintiff No. 2 as their son. The partnership deed in respect of the said brick field was done under coercion, undue influence exercised by the plaintiffs upon him. He did not make any gift of the suit property in favour of the plaintiffs. Nor did he execute any Hiba deed as alleged by the plaintiffs. He collected rents from the tenants and he inducted tenants in the suit premises. He also filed suits for eviction against three tenants and these three tenants were paying rents to him. He married Musst. Manowara Khatun in 1981 and one child was born out of such second marriage in 1982. The defendant No. 1 and his second wife lived in the fourth floor of the suit premises. He also gave talak to the plaintiff No. 1. The plaintiff No. 1, in collusion with the plaintiff No. 2, threatened the defendant No. 1 with dire consequences unless he executed a deed of partnership in respect of the brick field and so a deed of partnership was prepared. The plaintiff No. 2 was brought up by the defendant No. 1 out of mercy since his father had No. sufficient means to maintain his children. The story of adoption is totally false. Adoption is not permissible under the Mahomedan Law. Upon consideration of evidence of both the sides, learned Trial Judge has dismissed the suit. Being aggrieved, the plaintiffs/appellants have preferred this appeal.

4. After hearing the submissions of the learned Advocates of both the sides and perusing the materials-on-record, we find that admittedly the defendant No. 1 (since deceased) became owner of the suit property as mentioned in the schedule of the plaint in the suit for partition being numbered as T.S. No. 1677 of 1981 under a compromise decree between himself and other co-sharers passed by the learned Judge, City Civil Court, Calcutta. Admittedly, there are nine flats in the suit property out of which eight flats were let out to different tenants and the fourth floor was retained by the defendant No. 1 for his own residence. Admittedly, five tenants were paying rents to the defendant No. 1 directly and the defendant No. 1 filed three suits for ejectment against the three tenants, now pending before the Court at Sealdah.

These three suits were filed prior to the date of the so-called deed of Hiba dated 25.07.1983. Admittedly, the plaintiff No. 1 is the wife of the defendant No. 1 and the plaintiff No. 2 was the nephew of the defendant No. 1. Admittedly, the defendant No. 1 married one Musst. Manowara Khatun in 1981 for the second time and one child was born to them out of such second wedlock. Admittedly, the defendant No. 1, Manowara Khatun and their child have been residing at Budge Budge since November, 1983. Now the main crux of the dispute between the parties is whether the defendant No. 1 (since deceased) made Hiba in respect of the suit property in favour of the plaintiffs.

5. Mr. D.P. Adhikary, learned Advocate for the plaintiffs has contended that the defendant No. 1 took adoption of the plaintiff No. 2 immediately after his birth and that there is a custom for adoption in the families of the plaintiffs though as a general custom adoption is prohibited under the Mahomedan Law. He has contended that the deed of partition and the oral Hiba were done by the defendant No. 1 on 25.07.1983. Thereafter, the transcription of the said oral Hiba was made by P.W.10, Mr. A.F. Mondal, learned Advocate appointed by the defendant No. 1 and such transcription had been done in presence of the witnesses beside the plaintiffs on the same day. This was done as after execution of the deed of partnership dated 25.07.1983. He became ill and so he did the oral Hiba in order to avoid future disputes amongst his heirs. He has also submitted that the plaintiff No. 2 was brought up by the plaintiff No. 1 and the defendant No. 1 as their son and the defendant No. 1 was described as the father of the plaintiff No. 2 in all matters relating to education of the plaintiff No. 2 in school and college. So the execution of the partnership deed and the subsequent oral Hiba in favour of the plaintiffs is not at all a matter of surprise and those were done properly by the defendant No. 1 in presence of the witnesses including the plaintiffs. But the Court below has failed to appreciate the evidence-on-record properly and dismissed the suit.

6. On the other hand, Mr. Mukherjee, learned Advocate for the respondents has contended that the plaintiff No. 2 in collusion with the legal brain of the P.W.10, Mr. A.F. Mondal, an Advocate prepared the deed of Hiba and the all the conditions required for fulfillment of the execution of the Hiba have not been complied with. So the deed of Hiba is nothing but a collusive one. He has contended that the oral Hiba was not properly done. So the trial Court was right in rejecting the claim of the plaintiffs. He has also contended that adoption as claimed by the plaintiffs cannot be accepted because the Mahomedan Law does not permit such adoption. He has contended that the deed of Hiba had been done on a one year old stamp paper of Rs. 5/-. So this fact casts a doubt about the execution of the deed. He has contended that as the defendant No. 1 gave talak to the plaintiff No. 1 by Exhibit-A in 1987, the plaintiffs are not at all entitled to get the suit property beside Dilmohor and maintenance for the period of iddat. So the learned Trial Judge has rightly dismissed the suit. He has supported the judgment.

7. So far as Hiba is concerned, the plaintiffs are required to prove the three essential conditions such as:

(1) Declaration of gift by the donor

(2) Acceptance of the gift express or implied by or on behalf of the donee, and

(3) Delivery of possession of the subject of the gift by the donor to the donee.

8. So far as declaration and acceptance are concerned, we find that there are both oral and documentary evidence on this matter. Beside the oral evidence of the plaintiff Nos.1 & 2 the other witnesses including the near relations of the parties, one tenant and one Advocate who transcribed the deed of gift have proved the Hiba in respect of the suit property by the defendant No. 1. Exhibit-1 is the written document in support of the Hiba. The P.W.Nos.1, 2, 3, 4 and 21 have supported declaration of the gift by the donor and ac.ceptance of the gift by the donee.

9. So far as possession is concerned, admittedly the plaintiffs have been residing at the suit property on the fourth floor of the five storied building in suit. As stated earlier, admittedly, since November, 1983 the defendant No. 1, his second wife and the daughter by second wife have been residing at Budge Budge. From the convincing evidence it has also been proved that previously the defendant No. 1 resided at Domzur, Howrah in spite of having ownership over the suit property. The defendant No. 1 is presumed to have possession over the suit property till the date of execution of the Hiba deed, Exhibit-1. In the instant case, the Hiba deed was done by the husband in favour of his wife and one child. It is not always necessary that the donor was formally to depart from the suit property at once to indicate that he had delivered possession of the property gifted. But from his subsequent conduct that he left the suit property along with his second wife and one child named Dipali on 11.11.1983, it is obvious that he delivered possession of the suit property in favour of the plaintiffs (donees).

10. So far as collection of rent by the defendant No. 1 from the five tenants is concerned, it has been contended by the plaintiffs that the defendant No. 1 was collecting rents from such tenants on behalf of the plaintiffs. On the other hand, the defendant No. 1 claimed that he had been collecting rents from the tenants as owner and not on behalf of the plaintiffs and that he filed three suits against three tenants before the Court at Sealdah. But on perusal of the materials in this regard, we find that those three suits had been filed before the date of execution of the Hiba that is on 25.07.1983. So it is natural conduct that as the relationship of the husband and wife was subsisting till then the defendant No. 1 being guardian of the plaintiffs would take all necessary steps for protection and preservation of the properties of the plaintiffs. So, we hold that the defendant No. 1 had taken steps relating to suits on behalf of the donees.

11. From exhibited documents such as Exhibit Nos.10 to 13, we find that the plaintiffs have taken steps for mutation of their names with the Kolkata Municipal Corporation in respect of the suit property and they paid Municipal taxes for the year 1983-84. No explanation is forthcoming from side of the defendant No. 1 why he did not take steps to protest against mutation or he did not pay Municipal taxes for the said period. Subsequently, he began to pay Municipal taxes as per evidence-on-record. But there is no mention of his name of paying the tax on his own behalf.

12. From the evidence-on-record, it reveals that the defendant No. 1 was very much aware of the execution of the deed of Hiba (Exhibit-1) on 25.07.1983. The defendant No. 1, in spite of knowing such fact, did not take. any step for cancellation of the gift in favour of the plaintiffs. Such inaction on the part of the defendant No. 1 proves that he had gifted the suit property in favour of the plaintiffs.

13. The defendant No. 1 contended that he did not know P.W.10, Mr. A.F. Mondal, an Advocate of Alipore Court at all and that he did not engage him as lawyer to transcribe the deed of gift at all. But such contention of the defendant No. 1, we hold, has been belied by the convincing evidence of the plaintiff Nos.1 and 2 and also by the evidence of the learned Advocate (P.W.10) himself. The plaintiffs may be interested to say in support of the plaint case but on scrutiny of the evidence of the P.W.10 it appears to us that he has deposed as an independent witness in the true sense. During cross-examination, nothing has been obtained to discredit his statement. He has stated unequivocally that it was the defendant No. 1 who engaged him to prepare the deed of the gift. As regards transcription of the deed of the gift on a stamp paper of Rs. 5/- which was one year old prior to the date of execution, from the evidence on record, it has appeared that the defendant No. 1 was a man of business and he had to take steps before the banks for different loans, etc. So it was not unbelievable that he would possess a stamp paper of Rs. 5/- which was one year old. We do not find any justified ground to reject the evidence of the P.W.10. Above all, from the evidence on record, we find that the defendant No. 1 admitted in his deposition that during pendency of the suit tenants vacated the possession of flats and in those flats the plaintiff No. 2 inducted other tenants in the said premises. It is not the evidence that the plaintiff No. 2 inducted tenants on behalf of the defendant No. 1 in the said premises. It is in evidence that the plaintiff No. 2 is realising rents from such tenants. This could happen when the plaintiff No. 2 acts as one of the owners of the suit property. This fact has also proved that the plaintiffs have possession over the suit property.

14. Another tenant of the suit property namely P.W.4, Mr. Jahangir, has supported the fact of transcription. of the Hiba deed by the P.W.10. This witness has stated that defendant No. 1 had executed the Hiba in his presence. This P.W.4 may be the friend of the plaintiff No. 2 but in fact he is known to all the plaintiffs and the defendant No. 1 since before his induction in the suit property. On scrutiny of the evidence of

P. W.4 we are of the view that from the trend of cross-examination nothing has been obtained that this witness has enmity towards the defendant No. 1 and for that reason he may depose falsely against him. So we are of the view that his evidence is acceptable. Again, we find that one near relation that is P.W.3, Golam Hussain Mullick, brother of the plaintiff No. 2, has supported the fact of gift. On scrutiny of his evidence, we do not find anything to disbelieve in his statement. During cross-examination it has been taken that "I shall be glad if my brother gets any property". This is, we hold, a general statement and it may be the situation that such statement was taken by putting a leading question to him. Except this sentence nothing has been obtained to disbelieve in him. For that reason, we hold that the evidence of P.W.3 cannot be discarded and it should be accepted.

15. Admittedly, the defendant No. 1 and the plaintiffs executed a deed of partnership on 25.07.1983 at Howrah Court admitting the plaintiffs as partners of the brick field. After doing so, admittedly he came back home at the suit property and he became ill. He has 25/30 close relations. There are 50/60 occupants in the suit property beside the plaintiffs but we find that none of them has supported the contention of the defendant No. 1. On the other hand, the plaintiffs have been able to prove the plaint case not only by close relations but also an independent witness namely P.W.10 who was appointed by the defendant No. 1 to transcribe the fact of gift.

16. The defendant No. 1 has also contended that the plaintiffs collected rents forcibly and they did mutation forcibly. This contention of the defendant No. 1, we hold, cannot be believed. If it were so, the defendant No. 1 could have taken steps against the plaintiffs and he could have raised objection against mutation of the names of the plaintiffs in respect of the suit property but the defendant No. 1 did not do so.

17. As regards adoption, we find that no issue was framed in this regard; but from the overwhelming evidence-on-record, the conduct of the parties to the suit and also inaction on the part of the defendant No. 1, we hold that unless there was adoption, the defendant No. 1 would not have consented to describe himself as father of the plaintiff No. 2, that he would not have allowed the plaintiff No. 2 as a partner of his business of brick field and that he would not have allowed the plaintiff No. 2 to take possession of the suit property and to induct tenants thereat. The deed of partnership describes the plaintiff No. 2 as son of the defendant No. 1 (vide Exhibit No. 30). Though the Mohamedan Law does not recognize adoption in general, according to explanation to the para 347 of the Mulla"s book on the Mahomedan Law if there is a custom in the family, it will prevail over the law. The facts stated above clearly indicate that the defendant No. 1 was treating the plaintiff No. 2 as his adopted son. Though the question of adoption is not an issue in the suit, yet we find that the defendant No. 1 treated the plaintiff No. 2 as his son. P.W.6, B.B. Chattopadhyay, a Senior Teacher of the Bangabasi Collegiate School, Calcutta-12

has stated that he knows the plaintiff No. 2 and the defendant No. 1 personally and that the defendant No. 1 is the father of the plaintiff No. 2 and he has identified the defendant No. 1 in Court. He has proved the admission register of the said school Exhibit 26-a) to show that the defendant No. 1 is the father of the plaintiff No. 2 as per admission register. He has been cross-examined in details and from his cross-examination nothing has been obtained to shake the credence of his statement. So his evidence inspires confidence. Similarly, the plaintiffs have been able to prove the admit card of the University of Calcutta issued in favour of the plaintiff No. 2 (Exhibit 8-a) which also lays down that the defendant No. 1 is the father of the plaintiff No. 2 and this admit card was issued in the year 1979 with mention of the registration number of the year 1976-77 that is long before the date of Hiba on 25.07.1983. Above all, P.W.21, Ayesha Bibi, is the real mother of the plaintiff No. 2 and she has admitted that she and her husband gave the plaintiff No. 2 to the plaintiff No. 1 and the defendant No. 1 for adoption and in fact adoption had been made by them. She has also stated that there is a custom in the family for adoption and. that is why after adoption the plaintiff No. 2 was deprived of his father''s property. We do not find any reason to disbelieve in the statement of the mother of the plaintiff No. 2. Even the Indo-Bangladesh passport [Exhibit Nos.2-2(b)] have disclosed that defendant No. 1 is the father of the plaintiff No. 2. Thus; we find that there is overwhelming evidence, both oral and documentary, to the effect that all along the plaintiff No. 2 has been recognized as son of the plaintiff No. 1 and the defendant No. 1.

18. So whether adoption is valid or not this question is kept open for future decision if the situation arises. But the fact remains proved that the defendant No. 1 all through recognized the plaintiff No. 2 as his son.

19. There is no bar to make the gift of immovable property even to a putative son under the Mohamedan Law.

20. The plaintiffs were compelled to file the suit when their attention was drawn to the advertisement published in the Statesman Patrika dated 04.08.1984 for sale of the suit property. So the plaintiffs have proved the cause of action. The issue No. 1 that is cause of action as framed by the learned Trial Court is decided in favour of the plaintiffs. In that suit, the defendant No. 1 filed a written statement in details but they did not place any counter-claim for cancellation/revocation of the gift against the plaintiffs but simply defended the suit. So such facts and circumstances will go against the defendant No. 1.

21. Mr. Adhikary, learned Advocate for the appellants, has submitted before us that the plaintiffs filed a petition before the learned Trial Judge to decide whether Manowara is the wife of a Rickshaw puller and she has a son by him. That petition has not been disposed of. So the appeal should be disposed of with passing orders of remand for disposal of the said application. This submission, we hold, cannot be accepted because ultimately after depth of the defendant No. 1, Manowara has

been made one of the respondents in the appeal. When the suit was disposed of finally by the learned Trial Judge, the matter of filing of the application merges with the judgment and decree. So it is not all required for sending the matter on remand for decision. This submission, therefore, cannot be accepted. The appeal can well be disposed of on merits without the order of remand as submitted.

22. The deposition of the plaintiffs duly corroborated by the unshaken evidence of a close relation (P.W.3), one common friend cum tenant (P.W.4) and an Advocate appointed by the defendant No. 1 inspires confidence. On the other hand, evidence of the defendant No. 1 is full of contradictions for which his deposition cannot be accepted save what he had admitted. The following are some of the instances to show controversy in the statement and conduct of the D.W.1:-

(i) The defendant No. 1 advertised for sale of the suit property in 1984 though he had gifted the property to the plaintiffs earlier and did not obtain any permission to advertise for sale of the suit property from them.

(ii) The defendant No. 1 has stated in his Examination-in-Chief that he did not know one Azim Khan and that no servant named Azim Khan was ever engaged by him. But he appears to be a witness to the deed of Hiba (Exhibit-1). During cross-examination he admitted that he donated Rs. 500/- on the occasion of marriage ceremony of Azim Khan and that he was his employee till his death.

(iii) One Indra Kumar was a tenant under the D.W.1 in respect of one flat of the suit property. When he vacated the said flat, the plaintiff No. 2 inducted a new tenant in respect of the said vacant flat. But the D.W.1 stated that he does not know the name of the tenant signifying the fact that the said premises is under control of the plaintiff No. 2.

(iv) The defendant No. 1 has stated that Mr. Joseph, a tenant vacated the possession of Flat-A in August, 1990 in his favour but during cross-examination it revealed that Mr. Joseph handed over the key of the tenanted flat to the Executive Magistrate at Sealdah and the key is still lying with the custody and possession of the Executive Magistrate at Sealdah.

(v) The defendant No. 1 has stated on oath that he did not describe himself as father of the plaintiff No. 2; but his own document of the deed of partnership describes himself as the father of the plaintiff No. 2 (vide exhibit No. 30).

23. So we are of the view that the evidence of the D.W.1 cannot be believed save his admission.

24. The learned Trial Judge has observed that the story of the defendant No. 1''s becoming ill on 25.07.1983 is without any foundation. This observation, we hold, is contrary to the pleadings. As observed earlier, admittedly, the defendant No. 1 became ill after return from Howrah Registry Office. In fact, the defendant No. 1 himself admitted that after coming back from Howrah Registry Office in the evening

to his residence with illness, he became unconscious and bedridden and lost his senses temporarily. The fact of general illness remains unchallenged but the special defence of the defendant No. 1 that he became unconscious, bedridden and lost his sense is without any support of medical evidence or from other convincing evidence of the inmates of the suit property. Though the defendant was ill on the relevant day, there is no evidence that the defendant No. 1 was not physically and mentally fit to make the gift of immovable property on that day. His contention of becoming unconscious appears to us as a pretext to show that he was not capable of making any deed of gift. But the direct evidence-on-record and the circumstantial evidence have negatived such contention. Rather his illness of a general nature on the relevant day proves that he was eager to dispose of the suit property to avoid future complications amongst his heirs.

25. Thus, upon analysing the evidence-on-record, we find that the plaintiffs have produced oral and documentary evidence in support of their claim of gift by the defendant No. 1 in their favour. The close relations and the tenant who is equally known to both the parties are the best persons for becoming the witnesses to the gift. In the instant case, the oral evidence of the plaintiff Nos.1 and 2 have been duly corroborated by the evidence of the brother of the plaintiff No. 2, one tenant who knew the parties to the suit for a quite long time and an independent person that is the learned Advocate who transcribed the deed of the gift afterwards. We hold, they are the best witnesses in support of the gift in favour of the plaintiffs. On the contrary, the defendant No. 1 was not able to produce any convincing evidence in support of his becoming unconscious or that he did not make any gift in favour the plaintiffs. We, therefore, hold that the plaintiffs are in possession of the suit property and that whatever action the defendant No. 1 did post gift, he did so as an agent of the plaintiffs and in no other capacity. Thus, we are of the view that the plaintiffs have been able to prove the essential conditions for a valid gift and the fact that such gift was transcribed afterwards by an Advocate engaged by the defendant No. 1 to prepare the deed of gift (Exhibit-1). What better evidence could be expected from the plaintiffs in support of the Hiba. So upon consideration of the totality of the evidence on record, we are of the view that the Hiba in respect of the suit property by the defendant No. 1 has been properly proved. Consequently, the plaintiffs have acquired right, title, interest and possession over the suit property. The observations of the learned Trial Judge contrary to such fact cannot be supported.

26. It is contended on behalf of the defendants/respondents that the defendant No. 1 gave talak to the defendant No. 1 in 1987 and so except Denmohar and maintenance for iddat period the plaintiff No. 1 is not entitled to get any benefit of the suit property. This submission, we hold, cannot be accepted because once the right, title, interest and possession are vested in the plaintiff No. 1 the same could not be divested except due process of law. The contention of divorce in 1987 cannot denude the plaintiff No. 1 from the benefits of the suit property obtained in 1983.

27. We are of the view that the opinion of the trial Court that the three essential conditions to prove a gift valid under the Mohamedan Law are not satisfied, cannot be accepted. Similarly, we cannot support the observations of the learned Trial Judge that the deed of gift (Exhibit-1) had been created only to grab the valuable property belonging to the defendant No. 1 without paying a single amount as consideration to him. As it was a matter of gift question of payment of consideration did not arise at all.

28. As a result, the observations of the learned Trial Judge on the issue Nos.3 and 4 to the effect that Hiba in respect of the suit property was not valid and acted upon and that the plaintiffs have not acquired any right, title and interest of the suit property cannot be supported. Those two issues are, therefore, decided in favour of the plaintiffs: The issue No. 2 on maintainability of the suit is not pressed before us. Therefore, the issue Nos.5 and 6 that is entitlement to any relief or other reliefs are also decided in favour of the plaintiffs.

29. In view of the above findings, judgment and decree of the learned Trial Judge dated 31.08.1991 cannot be sustained.

30. The appeal, therefore, succeeds. It is allowed. The judgment and decree dated 31.08.1991 against the defendant No. 1 is hereby set aside.

31. The suit stands decreed against the substituted heirs of defendant No. 1/respondent No. 1. The plaintiffs/appellants do get a decree for declaration that they are the owners of the suit property as described in the schedule of the plaint and that they have right, title, interest and possession in the suit property. The defendants/respondents are permanently restrained from interfering with the possession of the plaintiffs/appellants in the suit property. The suit stands dismissed ex parle against the defendant No. 2.

32. Considering the circumstances, there will be no order as to costs.

33. Urgent xerox certified copy of this order, if applied for, be made available to the learned Advocate for the parties on their usual undertakings.

Banerjee, J.