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Nasib Ali Vs Wajed Ali

None

Court: Calcutta High Court

Date of Decision: July 14, 1926

Acts Referred:
Registration Act, 1877 â€" Section 49

Citation: AIR 1927 Cal 197

Hon'ble Judges: Suhrawardy, J; Graham, J

Bench: Full Bench

Judgement

Suhrawardy, J.
The plaintiff-respondent brought the present suit for khas possession basing his title upon a gift by the admitted owner of

the property, Etim Meah, in favour of the plaintiff"s vendors. The defendant denied the gift and claimed title under purchase from some of the heirs

of Etim. The trial Court, on the evidence, found that the gift was not proved and dismissed the plaintiff"s suit. On appeal the learned Subordinate

Judge found upon the evidence on the record that the oral gift coupled with delivery of possession as alleged by the plaintiff, was satisfactorily

proved and made a decree in his favour. This gift was made by Etim Miah on the eve of his departure for Mecca, where he subsequently died. The

donees were the daughter"s son of Etim. They were fatherless and were brought up from their childhood by him. Etim had a son to inherit his

properties; and before he left for Mecca he made a gift of some of his properties in favour of his grandsons. About that time Etim also executed a

deed of gift in favour of his grandsons, viz., on the day before his departure; but for some reason or other it was not registered. The learned

Subordinate Judge is of opinion that the gift was complete as soon as there was delivery of possession by Etim and that the unregistered deed of

gift should be left out of consideration as it could not he received in evidence u/s 49 of the Registration Act. I think that the view taken by the lower

appellate Court is substantially correct and in perfect accord with the Mahomedan Law.

2. It is argued before us on behalf of the appellant that the deed of gift, not being registered under the Registration Act, is not admissible in

evidence and no other evidence of the fact of the gift can be admitted u/s 92 of the Evidence Act. This argument is based upon the fallacious

assumption that the gift was created by the deed. u/s 123 of the Transfer of Property Act a gift must be made by an attested, registered instrument.

But that section is not applicable to Mahomedans. That being so, the law that we have to follow in the present case is the Mahomedan Law. The

essentials of a gift under the Mahomedan Law are a declaration of heba by the donor, an acceptance, express or implied, of the gift by the donee,

and delivery of possession of the property, the subject-matter of the gift, according to its nature. A simple gift can only be made by going through

the above formalities and no written instrument is required. In fact no writing is necessary to validate a gift; and if a gift is made by a written

instrument without delivery of possession, it is invalid in law : see the case of Sudik Husain Khan v. Hashim Ali Khan and Ors. [1916] 38 All. 627.

The position under the Mahomedan Law is this : that a gift in order to be valid must be made in accordance with the forms stated above; and even

if it is evidenced by writing, unless all the essential forms are observed, it is not valid according to law. That being so, a deed of gift executed by a

Mahomedan is not the instrument effecting, creating or making the gift but a mere piece of evidence. It may so happen after a lapse of time that the

evidence of the observance of the above forms might not be forthcoming, so it is sometimes thought prudent; to reduce the fact that a gift has been

made into writing. Such writing is not a document of title but is a piece of evidence.

3. The law with regard to the gift being complete by declaration and delivery of possession is so clear that in a case before their Lordships of the

Judicial Committee Kamarunnissa Bibi v. Hussaini Bibi [1880] 3 All. 266, where a gift was said to have been made in lieu of dower, their

Lordships held that the requisite forms having been observed it was not necessary to enquire whether there was any consideration for the gift or

whether there was any dower due. The case of Karam Ilahi v. Sharfuddin [1916] 38 All. 212 is similar in principle to the present case. There also

a deed relating to the gift was executed. The learned Judge held that if the gift was valid under the Mahomedan Law it was none the less valid

because there was a deed of gift which, owing to some defect, was invalid u/s 123, Transfer of Property Act, and could not be used in evidence.

4. The next, question that calls for consideration is whether a document like the present one executed by a Mahomedan donor after he made a gift

to show that he had made it in favour of the donee is compulsorily registrable under the Registration Act. u/s 17 of the Registration Act an

instrument of gift must be registered. By the expression "instrument of gift of immovable property" I understand an instrument or deed which

creates, makes or completes the gift,, thereby transferring the ownership of the property from the executant to the person in whose favour it is

executed. ID order to affect the immovable property, the document must be a document of transfer; and if it is a document of transfer it must be

registered under the provisions of the Registration Act.

5. The present document does not affect immovable property. It does not transfer the immovable property from the donor to the donee. It only

affords evidence of the fact that the donor has observed the formalities under the Mahomedan Law in making the gift to the donee. I am prepared

to go so far as to hold that a document like the present one is not compulsorily registrable under the Registration Act, or the Registration Act does

not apply to a so-called deed of gift executed by a Mahomedan. But for purposes of the present case it is not necessary to go so far because I

hold that this document is only a piece of evidence, and conceding that it should, have been registered, the effect of its non-registration is to make it

inadmissible in evidence u/s 49 of the Registration Act. Apart from this piece of evidence the lower Court has found upon oral evidence on the

record that a valid gift was made by Etim in favour of his grandsons Monohar and Habijali, the plaintiff"s vendors. This being the principal issue in

the case, and it being decided against the appellant, the appeal must fail. It is argued that some other issues were raised at the trial in the first Court,

but they have not been decided by the lower appellate Court. Though these issues were decided against the appellant by the trial Court there was

no cross-appeal and the judgment does not show that they were raised in the lower appellate Court.

6. The appeal is dismissed with costs.

Graham, J.

7. I agree.