

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

.....
CSA No. 13/2017

Reserved on 27.02.2025.
Pronounced on 18.04.2025.

- 1. Abdul Majid Bhat S/O Late Mohammad Ismail Bhat.**
 - 2. Mst. Humeera Majid W/O Abdul Majid Bhat.**
- Residents of Bagath, Srinagar.**

..... Appellant(s)/Petitioner(s)

Through: Mr. H. U Salathi, Advocate.

Versus

Gulzar Ahmad Bhat.
S/O Mohammad Ismail Bhat
R/O Bagath, Srinagar.

.....Respondent(s)

Through: Mr. Hakim Suhail Ishtiaq, Advocate.

CORAM: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

JUDGMENT

1. The instant Civil Second Appeal has been filed under Section 100 of the Code of Civil Procedure, by the appellants herein, against the judgment and decree dated 17.07.2017, (for short '*Impugned judgment*') passed by the court of Principal District Judge, Bandipora (for short '*Appellate court*') in Civil 1st Appeal titled as "*Gulzar Ahmad Bhat vs. Abdul Majid Bhat and Another*", filed against the judgment and decree dated 28.05.2015, passed by the court of Munsiff Sumbal (for short '*trial court*') in a suit titled as '*Abdul Majid Bhat and Another vs. Gulzar Ahmad Bhat*'.

2. FACTS

- (i) The plaintiffs/appellants herein filed a suit for Declaration and perpetual Injunction against the defendant/respondent herein before the trial court on the premise that *Mohammad Ismail Bhat* being father of

appellant 1 and respondent herein and father-in-law of appellant 2 herein (for short '*Estate holder*'), upon his death was survived by his wife, two sons and daughters and owned land measuring 14 Kanals and 11 Marlas (12 Kanals and 08 marlas in survey No. 1048 and 02 Kanals 03 Marlas in survey No. 1049) situated at *Shilwat, Sonawari* (for short '*suit property*'), as also a residential house with land underneath and appurtenant thereto situated at *Barbarshah*. Srinagar, besides, a share in business styled as "Appolo Motors" jointly held by him with his wife, appellant 1 and respondent herein and that pursuant to a family settlement, the respondent herein was given the goodwill and the lease hold rights in the aforesaid business, whereas the daughters, except one were given their share in cash and kind in full and final settlement of their rights in the joint family assets, while as the other daughter had been orally gifted the aforesaid residential house and that the suit property came to be orally gifted by him; the Estate holder to the plaintiffs/appellants herein and were put in exclusive possession thereof to the exclusion of others including the respondent herein and claimed independent of the said oral gift perfection of their title over the suit property on account of being in adverse possession thereof, and that the Estate holder had made an express declaration of the aforesaid oral gift qua the suit property on 12.06.1987, 04.05.1988 and 07.02. 1989 respectively before the *Sadar Mufti, Central Darul-Fathua*, Srinagar, confirming the bequeathing of the suit property and transfer of its possession in equal shares in favour of the plaintiffs/appellants herein, consequent to which mutations bearing No's 814,816 and 836 came to be attested in their favour

and that on 08.03.2001, defendant/respondent herein attempted to interfere with the possession of the appellants over the suit property by cutting some trees, resulting to registration of an FIR against him in the local Police Station.

(ii). On the strength of the aforesaid facts, the plaintiffs/appellants in the suit supra sought the following reliefs:-

(a) A decree for declaration to the effect that the plaintiff are in possession in equal shares as owners thereof of the land measuring 14 Kanals 11 Marlas covered under Khasra No. 1048 to the extent of 12 Kanals and 8 marlas and Khasra No. 1049 to the extent of 02 Kanals 3 marlas situated at RakhShelwat Tehsil Sonawari.

(b) A decree for perpetual injunction restraining the defendant from interfering in the possession of the plaintiff over the land.

(iii). The defendant/ respondent herein after appearing before the trial court in the suit through his counsel on 04.03.2002, though sought time to file written statement to the suit, yet did not file the same and eventually on 31.05.2003, ex-parte proceedings were initiated against defendant/respondent herein.

(iv) The plaintiffs/appellants herein to support their claim lodged in the suit supra examined as many as 11 witnesses in ex-parte before the trial court.

(v). On 01.06.2012, the defendants/respondent herein filed an application before the trial court for setting aside of the ex-parte proceedings which application came to be however, dismissed on 18.03.2012, aggrieved

whereof the defendant/respondent herein challenged the same before this Court in a petition which also came to be dismissed on 06.09.2013, however, the defendant/respondent herein was permitted to join the proceedings and argue the case before the trial court.

(vi). The trial court after hearing the counsel for the parties in the suit, decreed the same vide judgment and decree dated 28.05.2015 in favour of the plaintiffs/appellants herein, holding that the plaintiffs/appellants have succeeded in proving the factum of gift in view of the statements of the scribe of the declarations namely *Mufti Mohammad Mehraj-U-din*.

(vii). The defendant/respondent herein challenged the judgment and decree dated 28.05.2015 in an appeal before the Appellate court on multiple grounds including that the decree was passed on the basis of pleadings which were never proved during the trial and that there was no evidence that the plaintiffs/appellants were in possession of the suit property to his exclusion and that the plaintiffs/appellants have resorted to *approbate* and *reprobate* as on one hand they claimed to be the owners of the suit property on the basis of an oral gift and on the other hand claimed that they perfected their title over the suit property on account of being in its adverse possession.

(viii). During the pendency of the aforesaid appeal before the Appellate court, the defendant/respondent herein filed an application before the Appellate court contending therein that the plaintiffs/appellants herein were not married on the date of pronouncement of alleged gifts, *qua* the suit property, requiring thus the plaintiffs/appellants to produce their *Nikha*

Nama in this regard in the objections filed thereto the said application by the plaintiffs/appellants herein, it came to be stated that since they happen to be cousins and had been engaged to each other prior to the declaration of the gifts in question by the Estate holder, the traditional *Rukhsati* in the marriage however had taken place in the year 1990 and that the *Nikha Nama*, in fact, stands destroyed in the floods of September, 2014 and, as such, cannot be produced.

- (ix). The Appellate court after considering the appeal and hearing the counsel for the parties vide impugned judgment and decree reversed the judgment and decree of the trial court on the premise that none of the witnesses of the plaintiffs/appellants herein had either deposed before the trial court qua the declaration of gifts made by the Estate holder or else to the handing over of the actual possession of the suit property pursuant to the said gifts. The said conclusion came to be drawn by the Appellate court on the premise that the plaintiffs/appellants herein were not in the relationship of a husband and wife at the time of making of gifts in question by the Estate holder according to the objections filed by the plaintiffs/appellants herein to the application filed by the defendant/respondent herein before it i.e. the Appellate court wherein the production of *Nikha Nama* was also sought by the respondent herein in the application filed before it. The Appellate court also concluded that the scribe of the gift deeds in question had also only proved the execution of said deeds and not as to when the plaintiffs/appellants were put in possession of the suit property by the Estate holder pursuant to the gifts. The Appellate court lastly concluded in the impugned judgment that the

gift deeds in question were compulsorily required to be registered under Section 17 of *the Jammu and Kashmir Registration Act, 1977*, and thus reliance placed by the trial court on the said gift deeds was legally impermissible.

03. The plaintiffs/appellants herein have challenged the impugned judgment on multiple grounds in the instant appeal.

04. This Court has admitted the instant appeal on 15.12.2021, on the following substantial questions of law:-

(I) *Whether the declarations made on 12.06.1987, 04.05.1988 and 07.02.1989 made by the donor amounts to valid gift under Mohammadan Law?*

(II) *Whether the findings returned by the appellate court that the appellant is not in possession of suit property is perverse?*

Heard learned counsel for the parties and perused the record.

04. According to Mr. H. U. Salathi, appearing counsel for the plaintiffs/appellants herein, the finding of the Appellate court that the gift deeds in question were compulsorily to be registered under Section 17 of the Registration Act, supra is against the mandate of Section 23 and 129 of *The Jammu and Kashmir Transfer of Property Act, 1977* as well as the judgment of the Apex Court passed in case tilted as ***Hafeeza Bibi v. Sheikh. Farid, reported in 2011 SCC 654*** and also that the gift deeds in question were in fact only a declaration of the oral gifts made by the Estate holder in favour of plaintiffs/appellants herein earlier pursuant to a family settlement.

05. On the contrary Mr. Hakim Suhail Ishtiaq, appearing counsel for the defendant/respondent herein contended that the entire claim of the plaintiffs/appellants herein over the suit property, in fact, is founded on the family settlement, pursuant to which the Estate holder is stated to have orally gifted the share in his estate to the plaintiff appellant 1 herein, to which the plaintiff appellant 1 herein was entitled. Mr. Hakim Suhail would submit that, however, neither the said alleged family settlement has been proved nor can the said gift deeds be construed as declarations made prior to oral gift in question as they are contemporaneous with the aforesaid act of the gifting the same to the plaintiff appellant 1 herein and do not anywhere record the factum of delivery of possession of the gifted property. Mr. Hakim, thus would insist that in absence of proving the said family settlement inasmuch as, delivery of possession of the suit property, the gift deeds cannot said to be fulfilling the essential requisites of a valid gift. Mr. Hakim would contend that the gift deeds did not contain any mention of any family settlement, but the reason for the oral gift has been mentioned the services rendered by the plaintiffs/appellants towards Estate holder in his old age. Mr. Hakim would also reiterate the plea of the defendant/respondent herein that the plaintiffs/appellants herein were not married on the date of alleged gift, as the actual marriage between them had taken place in the year 1990 having been admitted by them in the objections filed to the application filed by the defendant/respondent for production of *Nikha Nama* before the trial court and, therefore, the execution of gift deeds becomes seriously doubtful. In support of his submission, Mr. Hakim has heavily relied upon the judgment of the Apex

Court passed in case titled as *Lilian Coelho & Ors. Vs. Myra Philomena Coelho [Civil Appeal No. 7198 of 2009]* to suggest that it is within the jurisdiction of a court to hold that an instrument even though having been held genuine is not worthy to act upon if it is shrouded in suspicious circumstances when the propounder fails to remove such suspicious circumstances to the satisfaction of the court.

06. Before proceedings further in the matter it would be advantageous to refer to the essential ingredients of a valid gift under Muslim Personal Law being, (a) Declaration of the gift by the donor; (b) Acceptance of the gift by the donee; and (c) Delivery of Possession of the gifted property.

Thus in law, for a gift to be valid, compliance of the above three essentials are necessary in the aforesaid sequence and if one of the said essentials is missing, a gift cannot be said to have been validly made.

07. Besides a reference to Sections 123 and 129 of J&K Transfer of Property Act, supra would also be advantageous which reads as under:-

123. Transfer how effected. -For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

Explanation.-The word “attest” has the same meaning in the section as in section 59.

129. Saving.- *Nothing in this chapter relates to gifts of moveable property made in contemplation of death or shall be deemed to affect, save as provided by section 123, any rule of Hindu or Buddhist law, or to effect any rule of Mohammedan Law.*

As is manifest from the above provisions, in terms Section 123 supra transfer by virtue of a gift can only be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses to this general requirement however, has an exception contained in Section 129 supra which provides that nothing in the chapter relating to gifts shall be deemed to affect any rule of *Mohammedan Law*.

The aforesaid position contained in the said provisions have also been authenticated by the Apex Court in the case of “*Hafiza Bibi*” supra wherein at para 29, following has been held:-

“29. In our opinion, merely because the gift is reduced to writing by a Mohammadan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by a Mohammadan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under *Mohammadan Law* is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of *gifts in Mohammadan Law*”.

08. Thus, what emanates from above is that in Muslims a gift is valid if the above three essentials are fulfilled even though it is not registered by a registered instrument, but if the conditions are not fulfilled, the gift is not valid even though it may have been effected by a registered instrument. Therefore, a valid gift could be made by oral statements as long as three requirements discussed above are met thereby, in that it is because registration is not a requirement which obviates the need for a gift to be reduced in writing. Accordingly, the only conclusion, in law, that could be drawn is that even if a gift is reduced in writing or a declaration of an oral gift, made earlier in point of time, is reduced in writing, it is valid even without registration.

09. Having regard to the aforesaid settled legal position and coming back to impugned judgment in regard thereto, the observations made by the Appellate court in this behalf that registration in terms of the Section 17 of the Act supra was mandatory *qua* the gift deeds in question is patently de hors the aforesaid legal position and therefore legally unsustainable.

10. Having held above that the gift deeds in question did not require the registration under the Act of 1977 supra to be valid, yet a bare perusal of the gift deeds do not conclusively suggest the fulfilment of the essentials of the gift referred above, as such, necessitating the remanding of the matter back to Appellate court, in that, this Court refrains from making any observation in this regard, lest it may prejudice the rights and interests of the parties herein as also notwithstanding the substantial questions of law framed in the matter.

11. Viewed thus, for what has been observed, considered and analyzed hereinabove, the impugned judgment and decree dated 17.07.2017, passed by the Appellate court is *set aside* and the matter is remanded back to the Appellate court with a direction to proceed in the matter afresh in accordance with law.

12. **Disposed of.**

13. Parties to appear before the Appellate court on 30.04.2025.

(Javed Iqbal Wani)
Judge

Srinagar

18.04.2025.

“Ab. Rashid PS”

Whether the judgment/order is speaking; Yes/No
Whether the judgement/order is reportable; Yes/No

