

## **Mirza Mehdi Husain vs Sikandar Nawab And Ors. on 6 December, 1954**

**Equivalent citations: AIR1955ALL255, AIR 1955 ALLAHABAD 255**

### **JUDGMENT**

Randhir Singh, J.

1. This is a defendant's second appeal arising out of a suit for partition. The plaintiff claiming to have purchased a half share in the house in dispute sued for the partition of his share of the house. Sikandar Nawab defendant No. 1 claimed a half share in the house under a gift deed executed by Kazim Ali who was admittedly the owner of the house before it passed to the plaintiff or to the defendant.

There was yet another defendant and he was defendant No. 2 Mehdi Husain, who claimed to be the owner of the entire house having purchased it in execution of a money decree held by him against Kazim Ali, the owner of the house. The suit was contested by both the defendants. Sikandar Nawab claimed to be the owner of half of the house under a gift deed executed by Kazim Ali on 24-7-1937, while defendant No. 2, Mehdi Husain contended that he was the owner of the entire house and the gift deed obtained by defendant No. 1 was invalid. Various other defences, which are riot material for the disposal of this appeal, were also raised by the defendants.

The trial Court, however, found that "the gift deed obtained by Sikandar Nawab, defendant No. 1, was not a valid gift and, as such, he had no share in the house, and as the plaintiff was found to be the owner of half of the house, the suit for partition was decreed against both the defendants. Sikandar Nawab then went up in appeal to the District Judge and the learned District Judge allowed the appeal. He found the gift in favour of Sikandar Nawab to be a valid gift and, as such, he was held to be the owner of half of the house. Mehdi Husain, who was mainly affected by this finding of the lower appellate Court, has now come up in second appeal.

2. The only point which arises for determination in this appeal is whether the gift made by Kazim Ali in favour of Sikandar Nawab on 24-7-1937, was a valid gift and the ground on which the validity of the gift is challenged is that a gift of property, which is the Subject of an usufructuary mortgage, could not be made by the execution of a deed and that the donor should have done all that lay in his power to transfer possession of the property to the donee' in order to make the gift valid.

The Bombay High Court took the view that if a property is subject to an usufructuary mortgage a gift of such a property could not be made at all; vide -- 'Ismal v. Ramji', 23 Bom 682 (A), and -- 'Mohinuddin v. Manchershah', 6 Bom 650 (B). The main ground on which this view was taken by the Bombay High Court was that in order to make a valid gift, delivery of possession, is essential and

in the case of an usufructuary mortgage, the property being In the possession of the mortgagee, no delivery of possession was possible and, as such, a valid gift of such property could not be made.

The other High Courts, including our own High Court, however, did not accept the view taken by the Bombay High Court. A property which is made the subject of an usufructuary mortgage is split up into two parcels, the equity of redemption and the mortgagee rights. With great respect to the learned Judges of the Bombay High Court who have taken the view that a mortgaged property cannot be made the subject of a gift, it may be pointed out that a distinction has to be made between a gift of the entire property and a gift of a parcel of it. The equity of redemption is as much property as mortgagee rights in the mortgage and there seems to be no bar to a person owning only the equity of redemption, to make a valid gift of the same. The requirements of Mohammedan Law in the matter of a valid gift will be complied with sufficiently if the donor does all that lies in his power to complete a transfer of the proprietary rights and such rights of possession as he has over that property in favour of the donee.

Mr. Amir All in his admirable book on Mohammedan Law has discussed this point on pages 66 to 68, Fourth Edition, of his book, and is of opinion that the view taken by the Bombay High Court was not the correct view and that it is possible for a person owning only the equity of redemption to make a valid transfer of it by gift. All that is required in such cases is to deliver to the donee such possession as the donor himself had and as the donor had no tangible physical possession an unequivocal declaration would be a sufficient delivery of possession.

It has been argued on behalf of Mehdi Husain that the donor Kazim Ali ought to have told the mortgagee after he had made the gift that the donee would thereafter be the mortgagor and that he should have got his name removed from the Municipal registers. If a gift is made by an oral declaration perhaps such a course of conduct may make the declaration more effectual, but if a gift deed has been made by a written and registered document, the information given to the mortgagee by word of mouth that the mortgagor had divested himself of his right would not add to the value of the declaration. Names of owners of houses in Municipal records are entered for fiscal purposes only, that is, for the realisation of taxes. It is more of a liability than a right which is created by the mutation of a name in the Municipal registers. Learned Counsel for the appellant has argued on the basis of some rulings that mutation of names in the revenue records were held to be necessary to evidence transfer of possession.

Mutation in revenue records in respect of agricultural property stands on a different footing. If a person's name is not mutated in the mutation records he does not acquire any right to sue for recovery of rent against tenants in the revenue Courts. No such disability attaches to a person whose name does not appear in the Municipal registers. It would be difficult, therefore, to rely on this circumstance alone - For holding that Kazim All had not done all which he could possibly do to transfer possession.

3. It has further been argued that the intention of the donor could be inferred from some of his subsequent acts also. In the security bond which Kazim Ali furnished in connection with his application for the setting aside of 'an ex parte decree on 29-9-1943, he mentioned the whole of the house as his own property. Again in July, 1945, he made an application for the redemption of the mortgage under Section 12, Agriculturists' Relief Act, and in this application also no mention of the gift made in favour of his son was made. With regard to the application for redemption it is open to a co-mortgagor also to make, an application for redemption and the omission to make a mention of the co-mortgagor would not necessarily show that Kazim Ali denied that the gift in respect of a half of the property was not acceptable to him.

4. The gift was made in 1937 and any conduct of the donor immediately before or after the gift deed may perhaps have been taken into consideration in judging his intention. But the conduct of the donor exhibited seven years after the gift deed cannot be taken into consideration in arriving at a conclusion about his intention at the time when he made the gift in 1937. There may be a deliberate attempt on behalf of the donor, if he had parted with the property, to repudiate the transaction even after a valid gift had been made. No subsequent change in the mind of the donor can affect a valid and completed transaction made by him earlier. Moreover, the security bond hypothecating the whole of the house may have been made only to play a fraud upon the Court with no clear intention of repudiating the gift, and it cannot therefore, be said that Kazim Ali meant to repudiate the gift made by him in 1937.

What has to be seen in this case is whether Kazim Ali had parted with half of the house by making a gift in favour of his son and if the gift had become a completed transaction at that time. Kazim Ali having done all that lay in his power to transfer possession of his interest in a half of the house to the donee, the gift became complete in 1937. In the agreement of sale which Kazim Ali made with Syed Mohammad Akbar on 12-12-1945, he expressly mentioned the gift made by him in favour of his son who was a minor, and if Kazim Ali had, at any time, any intention to repudiate or revoke the gift he would not have mentioned the gift in his agreement for sale of the house on 12-12-1945. The view taken by the lower appellate Court that the gift in favour of Sikandar Nawab was a valid gift was therefore correct and the contention raised by the learned Counsel for the appellant cannot be accepted.

5. No other point arises for determination in this appeal. The appeal is dismissed with costs to the respondent Sikandar Nawab Mirza.

6. Leave to file a special appeal has been asked for and is granted.

7. Stay order, dated 4-5-1949, is vacated.