Maqbool Alam Khan vs Mst. Khodaija & Ors on 4 February, 1966

Equivalent citations: 1966 AIR 1194, 1966 SCR (3) 479, AIR 1966 SUPREME COURT 1194, 1966 ALL. L. J. 671, 1966 2 SCWR 170, 1966 2 SCWR 92, 1966 SCD 1010, 1966 BLJR 566, 1966 BLJR 684

Author: R.S. Bachawat

Bench: R.S. Bachawat, M. Hidayatullah

PETITIONER:
MAQBOOL ALAM KHAN

Vs.

RESPONDENT:
MST. KHODAIJA & ORS.

DATE OF JUDGMENT:
04/02/1966

BENCH:
BACHAWAT, R.S.
BENCH:
BACHAWAT, R.S.
SUBBARAO, K.
HIDAYATULLAH, M.

CITATION:
1966 AIR 1194 1966 SCR (3) 479

ACT:
Lis pendens-Respondent's name expunged from title suit by compromise decree in another suit Whether respondent constructively bound by final decree in title suit. Mohamedan law- Essential requirements of valid gift.

HEADNOTE:
The Maharaja of Dumraon filed a rent suit against some of the sharers in a tenure held under him of certain lands and at the sale in execution the tenure was purchased by one L. N, the widow of one of the original co-sharers instituted a title suit. (No. 127 of 1939) for a dad that her share in the tenure was not affected by the execution sale During the pendency of this suit the Maharaja instituted a second rent suit against L and at the sale in execution of the decree the respondent purchased the tenure and obtained possession.

The respondent was also impleaded as a party in N's suit and a preliminary decree was passed. Thereafter N died- and the appellant was substituted as the plaintiff in place of N on the ground that before her death N had made an oral gift of her share to him. A final decree was then passed and the appellant obtained possession of the land dispossessing the respondent. The respondent then instituted title suit No. 126 of 1944 against the appellant and others for a declaration that the decree passed in suit No. 127 of 1939 was not binding upon her. The case was disposed of by a compromise de whereby the respondent's name was expunged from the category of defendants in suit No. 127 though the decree was to stand in other respects. The respondent then applied for restitution of the land under s. 144 of the Code of Civil Procedure and obtained possession.

The appellant thereafter filed the present suit against the respondent and others for a declaration of his title to the land and contended, inter alia, (i) that by the doctrine of lis pendens the respondent was constructively bound by the final decree in suit No. 127 of 1939 in the presence of her predecessor-in-title L; and (ii) the decree conclusively declared his title to the land on the basis of the oral gift a to him by N.

The trial court decreed the appellants suit but on appeal to the High Court the decree was set aside. On appeal to this Court,

HELD: The appellant had no title to the suit property and the High Court had rightly dismissed the suit.

The purpose of the compromise decree in 'suit No. 126 of 1944 was that the respondent's name should be expunged from the array of parties in suit No. 127 of 1939 so that she should not be bound by the decree in that suit either actually or constructively.

An application for restitution under s. 144 C.P.C. is an application for execution of a decree and therefore the principle of res-judicata applies to such proceedings. Accordingly, in view of the restitution obtained by the respondent, she, was not bound by the decree in suit No. 127 of 1939. [482 G-H]

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Mahijibhai v. Manibhai [1965] 2 S.C.R. 436 applied.

The High Court had rightly held that the appellant failed to prove the alleged oral gift and furthermore, the gift was also invalid.

The three requirements of a valid gift under Mohamedan Law are declaration, acceptance and livery of possession. A gift of property in the possession of a lessee or mortgagee or a trespasser is not established by mere declaration of the donor and acceptance by the donee. To validat the gift there must also be delivery of possession, or failing such delivery. some overt act by the donor to put it within the power of the donee to obtain possession. On the facts N had done nothing after the alleged declaration to place it

within the power of the appellant to obtain possess sion.
[483 G; 484 G; 485 B]
Case law referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 629 of 1963. Appeal from the judgment and decree dated April 3, 1961 of the Patna High Court in Appeal from Original Decree No. 327 of 1955.

Sarjoo Prasad, R. S. Sinha, and R. C. Prasad, for the appellant.

S. C. Agarwal, R. K. Garg, D. P. Singh and M. K. Ramamurthi for respondent No. 1.

K. R. Sinha, for respondents Nos. 16, 24 and 25. The Judgment of the Court was delivered by Bachawat, J: Shaik Ahmad Ali was the holder of a tenure recorded in Khewat No. 4, tauzi No. 3309, Mouza Babhnaul, comprising an area of 83 82 acres under the Maharaja of Dumraon. He died in 1910 leaving as his heirs, his mother Waziran, his second wife Elahijan, three sons Amanat, Ashghar and Ashraf and two daughters born of Elahijan, and two sons Hamid and Mahmud and four daughters born of his first wife Nabiban. Though all the heirs of Shaik Ahmad Ali Were cosharers of the tenure, the names of Hamid and Mahmud only were recorded as the tenure'holders in the record of rights published in 1911. The Maharaja of Dumraon instituted Rent Suit No. 13 of 1915 against Hamid and Mahmud only and obtained a decree for rent. The other cosharers of the tenure including Amanat were not parties to the suit. Amanat died in 1924. Before and after 1924 there were several litigations concerning the rights of the cosharers in the tenure. Eventually, under a compromise, Najma the wife of Amanat got 2 annas 8 pies 10 krant share in the tenure. Subsequently, the Maharaja of Dumraon put the decree in Rent Suit No. 13 of 191.5 into execution, and Latafat, son of Ashgar by his first wife Safidan, purchased the tenure at the execution sale. In "October 1928, Latafat obtained possession of the tenure through Court. In May 1939, Najma instituted Title Suit No. 127 of

481. 1939 against Latafat, the Maharaja of Dumraon and others asking for a declaration that her share in the tenure was not affected by the sale and for partition and possession of her share and mesne profits. During the pendency of this suit, the Maharaja of Dumraon instituted Rent Suit No. 1077 of 1939 against Latafat, obtained a decree for rent and put the decree into execution. At the execution sale in November 1940, Khodaija, the second wife of Ashgar, purchased the tenure. Thereupon, Khodaija was impleaded as, a party in Title Suit No. 127 of 1939. On July 9, 1942, a decree declaring the title of Najma to her share in the tenure and a preliminary decree for partition were passed in that suit. On August 9, 1942, Khodaija obtained delivery of possession of the tenure through Court on the basis of her purchase in November 1940. On February 26, 1943, Najma died. On April 10, 1943, the appellant filed a petition in Title Suit No. 127 of 1939 praying for substitution in place of Najma on the ground that before her death Najma had made an oral gift of her share to him. On April 21, 1943, the Court passed an order substituting the appellant as plaintiff in the suit in place of Najma. On June 14, 1943, a final decree was passed in the suit. The appellant was allotted

19.54 acres of Ian out of the tenure. On June 25, 1943, the appellant obtained possession of the land dispossessing Khodaija. Thereafter, Khodaija instituted Title Suit No. 126 of 1944 against the appellant and others for a declaration that the decree passed in Title Suit No. 127 of' 1939 were fraudulently obtained and were not binding upon her.. The trial Court dismissed the suit, on appeal, the first appellate Court decreed the suit and a second appeal was disposed of by a compromise in these terms :

> "1. That the name of the plaintiff No. 1 (that is Khodaija) from the category of defendants in Title Suit No. 127 of 1939 shall be expunged.
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> of 1939) wilt stand in other respects.
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> 3. That the suit (that is, Title Suit No. 126 of 1944) wilt stand dismissed."

In 1948, Khodaija applied for restitution of the land under s 144 of the Code of Civil Procedure. The Munsif allowed the application; on appeal, the first Appellate Court dismissed it; and on second appeal, the High Court passed an order on January 24, 1949 declaring that Khodaija was entitled to restitution and remanded the case to the Munsif. On June 28, 1949, the Munsif directed restitution of 19.54 acres of land to Khodaija. On July 1, 1949, Khodaija obtained possession of the land through Court.. Thereafter, the appellant instituted the present suit against Khodaija and others praying for a declaration of his title to the-

lll482 aforesaid land. His case is that the suits instituted by the Maharaja of Dumraon were not rent suits and the sales in execution of those decrees were not rent sales, inasmuch as all the sharers of the tenure were not impleaded as parties to those suits, the share of Najma in the tenure now represented by the suit land-was not affected by the sales, and by an oral gift she gave the land to the appellant. The trial Court decreed the suit. On first appeal, the High Court dismissed the suit. The appellant now appeals to this Court by .special leave.

The appellant rests his claim of title to the land upon an alleged oral gift by Najma. Khodaija disputes the factum and validity of the gift. In rejoinder, the appellant contends that by the doctrine of lis pendens Khodaija is constructively bound by the final decree passed in Title Suit No. 127 of 1939 in the presence of her predecessor-in- title, Latafat and that the decree conclusively declared his title to the land on the basis of the oral gift by Najma. Khodaija gives a twofold answer to this contention. She says that (1) by the decree in Title Suit No. 126 of 1944 she was held not to be a party to Title Suit No. 127 of 1939 and she is therefore not bound by the decree passed in that suit, and (2) by the order of the High ,Court dated January 24, 1949 and the final order of the Munsif dated June 28, 1949 passed in the proceedings for restitution under s. 144 of the Code of Civil Procedure it was finally declared that she was not bound by the decree in Title Suit No. 127 of 1939. These contentions of Khodaija are sound and should be accepted. The ,compromise decree in Title Suit No. 126 of 1944 provided that Khodaija's name be expunged from the category of defendants in Title Suit No. 127 of 1939, and in other respects the decree in that Suit would stand. The purpose of the compromise decree was that Khodaija's name should be expunged from the array of parties in Title Suit No. 127 of 1939, so that she would not be bound by the decree in that suit either actually or

constructively. On a const ruction of this decree, the High Court held on January

24., 1949 in the proceedings for restitution that Khodaija's claim for restitution fell within the purview of S. 144 of the Code of Civil 'Procedure and that "as a result of a compromise, the decree was set aside as against her." By his final order dated June 28, 1949 the Munsif directed restitution on the basis of this finding. In Mahjibhai v. Manibhai (1), this Court by a majority held that an' :application for restitution under s. 144 of the code of Civil Procedure is an application for execution of a decree. The principle of res judicata applies to execution proceedings. it follows that Khodaija is not bound by the decree in Title Suit No. 127 of 1939 :and is entitled to re- agitate all the questions in issue in that suit. The appellant must, therefore, establish his title to the land. He claims that after the preliminary decree Najma orally gave (1) [1965] 2 S. C. R. 436.

him her entire movable and immovable properties including the tenure, and she died after making over possession of the same. She died leaving her father and mother as her heirs. Both herparents filed petitions in Title Suit No. 127 of 1939 supporting the oral gift of the suit land. This circumstance favours the case of oral gift. The appellant examined himself as a witness in this, case. He said that the gift was made on February 10, 1943 in the presence of his parents. His mother was alive, but she was not exmined as a witness. The date of the gift was not mentioned in the plaint or in any earlier document; 1 it was disclosed for the first time in the witness-box, and even then, it was not made clear how he remembered the date in the absence of any record. In the petition filed by him on April 10, 1943 in Title Suit No. 127 of 1939 he had made a different case and had stated that the gift was made a few months before her death on February 26, 1943. His case now is that Najma made a gift of her entire movable and immovable properties. This case was not made in the petitions filed in Title Suit No. 127 of 1939. The particulars of the other properties are not disclosed, nor is it shown that he ever took possession of those properties. In the plaint, he made the case that Najma died after making over possession of the tenure to him. This statement is, untrue, because Najma had been dispossessed of the tenure in August 1942 and was not in possession of it at the time of thealleged gift. Considering all the circumstances, the High Court held, and, in our opinion, rightly that the appellant failed to prove the alleged oral gift.

We also think that the alleged gift was invalid. In February 1943, Yhodaija was in possession of the tenure claiming it adversely to Najma. After the alleged gift, Najma neither gave possession of the property, nor did anything to put it within the power of them appellant to obtain possession. The three pillars of a valid gift under the Mahomedan law are declaration, acceptance and delivery of possession. In Mohammad Abdul Ghani v. Fakhr Jahan Begam Sir John Edge said :

> "For a valid gift inter vivos under the Mahomedan law applicable in this case, three conditions are necessary, which, their Lordships consider have been correctly stated thus (a) manifestation of the wish to giveon the part of the donor; (b) the acceptance of the donee either impliedly or expressly; and (c) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively' (Mahomedan Law, by Syed Ameer Ali, 4th ed. vol. i, p.
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> 41)."

The Prophet has said : "A gift is not valid without seisin."

The rule of law is :

> (1) (1922) L. R. 49 1. A,, 195,209.
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> "Gifts are rendered valid by tender, acceptance and' seisin.-Tender and acceptance are necessary because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts; and seisin is necessary in order to establish a right of property in the gift, because a right of property, according to our doctors, is not established in the thing given merely by means of the contract, without seisin." [See Hamilton's Hedaya (Grady's Edn), p. 482] Previously, the rule of law was thought to be so strict that it was said that land in the possession of a usurper (or wrongdoer) .,or of a lessee or a mortgagee cannot be given away, see Dorrul Mokhtar, Book on Gift, p. 635 cited in Mullic Abdool Guffoor V. Muleka (1). But the view now prevails that there can be a valid :gift of property in the possession of a lessee or, a mortgagee and a .gift may be sufficiently made by delivering constructive possession of the property to the donee. Some authorities still take the view that a property in the possession of a usurper cannot be given away, but this view appears to us to be too rigid. The donor may lawfully make a gift of a property in the possession of a trespasser. 'Such a gift is valid, provided the donor either obtains and gives possession of the property to the donee or does all that he can to put it within the power of the donee to obtain possession. In Mahomed Buksh Khan v. Hosseini Bibi(2), Lord Macnaghten
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> -said :
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> "In this case it appears to their Lordships that the lady did all she could to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with the utmost publicity, the hibbanama itself authorises the donees to take possession, and it appears that in fact they did take possession. Their Lordships hold und er these circumstances that there can be no objection to the gift on the ground that Shahzadi had not possession, and that she herself did not give possession at the time."

But a gift of a property in the possession of a trespasser is not established by mere declaration of the donor and acceptance by the donee. To validate the gift, there must also be either deli-very of possession, or failing such delivery, some overt act by the donor to put it within the power of the donee to obtain possession. If, apart from making a declaration, the donor does nothing else, the gift is invalid. In Macnaghten's Muhammadan Law, Precedents of Gifts, Case No. VI, the question was :

> "A person executed a deed of gift in favour of his nephew, conferring upon him the proprietary right to certain lands of which he (the donor) was not in possession, but to recover (1) (1884) I.L.R. IO Cal. 1112., 1123. (2) (898) L. R. 15 T. A 81, 95.

which he had brought an action, then pending, against his wife..... About a month after executing the deed, the donor died, and the donee, in virtue of the gift, lays claim to the litigated property. Under these circumstances is his claim, under the deed, allowable?"

> and the answer was that the gift was null and the claim of the donee was inadmissible. The precedent covers the present case. Najma did nothing after the alleged declaration, She did not even file a petition in, Title Suit No. 127 of 1939 mentioning the gift and asking for the substitution of the appellant in her place. Had she filed such a petition and submitted to an order of substitution, she would have placed it within the power of the appellant to obtain possession of the property; but she did nothing. Nor did the appellant obtain possession of the property during her life time with her consent. The gift is, therefore, invalid.
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> It follows that the appellant has no title to the suit property and the High Court rightly dismissed the suit. During the pendency of this appeal, one Babulal, an heir of a co-lessee from Khodaija in respect of plot No. 1400, died, and the appeal has abated against him. The respondent contended that in the circumstances the entire appeal has become defective for non-joinder of necessary parties and must be dismissed. We think that the appeal, so far as it concerns plot No. 1400, is defective for, non-joinder of necessary parties, but the rest of the appeal is not defective on this ground-. But for the other reasons already stated, the entire appeal is liable to be dismissed. The appeal is dismissed with costs. Appeal dismissed.