2023:APHC:15660

HON'BLE SRI JUSTICE T.MALLIKARJUNA RAO

APPEAL SUIT No.913 OF 2010

and

APPEAL SUIT No.989 OF 2010

COMMON JUDGMENT:

1. As both the Appeals arise out of the Judgment and decree dated 06.08.2009 in O.S.No.446 of 2006 on the file of II Additional Senior Civil Judge, Vijayawada, the same are disposed of by this following common Judgment.
2. The parties will be referred to as plaintiffs and defendants per their respective ranks before the Trial Court for convenience.
3. The plaintiff laid the suit for partition to divide the plaint schedule property consisting of two items into five equal shares and to allot one such share to her and also to direct the defendants No.3 to 5 to pay 1/5th share of the rents till the delivery of 1/5th share of the schedule property.
4. Item No.1 of the plaint schedule property is a single-storied building bearing D.No.28-10-10/11 at Arundalpet, Vijayawada. Item No.2 of the plaint schedule property is an extent of 374 sq. yards of the tiled house bearing D.No.32-37-6, situated at Maruthi Nagar, Vijayawada.
5. After completing the trial and hearing the arguments of both sides, the Trial Court passed a preliminary decree partly for partitioning Item No.1 of the plaint schedule property into five equal shares. It

allotted one such share, i.e. 1/5th share to the plaintiff. Further, defendants No.3 to 5 are directed to pay 1/5th share of rent to the plaintiff from the date of filing suit till delivery of the property as prayed for. However, the suit claim regarding Item No.2 of the plaint schedule property is dismissed.

6. The plaintiff filed the appeal in A.S.No.913 of 2010, under Section 96 of the Code of the Civil Procedure, 1908, questioning the dismissal of the suit regarding Item No.2 of the plaint schedule property. Whereas the unsuccessful defendants No.1 and 2 filed the appeal in A.S.No.989 of 2010, questioning the granting of the preliminary decree in respect of Item No.1 of the schedule property.

7. In a nutshell, the averments in the plaint are to the effect that the plaintiff is the natural sister of defendants No.1 and 2; they are the children of Abdul Wahid and Jaibunnisa. Their father and mother died in the year 1990 and 1998, respectively. The schedule properties have to be divided into five shares, of which the plaintiff is entitled to 1/5th share as per Muslim Law. After her parents' death, the plaintiff insisted on the division of plaint schedule properties and for separate possession. Defendants No.1 and 2 also manage the schedule property on her behalf. On being found they were trying to avoid the division of the plaint schedule properties, she gave them a legal notice.

(a) Defendants No.3 to 5 are the tenants in Item No.1 of the schedule property. They are paying rent to defendant No.1, as he is the eldest member. Defendant No.1 paid the plaintiff's share of the rent till 2004, and he stopped paying it to the plaintiff.

(b) While the matter stood thus, Defendants No.3 to 5, the tenants were demanded to pay the 4/5th share of the rent to the plaintiff from 2006, May onwards and obtain a valid receipt against the payments. Defendant No.1 was also requested to pay the plaintiff's share from January 2004 onwards and settle the accounts.

8. Defendants No.1 and 2 filed their written statement contending that the plaintiff was never in possession of the schedule property jointly with them. She was never paid any amount towards her alleged share in the rents. Their father was not in possession and enjoyment of the plaint schedule property (i.e., Item No.1) on the date of his death. The parents used to live in the house of Defendants No.1 and 2. One month before his death, their father/Abdul Wahid, gifted the plaint schedule property (Item No.1) to his two sons/Defendants No.1 and 2 with absolute rights and in equal shares; Defendants No.1 and 2 accepted the gift. Their father did not intend to give any share to the plaintiff as she was already given the property stood in the name of her mother at Hussain Street, Arundalpet, Vijayawada.

(a) Defendants No.1 and 2 allowed their mother/Jai Bunnisa, to take the rent payable for the ground floor for her medical and other personal expenses only, but she was not the owner of the plaint schedule property. After receiving the notice from the plaintiff, defendants No.1 and 2, Shaik Usman approached and questioned her propriety in issuing a notice. She replied that her husband provoked her and got issued the notice. She promised that she would not file any suit against them. But, against her promise, she filed the suit with all false and frivolous allegations. Defendant No.3 is paying the rent of Rs.1,200/- towards the ground floor, defendant No.4 is paying the rent of Rs.1,000/- towards the first floor of the plaint schedule property, and defendant No.5 is not at all the tenant of the plaint scheduled property.

9. Defendant No.3 filed his written statement, contending that he joined as a tenant in 1986 and paid rent of Rs.500/- to Abdul Wahid till his death in 1990. After his death, his wife succeeded him and paid the rent till her death, and he has been paying the rent of Rs.1,200/- towards the ground floor of the plaint schedule property to defendant No.1. Defendant No.4 has been paying the rent of Rs.1000/- towards the first floor of the plaint schedule property. Defendant No.5 is not the tenant of the plaint schedule property as he is a close relative of defendant No.4 and resides with him in his house.

10. Defendant No.4 filed a written statement contending that he is unnecessarily added as a party in the proceedings. Defendant No.4 is paying Rs.1000/- towards the first floor of the plaint schedule property.

11. Defendant No.5 adopted the written statement of defendant No.4 by filing an adoption memo.

12. After the inclusion of Item No.2 in the plaint schedule, defendants No.1 and 2 filed their additional written statement contended that they purchased Item No.2 of the plaint schedule property from her mother and obtained documents from her; the plaintiff also attested those documents and also executed a relinquishment deed in respect of the said property; the property was also mutated in their names long back, and they have been paying the taxes separately in their names, and the property fell to the share of the defendant No.1 was renovated, and the property fell to the share of the defendant No.2 was in a dilapidated condition; the defendants No.1 and 2 have become absolute owners of the plaint schedule property.

13. Based on the above pleadings, the trial court framed the following issues and additional issues:

    a. Whether the plaintiff is entitled to partition of plaint schedule property as prayed for and 1/5th rents as prayed for?
    b. Whether the plaintiff is entitled to seek relief for partition of item No.2 of the plaint schedule property?

c. To what relief?

14. During the trial, the plaintiff got examined P.Ws.1 to 4 and marked Exs.A.1 to A.10. The defendants got examined D.Ws.1 to 7 and marked Exs.B.1 to B.29. The trial court partly decreed the suit as indicated in the preceding paragraphs.

15. I have heard Sri.A.V.Sivaiah, learned counsel for the appellant/plaintiff/respondent in both appeals, Sri. P. Narasimha Rao, learned counsel for respondents/defendants No.1 and 2 in A.S.No.913 of 2010 and Sri. Sai Gangadhar Chamarty, learned counsel for appellants/defendants 1 and 2 in A.S.No.989 of 2010.

16. I have carefully perused the pleadings, evidence, Judgment of the Trial Court and the grounds of appeal with utmost circumspection and considered the rival submissions.

17. To avoid undue duplication, the contentions ardently canvassed on behalf of both parties shall be referenced and deliberated upon in the ensuing part of this Judgment. I have given my anxious consideration to the submissions made by the respective learned counsel and perused the material on record.

18. Having regard to the pleadings in the suit, the findings recorded by the Trial Court and in light of the rival contentions and submissions made on either side before this Court, the following points would arise for determination:-

1) Was the Trial Court justified in passing a preliminary decree for partition of Item No.1 of the plaint schedule property by not accepting the oral gift pleaded by defendants No.1 and 2?
2) Was the Trial Court justified in dismissing the suit regarding Item No.2 of the scheduled property?

POINT No.1:

19. The sheet anchor of the defendants No.1 and 2 case is that their father made a declaration that he gifted item No.1 of the schedule property to them in the presence of their mother, plaintiff and elders. The burden lies on the defendants No.1 and 2/appellants to prove the gift.

20. In sum and substance, the learned counsel for the plaintiff vehemently contends that the donees have not been put in possession of Item No.1 of schedule property, but what is necessary for the validity of the gift is that the donor should have delivered possession of the property to the donees. Defendants No.1 and 2 fail to establish that they were put in possession of Item No.1 of the schedule property in pursuance of the alleged oral gift made by their father. The evidence adduced on behalf of defendants No.1 and 2 establishes that the donee's wife remained in possession of Item No.1 of the schedule property after the death of her husband, i.e., the donee; the non-mutation of Item No.1 of the plaint schedule property in the name of defendants No.1 and 2, falsifies their version regarding HIBA.

21. Per contra, the learned counsel appearing for defendants No.1 and 2 repelling the contentions submits that there is ample evidence to prove the plea of the oral gift made by the donee in favour of defendants No.1 and 2, but the trial Court wrongly disbelieved the evidence adduced on their behalf; no malice or motive has been suggested to the witnesses examined on behalf of the defendants No.1 and 2, in their cross-examination for speaking falsehood; there is no valid reason to disbelieve their testimony which has not been shaken in the cross-examination.

22. Before adverting to respective contentions put forward by the parties, it would be relevant to go through the settled legal principles relating to oral gifts in order to appreciate the case facts.

23. In **Mahboob Sahab Vs. Syed Ismail and others**[1], wherein the Hon'ble Apex Court observed that:

> *Under S. 147 of the Principles of Mahomedan Law by Mulla, 19th Ed. Edited by Chief Justice M. Hidayatullah, it envisages that writing is not essential to the validity of a gift, either of movable or immovable property. Section 148 requires that it is essential, to the validity of a gift, that the donor should divest himself completely of all ownership and dominion over the subject of the gift. Under S. 149, three essentials to the validity of the gift should be (i) a declaration of gift by the donor, (ii) acceptance of the gift, express or implied, by or on behalf of the donee, and (iii) delivery of possession of the subject of the gift by the donor to the donee as mentioned in S.150. If these conditions are complied with, the gift is complete. Section 150 specifically mentions that for a valid gift, there should be the delivery of possession of the subject of the gift and taking of possession of the gift by the donee, actually or constructively. Then only the gift is complete. Section 152 envisages that where the donor is in possession, a gift of*

[1] 1995 LawSuit (SC) 389, 1995 3 SCC 693

immovable property of which the donor is in actual possession is not complete unless the donor physically departs from the premises with all his goods and chattels and the donee formally enters into possession. It would, thus, be clear that though a gift by a Mohammadan is not required to be in writing and consequently need not be registered under the Registration Act, for a gift to be complete, there should be a declaration of the gift by the donor; acceptance of the gift, expressed or implied, by or on behalf of the donee, and delivery of possession of the property, the subject-matter of the gift by the donor to the donee. The donee should take delivery of the possession of that property either actually or constructively. On proof of these essential conditions, the gift becomes complete and valid. In the case of immovable property in possession of the donor, he should completely divest himself physically of the subject of the gift.

24. The above principle was well delineated in a number of decisions. The Common High Court of Andhra Pradesh at Hyderabad reiterates the same principle in **Ziauddin Ahmed Vs. M.A.Rao[2],** it was observed that:

The donee should take delivery of the possession of this property either actually or constructively. In case no physical possession can be delivered on account of the constraints, some overt act by the donor, like handing over the title deed, should be made. Where both the donor and donee reside in the property, no physical departure or formal entry is necessary. In such a case, the gift is complete if some overt act by the donor indicating a clear intention of transfer of possession and to divest himself or herself of all the control over the subject of the gift is sufficient.

25. In **Jamila Begum (dead) per L.R.s. v. Shami Mohd. (dead) The L.R.s. and another[3],** concerning the contention of oral gifts, the Hon'ble Apex Court held that:

"21. Under Mohammedan law, no doubt, making an oral gift is permissible. The conditions for making a valid oral gift under Mohammedan law are:-

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[2]2003 4 ALT 43 and 2002 LawSuit (A.P.) 807
[3]Civil Appeal No.1007 of 2013 decided on 14.12.2018

(i) there should be a wish or intention on the part of the donor to gift;
(ii) acceptance by the donee; and
(iii) taking possession of the subject matter of the gift by the donee. The essentials of a valid and complete gift under Mohammedan law have been succinctly laid down in Abdul Rahim and Others v. Sk. Abdul Zabar and Others (2009) 6 SCC 160 as under:-
"13. The conditions to make a valid and complete gift under the Mohammadan law are as under:
(a) The donor should be sane and major and must be the owner of the property which he is gifting.
(b) The thing gifted should be in existence at the time of hiba.
(c) If the thing gifted is divisible, it should be separated and made distinct.
(d) The thing gifted should be such property to benefit from, which is lawful under the Shariat.
(e) The thing gifted should not be accompanied by things not gifted, i.e. should be free from things which have not been gifted.
(f) The thing gifted should come in possession of the donee himself or his representative, guardian or executor.

26. In **Ilahi Samsuddin Vs. Jaitunbi Maqbul[4],** the Hon'ble Apex Court held that:

> *Under Muslim Law, a declaration made by the donor can be oral irrespective of the nature of the property. The Hiba nama need not be on the stamp paper and was not compulsory to be registered. But for the valid gift, it must be accepted by the donee, and if there are more than one or two donees, it must be accepted by all the donees separately.*

27. In **Mayana Saheb Khan vs. Mayana Gulab Jan and Others[5],** the common High Court of Andhra Pradesh at Hyderabad held that:

> *It is a settled principle of law that it is the prerogative of a Muslim to effect a gift of immovable properties without even executing a written document, much less registering the same. An oral gift in respect of such persons is permissible. Where the gift is said to have been made through a written document, it must conform with Section 123 of the Act.*

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[4]1994 SCC (5) 476
[5]2011 (1) ALD 36

28. Now, after careful perusal of the principles laid down in the above citations, I consider whether the evidence adduced on behalf of defendants No.1 and 2 satisfies the essential conditions of oral gift and their possession of Item No.1 of the schedule property in pursuance of oral gift.

29. Regarding the case facts, there cannot be any dispute concerning the relationship between the plaintiff and defendants No.1 and 2. The plaintiff is the sister of the defendants No.1 and 2; they are the children of Abdul Wahid and Jaibunnisa. Admittedly, their father died in the year 1990; their mother died in the year 1998. Initially, the plaintiff filed a suit for partition of item No.1 of the plaint schedule property. By virtue of the orders in I.A. No.146 of 2008 dated 21.08.2008, item No.2 of the plaint schedule property was included. Admittedly, item No.1 of the plaint schedule property belonged to Abdul Wahid, and item No.2 belonged to Jaibunnisa. In view of the same, without any ambiguity, it can be held that Ex.B29 sale deed relied on by the defendant Nos.1 and 2 does not help to decide the matter in controversy.

30. It is also not in dispute and apt to state that the plaintiff was gifted the house property situated at Hussain Street, Arundalpet, Vijayawada, and its extent is 99 Sq.yards and the plaintiff resides therein. Admittedly, the said property belonged to the plaintiff's mother.

31. The factual position is undisputed and needs a brief reference that before filing the suit, the plaintiff had given notice to all the defendants vide original of Ex.A.2-legal notice dated 27.02.2006. She also issued another legal notice vide original of Ex.A9 dated 23.03.2006 to the 1st defendant at his shop address due to non service of earlier notice. The contents of both notices are the same. Ex.A10-postal acknowledgement shows the service of Ex.A.9 to the defendant No.1. It is not the case of defendants No.1 and 2 that they replied to the Ex.A.2 and Ex.A.9 legal notices. However, they offered some reasons for non-responding to the legal notices, but it is not convincing.

32. Ex.A.3 and Ex.A.4 returned covers show the non services of notices to defendants No.1 and 5. Ex.A.5 to Ex.A.7-postal acknowledgements show the receipt of the legal notices by defendants No.2 to 4. The stand taken by defendant No.3 in Ex.A.8 reply notice and the written statement is one and the same. A reading of Ex.A.2 and Ex.A.9 shows that the plaintiff demanded defendants No.1 and 2 for the division of item No.1 of the plaint schedule property only. But no claim is made regarding item No.2 of the plaint schedule property. Ex.A1-valuation certificate does not help to decide the controversy in the suit, as it only reflects the schedule property's value. Thus, the plaintiff has not placed documentary evidence supporting her claim in the suit.

33. As per the version of DWs.1 and 2, one month before the death of their father, he informed them about the declaration made by him gifting item No.1 of the plaint schedule property to them with absolute rights in the presence of his wife, daughter (plaintiff), defendants No.1 and 2, Shaik Usman, Ayub and Azeemunissa. In pursuance of the oral gift, defendants No.1 and 2 came into possession and enjoyment of the said property.

34. DW.1, the 1st defendant, denied the suggestion in the cross-examination that his mother, Jaibunnisa, was with the plaintiff until her death. However, PW.1 admitted in cross-examination that her mother died in the house of defendant No.2. During the last period of her life, her parents resided in Durgapuram for three years. In the cross-examination, DW.1 admitted that till the date of giving his evidence, the property tax for the plaint schedule property was being paid in the name of his father, Abdul Wahid. He did not submit any application before the Corporation Authority to mutate the plaint schedule property in his name. He testified in cross-examination that he disclosed the Hiba to the plaintiff at the time of his father's death. Thus, it shows that defendants No.1 and 2 have taken an inconsistent stand regarding the plaintiff's presence at the time of the alleged Hiba regarding item No.1 of the plaint schedule property.

35. The reading of DW.1's evidence shows that PW.1/plaintiff was not present at the time of Hiba made by his father, as alleged in the written statement. In the cross-examination, he testified that defendant No.3 had been a tenant in the plaint schedule property during his father's lifetime. He and his brother used to sign the rent receipts. DW.1 stated that Ex.B.2 to Ex.B.5 are the rent receipts dated 10.06.1990, 06.05.1990, 09.04.1990 and 07.03.1990, *respectively*, issued by their father.

36. It is the evidence of DW.1 that since June 1990, because of his father's ill health, he and his brother were issuing receipts by collecting rent. He admitted that Ex.B.6 to Ex.B.10 bear his signatures and also his brother's signatures. He also testified that he and his younger brother have been collecting the rent and issuing receipts after his father's death.

37. DW.1 further testified that defendant No.4 is the tenant on the 1st floor of the plaint schedule property and defendant No.5 is the son of R. Kishan's elder brother; defendant No.5 is not the tenant of the plaint schedule property. Defendant No.5 is unmarried and resides with Defendant No.4. The contention of Defendants No.1 and 2 is not seriously disputed by the plaintiff. Defendant No.4/DW.7 also supported the case of defendants No.1 and 2. DW.1 further testified that he had received the rent one month before his father's death. Rents were paid to him and his brother

jointly; defendant No.4 paid rent to him and his younger brother as per his father's instructions during his lifetime.

38. DW.2 testified that his father had not provided any share to his sister i.e., PW.1 as she was given house property at Hussain Street, Arundalpet, by her mother.

39. DW.3-Mohammad Usman testified that he worked as a tailor in the tailoring shop of Abdul Wahid. DW.7-R.Kishan, the 4th defendant, is the tenant on the first floor of item No.1 of the schedule property. DWs.3 and 7 supported the version of DWs.1 and 2 about the declaration made by Wahid gifting item No.1 of the plaint schedule property to defendants No.1 and 2 and accepting the gift by them and taking possession. They also testified that Abdul Wahid also expressed that he had no intention to give his daughter any share in the said property as she was already given the property stands in the name of his wife at Hussain Street, Arundalpet.

40. In the cross-examination, DW.3 testified that he does not know the boundaries and door number of item No.1 of the plaint schedule property. No disputes or differences existed between the father and daughter (plaintiff). He has not disclosed any reason for not providing a share to the plaintiff.

41. In the cross-examination, DW.7 testified that his father started paying rent to defendants No.1 and 2 one month prior to the

demise of Abdul Wahid. There were no disputes or differences between the father of defendants No.1 and 2 and the plaintiff.

42. In this regard, PW.1 testified in her cross-examination that she does not know the details of the rent paid by the tenants. Her share of the rent was given to defendants No.1 and 2, along with a share of her mother. Defendants No.1 and 2 used to give her share of the rent to her mother. She was given Rs.2,500/- per month by the defendants. She admitted that the Eenadu Daily Edition Newspaper dated 30.03.1997 on page No.7 vide Ex.B1 shows the photograph of her husband. As seen from Ex.B.1, there is no reference concerning the schedule properties. As per Ex.B1, it seems that PW.1's husband was stated to be involved in the act of cheating.

43. The plaintiff got examined by PW.2-Haji Abdul Azeem. He testified that the plaintiff and defendants No.1 and 2 were enjoying the plaint schedule properties jointly, and he mediated for the division of the properties, but the plaintiff's brothers refused. To his knowledge, the parents of the plaintiff and defendants No.1 and 2 did not execute any Will nor create any Hiba. In cross-examination, he testified that he had not acted as an elder to partition the properties between plaintiff and defendants No.1 and 2.

44. PW.3 also testified that, to his knowledge, the said Abdul Wahid did not create any Hiba for his sons. In the cross-examination, he testified that he did not know the details of the property purchased by the plaintiff's father and day to day affairs of Abdul Wahid before his death. The Abdul Wahid's wife also died at the house of their sons.

45. PW.4-Haji Mohammad Sanavulla testified that he was the secretary of the Bilal Masjid Committee at Arundelpet. Abdul Wahid is a member of the committee and also his close friend. PWs.3 and 4 testified that the plaintiff's father decided to give a share to the plaintiff as per Muslim law, as exclusive rights were given to defendants No.1 and 2 for other properties.

46. Defendants No.1 and 2 claims through oral gift. Admittedly, the tenants are in occupation of item No.1 of the schedule property. Defendants No.1 and 2 have not proved how at the time of the oral gift, the possession was delivered to them.

47. If the property has tenants, it is sufficient if the donor requires them to attorn to the donee. As is stated in Mullas Mahommedan Law, 17th Edition, paragraph 152:

> *"Gift of immoveable property which is in the occupation of tenants may be completed by a request of the donor to the tenants to attorn to the donee or by delivery of the title deed or by mutation in the revenue register."*

48. In **Ebrahim Alibhai Akuji Vs. Bai Asi and others[6],** the High Court of Bombay held that:

> *In all cases in which the question is raised whether a gift governed by Mohammedan Law has been completed, the most satisfactory method of dealing with the question is to direct attention to the conduct of the donor and the donee after the time when the gift is said to have been completed. If after that time, the alleged donor continues to take the benefit of the subject of the gift, whether it consists of reaping the harvest or the recovery of the rents or profits, or actual occupation or such other benefit, whatever it be, as can accrue to the owner from the ownership of the particular subject of gift, then the possession of the subject of the gift has not been transferred. If the donee is permitted directly or indirectly to receive the benefit, then the possession is transferred.*

49. The evidence of defendants No.1 and 2 as DWs.1 and 2 shows that their father had given a declaration regarding item No.1 of the plaint schedule property. The House tax receipts filed by them show that the tax was paid in the name of Abdul Wahid without mutation of their names. The evidence of DWs.1 and 2 is that they have been collecting rent after the demise of their father. Admittedly, their mother died in 1998. No record is placed to show the collection of the rent before their mother's death. The defendants have relied on Ex.B.2 to Ex.B.10 rent receipts. The said receipts pertain to the year 1990. The non issuance of rent receipts by defendants No.1 and 2 after their father's death weakens their case. Had there been truth in the contentions of defendants No.1 and 2 regarding the collection of rent relating to item No.1 of the schedule property after their father's death, they would have

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[6]AIR 1934 Bombay 21

issued rent receipts. The evidence shows that they are in the practice of issuing rent receipts. They filed rent receipts pertain to the period after the death of their mother. The rent receipts placed show that during the lifetime of their father, they used to provide rent receipts to the tenants.

50. It is suggested to PW.1 in the cross-examination on behalf of defendants No.1 and 2 that their mother was permitted to receive rent for the ground floor for her medical expenses. In the written statement also, defendants No.1 and 2 contend that they allowed their mother to take the rent payable for the ground floor for her medical and other personal expenses. On the other hand, it is defendant No.3's stand that he paid the rent for a portion of item No.1 of the schedule property to the mother of defendants No.1 and 2 till her death. Defendants No.1 and 2 had explained the reason for payment of such rent to their mother, but the said reason is not convincing. Even if that is so, defendants No.1 and 2 would have issued rent receipts to the tenants. No cogent material is placed to show by defendants No.1 and 2 that they collected rent from the tenants during the lifetime of their mother subsequent to the death of their father.

51. Defendants No.1 and 2 have not chosen to examine defendant No.3 to establish their stand taken for payment of rent to their mother. They have not stated any particular reason for not issuing rent

receipts to defendant No.4. Nothing on the record shows that defendants No.1 and 2 collected the rent in pursuance of the alleged oral gift made by their father. The essential conditions to make a valid gift under the Mohammedan law have not been established by defendants No.1 and 2. In the absence of proof to show the delivery of possession of item No.1 of the schedule property in pursuance of the oral gift, the version given by DWs.1 and 2 cannot be accepted.

52. It is noteworthy that there is no evidence to suggest that defendants No.1 and 2 took any steps to have the property mutated in their name after the alleged oral gift, nor have they shown that they collected rent from the tenants as per their ownership claim. As mentioned earlier, even after the demise of their father, the property remained in their father's name and was not transferred to defendants No.1 and 2. Additionally, defendants No.1 and 2 did not dispute the fact that the house tax continued to be paid in Abdul Wahid's name as of the date of their testimony. In light of these facts, the trial Court reasonably concluded that if the alleged gift had actually taken place, defendants No.1 and 2 would have taken steps to collect rent and mutate the property in their name after Abdul Wahid's death. Thus, the trial Court, after carefully analyzing the evidence on record, rejected the defendants' claim of an oral gift.

53. On the touchstone of legal position, the upshot of the aforementioned discussion is that defendants No.1 and 2 failed to establish the plea of oral gift in their favour in respect of Item No.1 of the schedule property. The trial court has correctly appreciated the evidence on record and come to a correct conclusion regarding Item No.1 of the schedule property. Accordingly, point No.1 is answered.

POINT No.2:

54. Learned counsel for the plaintiff strenuously argued that defendants No.1 and 2 failed to prove that the plaintiff relinquished her right in Item No.2 of the plaint schedule property. They relied on an unregistered relinquishment deed in respect of the immovable property; it is required to be registered compulsorily as per Section 17 (1)(b) of the Indian Registration Act, 1908 and in the absence of registration, it cannot be admitted in evidence without paying the Stamp Duty under Section 35 of the Indian Stamp Act. The alleged GPA marked as Exs.B.12 and B.22 were not acted upon during the lifetime of executants by Power of Attorney.

55. The main thrust of the argument of learned counsel for defendants No.1 and 2 is that defendants No.1 and 2 established the execution of Ex.B14 unregistered relinquishment deed in respect of item No.2 of the schedule property, and the plaintiff's conduct also establish the same. Initially while filing the suit, the plaintiff has not claimed

any right in respect of item No.2 of the schedule property and therefore the Trial Court's Judgment is well merited and consequently the finding of fact may not be disturbed.

56. Learned counsel for defendants No.1 and 2 contend that the plaintiff's case is vitiated in the light of Exs.B.12 and B.22 documents, to which the plaintiff acted as an identifying witness. P.W.1's admission that her mother had given property to her at the time of her marriage clinches the plea of defendants No.1 and 2 in the suit.

57. At the outset, it is the defendants No.1 and 2's case that they purchased item No.2 of the plaint schedule property from their mother and obtained agreement of sale on 06.03.1993 and relied on Ex.B.13-agreement of sale dated 06.03.1993 executed by his mother in favour of defendant No.1; the plaintiff also attested those documents. The evidence of DWs.1 and 2 is not seriously disputed regarding the attestation of the agreement of sales by the plaintiff. It is the evidence of DW.1 that his mother also executed the General Power of Attorney on the same day and registered the same on 09.03.1993, authorizing her daughter-in-law to perform registered sale deeds in favour of defendants No.1 and 2. In support of the said stand, they relied on Ex.B.12 and Ex.B.22-original General Power of Attorneys executed by their mother in favour of defendant No.1's wife and defendant No.2's wife

respectively. Ex.B.12 is the registered Power of Attorney executed by Jaibunna in favour of Aktharunnisa, i.e., wife of defendant No.1, in respect of the property, i.e., house bearing D.No.32-27-6,4,6,5 situated in Maruthi Nagar, Vijayawada. Ex.B.13 is the agreement of sale executed on 06.03.1993 in favour of Abdul Khaddus, i.e., defendant No.2, in respect of the property situated at Maruthi Nagar, Machavaram area, Vijayawada, to the extent of 187 sq. yards. It is the evidence of DW.1 and DW.2 that in Ex.B.14-relinquishment deed, the plaintiff states that she received the consideration amount and executed it in favour of her mother, Jaibunnisa and her brothers, i.e., defendants No.1 and 2.

58. The evidence of DWs.1 and 2 shows that the plaintiff also appeared before the Sub Registrar, Vijayawada and attested those documents as identifying witnesses is not disputed. To establish the said fact, the defendants No.1 and 2 examined DW.6-C.H.Jaya Kumar; his evidence shows that he drafted an agreement of sale deeds executed by defendants No.1 and 2's mother in their favour and also Ex.B.12 and Ex.B.22 were executed in favour of the wives of defendants No.1 and 2 respectively. He also testified about the passing of consideration amount under the sale agreements. In the cross-examination, he testified that the relinquishment deed requires registration and is drafted by him. He does not know the reason for the non-registration of the Ex.B.14 document.

59. The cross-examination of DW.6 shows that no effort was made on behalf of the plaintiff to disprove his version concerning the execution of an agreement of sales and power of attorney documents and relinquishment. It is not suggested to him in the cross-examination that the plaintiff has not subscribed her signatures in those documents, and she was not present at the time of execution of the said documents.

60. To prove the agreement of sale transactions, defendants No.1 and 2 got examined 1st defendant's wife as DW.4. She testified about agreement of sale transactions in her favour and also in favour of defendant No.2's wife. She testified that the plaintiff attended before the Sub-registrar and attested those documents as an identifying witnesses. The said document establishes the said fact. She also testified about the execution of Ex.B.14-registered relinquishment deed by the plaintiff.

61. Defendants No.1 and 2 also examined DW.5-Ganji Koteswara Rao to establish that the plaintiff executed the relinquishment deed bearing document No.6393, and he attested the said document as the first attestor and Mohammad Usman was the 2nd attestor.

62. From the cross-examination of DW.1, DW.2, and DWs.4 to 6, it would be abundantly clear that even no effort was made to impeach their version regarding the execution of the said

documents. Virtually, the plaintiff has not disputed the said case projected by defendants No.1 and 2.

63. As per Ex.B14, though the plaintiff has no right over the properties, she received the consideration of Rs.42,000/-. Ex.B.14 shows that the property belonged to the mother of the plaintiff. Though Ex.B14 document is not registered, the admissions contained therein can be taken into consideration as Division Bench of this Court in ***G. Balakishtiah* v. *B. Ranga Reddy***[7], held that "there is also sufficient authority for the proposition that an unregistered document can be admitted in evidence for the purpose of proving the admission contained therein".

64. The bar contained in Section 49 of the Indian Registration Act, 1908 relating to receiving the unregistered instrument as evidence. A careful reading of Section 49 (c) of the Act does not create an absolute bar to receive an unregistered document. The only bar that is created and is envisaged is for receiving an unregistered document as "evidence of any transaction affecting such property" meaning thereby the unregistered document cannot be received as evidence in respect any transaction of an immovable property alone. The necessary consequence arising out of this singular bar created under Section 49 (c) is that an unregistered document can be received as evidence for any other purpose which does not relate

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[7]AIR 1960 AP 112

to a transfer of an interest in an immovable property. In other words, even if an unregistered document is in relation to an immovable property, it can still be received in evidence of something contained therein which does not affect the immovable property.

65. Three Judges Bench of the Hon'ble Apex Court in the case of **Mattapalli Chelamayya and another vs. Mattapalli venkataratnam and another**[8], in which the Apex Court while interpreting Section 49 (c) of the Act has held as follows:

> *"since the charge was not registered it will be correct to say that the document will not affect the immovable properties of the appellants sought to be charged. It will not also be received as evidence of any transaction affecting such property that is to say, in this case, as evidence of the charge. It should be noted that the section does not say that the document cannot be received in evidence at all. All that it says is that the document cannot be received as evidence of any transaction affecting such property. If under the Evidence Act the document is receivable in evidence for a collateral purpose, Section 49 is no bar. This construction of the provision which was accepted for a long time by the High Courts has been duly recognized by the Amending Act 21 of 1929, which added a proviso to the section. The proviso clearly empowers the courts to admit any un-registered document as evidence of a collateral transaction not required to be registered."*

66. It is pertinent to note that the trial Court marked Ex.B.14 subject to objection regarding stamp duty and registration. But the trial Court has not decided the objection. As such, this Court is inclined to consider the case of the defendants No.1 and 2 by excluding Ex.B.14.

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[8](1972) 3 SCC 799

67. In **M/s Park Street Properties Pvt. Ltd. Vs Dipak Kumar Singh & Another[9],** the Hon'ble Apex Court in para No.19 observed as follows:

> *"It is also a well-settled position of law that in the absence of a registered instrument, the Courts are not precluded from determining the factum of tenancy from the other evidence on the record as well as the conduct of the parties".*

68. The defendants No.1 and 2 in the additional written statement have taken all the pleas relating to different transactions made among the family members. The Court is obligated to give due regard to the facts pleaded by the defendants No.1 and 2.

69. In **Pannalal Vs. Labhchand[10],** wherein the High Court of Madhya Pradesh held that:

> *"in a case where the defendant has stated in his written statement all the facts on which he bases his defence without deducing his legal position properly from those facts, it would not be right to reject the defence merely because the defendant has not properly appreciated the law bearing on the facts set out by him. Where the plea arises upon the pleadings and upon the record of the case, it is not only competent but expedient in the interest of justice to entertain the plea".*

70. At this stage, it would be apposite to refer settled principle of law that nomenclature given to the document is not a decisive factor. Still, the nature and substance of the transaction have to be determined concerning the terms of the documents. The admissibility of a document is entirely dependent upon the recitals contained in that document but not based on the

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[9] 2016 (9) SCC 268
[10] AIR 1955 Madh-B 49

pleadings set up by the party who seeks to introduce the document in question.

71. The plaintiff's mother executed the sale agreements in favour of their sons, i.e., defendants No.1 and 2, after receipt of consideration. She also had given power of attorney to her daughter in laws vide Ex.B.12 and Ex.B.22, wherein the plaintiff acted as an identifying witness. The evidence of DWs.1, 2, 4 to 6 establishes the plaintiff's presence and her attestation of the agreement of sale and power of attorney. The evidence aforesaid referred manifestly indicates that the plaintiff has got explicit knowledge about the Power of Attorneys executed by their mother vide Ex.B.12, and Ex.B.22 and agreements of sale executed in favour of defendants No.1 and 2.

72. As seen from the record, though the plaintiff has no right over the properties, but she executed relinquishment deed in respect of the said properties. It is not her case that during the life time of her mother, she got right over the properties.

73. No doubt, as seen from the contents of a written statement, defendants No.1 and 2 have not taken the plea of family arrangement. It seems that in pursuance of the settlement between the parties, the plaintiff's mother had entered into an agreement of sale transactions regarding item No.2 of the schedule property in favour of her sons by receiving to the entire

consideration amount. She also paid some amount to the plaintiff on the same day of agreement of sale transactions. The record shows that the plaintiff got the house property, i.e., 99 sq. yards, situated at Arundelpet, from her mother by virtue of the registered gift deed even before her marriage. Defendants No.1 and 2 are not claiming any right over the said property. All these established facts show there is a family arrangement among the family members rather than relinquishment of rights by the plaintiff.

74. In **Kale and others Vs. Deputy Director of Consolidation and others**[11], the Apex Court held in Para No.10 explaining the essentials of family settlement in a concretized form, the matter may be reduced into the form of the following propositions:

> xxxxxxxx
> xxxxxxxx
> *5. The members who may be parties to the family arrangement must have some antecedent title, claim or interest, even a possible claim in the property 'Which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement, the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed, and the family arrangement will be upheld, and the Courts will find no difficulty in giving assent to the same;*
> *6. Even if bona fide disputes, present or possible, which may not involve legal claims, are settled by a bona fide family arrangement which is fair and equitable, the family arrangement is final and binding on the parties to the settlement.*

[11](1976) 3 SCC 180

The Apex court further held in Para No.24 and 30 of its Judgment that:

> xxxx xxxx
> *A family arrangement is binding on the parties to the arrangement and clearly operates as an estoppel so as to preclude any of the parties who have taken advantage of the agreement from revoking or challenging the same.*
> xxxxxxx
> *In these circumstances, there can be no doubt that even if the family settlement were not registered, it would operate as a complete estoppel against respondents 4 & 5. Respondent No. 1, as also the High Court, committed a substantial error of law in not giving effect to the doctrine of estoppel as spelt out by this Court in so many cases.*

75. In **Ajambi (Dead) by LR. Vs. Roshanbi & Others[12],** the Hon'ble Apex Court held that:

> *It is true that there is no concept of joint family in Muslims but it was open to late Shri Shaikaji to give his property to his children in a particular manner during his lifetime, which he rightly did, so as to avoid any dispute which could have arisen after his death. The arrangement so made was duly accepted by the family members and it was also acted upon.*

76. It is important to note that the plaintiff did not initially include item No.2 of the schedule property in the plaint. It was only later she included it. The plaintiff did not provide any specific reasons for not including the property earlier. However, it was revealed through the evidence of PW.1 that she enquired about the title of item No.2 of the schedule property only after the cross-examination of her elder brother DW.1, and found that her mother did not execute any registered document. It was then only that the plaintiff

[12](2017) 11 SCC 544

included item No.2 in the schedule property. In light of this evidence, it becomes difficult to believe the plaintiff's version regarding the receipt of rent amounts as claimed by her.

77. On the other hand, evidence adduced by the plaintiff indicates that she was aware at the time of filing the suit that she did not have any rights over her parents' properties, except for item No.1 of the schedule property. This is evident from the legal notices issued by the plaintiff and the original plaint, in which she did not claim any rights over item No.2 of the schedule property. The court must carefully consider and evaluate the evidence presented by both parties to make a determination on each issue that will ultimately determine the outcome of the case. PWs.3 and 4 also testified that the plaintiff's father had given exclusive rights over all other properties to defendants No.1 and 2, but decided to give the plaintiff a share in item No.1 of the schedule property as per Muslim law. This evidence goes against the plaintiff's case.

78. The preceding discussion shows that the plaintiff tries to take advantage of the situation as the sale deeds have not been registered in favour of defendants No.1 and 2.

79. The registered power of attorneys granted by the mother of defendants No.1 and 2 to their wives made specific reference about the sale agreement transactions, and the plaintiff acted as an identifying witness to these documents. Admittedly, the item No.2

of the schedule property belonged to the plaintiff's mother. It is not disputed by any party to the suit. Given this fact, it was not necessary for the plaintiff's mother to get a relinquishment deed executed by the plaintiff. As the registered sale deeds had not been executed in favor of defendants No.1 and 2, and the house property had already been given to the plaintiff prior to her marriage, the unregistered relinquishment deed came to be executed to avoid future complications. It can be inferred that all the aforementioned documents were executed as part of a family arrangement to prevent future issues, and that such arrangement is binding and final on all parties involved and it would operate as an estoppel against the plaintiff.

80. In civil cases, the preponderance of probability constitutes a sufficient ground for decision if the facts and circumstances are such that no reasonable man would draw a particular inference from them or if the degree of probability in the case is such that as to include any hypothesis besides the one to be proved then the party who relies on a particular theory cannot be said to have discharged the onus of proof of establishing that theory. But, if there is evidence strongly prepondering in favour of any one of the two theories set up, the Court is entitled to act upon it.

81. Upon reading the evidence of DW.1, DW.2 and DW.4, it is clear that due to a financial constrains, defendants No.1 and 2 could not

get the execution of the registered sale deeds, despite the plaintiff's mother's willingness to do so in their favour. All these circumstances make it probable that there was an arrangement, and in pursuance of the same, family members executed the documents referred to above on the same day. It seems that with an abundant caution and anticipating trouble from the plaintiff, to avoid future complications and to impute knowledge to the plaintiff about the sale agreement transactions, the documents were got executed. By attesting to those documents as an identifying witness or an attestor, the plaintiff effectively acknowledged and accepted the terms of the sale agreement transactions and power of attorneys and the said documents operate as estoppel to preclude the plaintiff who has taken advantage of receiving the payment and the said conclusion is supported by the testimonies of DWs.1, 2 and 4 to 6.

82. In that view, having considered all these aspects of the matter, this Court is given to understand as the differences between the parties were worked out by way of family arrangement; it is final and binding on the parties.

83. With an analytical appreciation of the facts and circumstances of the case, this Court views that the plaintiff failed to establish her right over item No.2 of the schedule property. Therefore, viewed from any angle, in my considered view, the trial Court's Judgment

does not require any interference by this Court. Accordingly, Point No.2 is answered.

84. I would therefore hold that the suit was rightly partly decreed by the trial Court in respect of Item No.1 of the schedule property and rightly dismissed in respect of Item no.2 of the plaint schedule property. In light of the foregoing discussion, this Court is of the considered opinion that the appeals are devoid of merit and are liable to be dismissed.

85. Given the propinquity of the relationship between the plaintiff and defendants No.1 and 2, there shall be no order as to costs.

86. In the result, the appeals are dismissed, without costs, by confirming the Judgment and Decree dated 06.08.2009 in OS.No.446 of 2006 on the file of II Additional Senior Civil Judge, Vijayawada.

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JUSTICE T. MALLIKARJUNA RAO

Date: 26.04.2023

Note: *LR copy to be marked.*
b/o. MS/KGM/SAK

HON'BLE SRI JUSTICE T.MALLIKARJUNA RAO

APPEAL SUIT NO.913 OF 2010
and
APPEAL SUIT NO.989 OF 2010

Date: 26.04.2023

MS/KGM/SAK