

HEADING OF JUDGMENT IN ORIGINAL SUIT

District : Baksa

IN THE COURT OF MUNSIFF, BAKSA, MUSHALPUR

Present: - Smt. Dikshya Rani Dutta LL.M, AJS.

Munsiff, Baksa, Mushalpur

Monday, the 28th day of February , 2022

Title Suit No.- 121 of 2018

Md. Soleman Ali
S/O- Late Ahed Ali
Resident of Vill.-Niz-Kaurbaha
Mouza-Kaurbaha, P.S.-Tamulpur
District- Baksa, Assam

.....**Plaintiff**

-VS-

1. Miss Saleha Bii @ Saleha Khatun
W/o Md. Zakir Ali
2. Ahitun Bibi
S/o Late Sukur Ali

Both are Resident of- Vill-Niz- Kaurbaha
Mouza-Kaurbaha,P.S.-Tamulpur
District- Baksa, Assam

.....**Defendants**

3. Jahura Khatun
W/o Late Ahed Ali

4. Md. Jahur Ali
S/o Late Ahed Ali
5. Md. Khalilur Rahman
S/o Safiulla
6. Md. Azizur Rahman
S/o Safiulla
7. Sri Chambalal @ Chambal Bodo
S/o Phaila Bodo
8. Sri Dehebor Bodo
S/o Agala Bodo
9. Sri Pilot Bodo
S/o Agala Bodo
10. Sri Gedaram Bodo
S/o Sukram Bod0
11. Syed Asar Ali
S/o Abbas
12. Syed Jahur Ali
S/o Abbas
13. Syed Mohatab Ali
S/o Abbas
14. Syed Azizur Rahman
S/o Abbas
15. Syed Khosful
S/o Abbas
16. Md. Rahim Ali
S/o Late Jahur Ali

All are resident of
Vill-Niz- Kaurbaha
Mouza-Kaurbaha,P.S.-Tamulpur
District- Baksa, Assam

This suit/case coming on for final hearing on
21.02.2022 in presence of :

Matiur Rahman; Advocate for the Plaintiff/petitioner; and

None ; Advocate for the Defendants/respondents

And having stood for consideration to this day, the
Court delivered the following Judgment:-

JUDGMENT

This is a Suit for declaration of plaintiff's right, title, interest over the suit land, recovery of khas possession by evicting the defendants, issuance of a precept to revenue authority for mutation of the plaintiff's name in respect of the suit land, cancellation and correction of mutation order and also for permanent injunction.

Plaintiff's Case in brief:

1. Plaintiff's case is that one Ahed Ali was the father of the plaintiff and proforma defendant no. 4 and husband of the proforma defendant no.3. During his life time, Ahed Ali had executed gift deed vide Registered gift deed no 3421/1982 dated 11.8.1982 in respect of land measuring 1 Bigha 3 katha 17 lessa in K.P Patta No. 6, dag No. 532 situated at village Kaurbaha in favour of the plaintiff and proforma defendant Nos.3 & 4. Proforma defendant No. 4

had relinquished his share of gifted property measuring 2 katha 19 lessa in favour of the plaintiff and accordingly the name of the plaintiff was mutated in respect of the relinquished share of the proforma defendant No.4; but the name of the plaintiff was wrongly mutated over land measuring 3 katha 8 ½ lessa instead of the said relinquished share of land measuring 2 katha 19 lessa. The plaintiff further submitted that presently one Rahim Ali with the consent of proforma defendant No.3 i.e. the mother of the plaintiff is in possession of her share of the land measuring 2 katha 19 lessa. Plaintiff has no claim against the said land of Rahim Ali. The plaintiff submitted that although on strength of the gift deed dated 11.8.1982 the property in dag no 532 ought to have mutated in the names of the plaintiff, and proforma defendant Nos.3 & 4 namely Soleman Ali, Jahura Khaton & Jahur Ali but vide order dated 12.9.2003 of Circle Officer the said property was wrongly mutated in the names of plaintiff, Jahur Ali i.e. proforma defendant No. 3 and defendant no. 1 namely Saleha Bibi through inheritance.

2. On 05.02.2008 the defendant No. 2 had fraudulently mutated her name along with the names of the plaintiff and defendant No. 1 in respect of land measuring 3 katha in the suit land and the same has been reflected on the land records vide order dated 10.10.2016. On the pretext of the said fraudulent mutation, the defendant no. 1 had illegally entered into the suit land in Schedule KHA and forcefully constructed a house therein and dispossessed

the plaintiff from the suit land and the defendant No. 2 has been also making attempt to trespass into the suit land.

3. Hence, the plaintiff has filed the suit for declaration of his right, title and interest over the suit ,for recovery of khas possession, permanent injunction and also for issuance of precept for mutation as well as correction of revenue records.
4. After receiving summons the principal defendant Nos.1,2 and proforma defendant Nos 3 & 4 contested the suit by filing a joint written statement-cum-counter claim urging that the gift deed No. 3421/1982 dated 11.8.1982 executed by Ahed Ali in favour of the plaintiff is a fabricated one. One Ahed Ali had two wives namely Late Asia Begum and Jahura Khatun. From the first wife, Asia Begum he had a daughter who is the defendant No. 2 in this suit. From the second wife he had 3 children, the plaintiff, Jahur Ali (prof. defendant No. 3), Saleha Bibi (defendant No.1).Land described in Schedule B of the counter claim measuring 1 Bigha 3 katha 17 lessa in K.P Patta No. 6, dag No. 532 situated at village Kaurbaha was purchased by Late Ahed Ali and his name was mutated in the land records. On 15.10.1981 Ahed Ali had gifted land measuring 3 katha (Schedule C Of the Counter claim) out of the Schedule B to his daughter Ahintun Bibi (principal defendant No. 2) vide a registered gift deed. On request of the plaintiff, the defendant No. 2 allowed the plaintiff to construct a house in the said land to reside therein and

the plaintiff agreed to vacate the said land on demand. Further at the time of marriage of the defendant No. 1, the defendant Nos, 2,3 & 4 had verbally gifted her land measuring 02 katha which is described in the Schedule F of the counter claim. At present, the plaintiff has denied the right, title of the defendant No. 2 over the Schedule C land by filing the title suit and the plaintiff is also trying dispossesses the defendant No. 1 from the Schedule F land. Hence, the defendant Nos 1,2,3 ,4 while praying for dismissal of the plaintiffs' suit had also made a counterclaim for passing a decree declaring their right, title and interest of defendant Nos 1 &2 over Schedule F and C land respectively and to recover the khas possession of the same and also for a decree of preliminary partition in respect of the total land, also for cancellation of mutation order in favour of the plaintiff etc.

5. vide order dated 19.12.17 and 21.7.18 the suit proceeded ex parte against Proforma defendants Nos. 7,8,9,15 and proforma defendan Nos. 5,6,10,13 respectively. Plaintiff side also filed evidence in affidavit of four witnesses. But subsequently after cross examining two plaintiff's witnesses , the contesting defendants stopped appearing , hence the suit proceeded ex parte against the remaining defendants vide order dated 05.01.2022 and the counter claim has been dismissed for default. Although the issues were settled in this suit but as the defendants did not appear to lead evidence and the suit will not come within sweep of explanation to Order XVII

Rule 2 of the Code of Civil Procedure and hence the suit will be considered to have proceeded ex-parte against all the defendants .

6. During trial, in support of his case, plaintiff side submitted evidence of four witness including himself Plaintiff also exhibited the following documents:

- i) Exhibit 1 - Certified copy of Jamabandi of K.P Patta No. 06 situated at village Kaurbaha, Mouza: Kaurbaha.
- ii) Exhibit 2 - Registered Gift Deed No. 3421/1982 dated 11.8.1982
- iii) Exhibit 3(1), 3(2), 3(3) – Land revenue payment receipts of Patta No. 6 for the Bangla years 1423,1417,1410

7. Although the issues have been settled in this suit but as the suit subsequently has proceeded ex parte against all the defendants, hence the following points for determination are framed to facilitate a convenient discussion and to arrive at a conclusive decision instead of issue wise discussion.

8. **Points for determination -**

- a) Whether the plaintiff is entitled to right, title and interest over the suit land mentioned in schedule KHA?
- b) Whether the plaintiff is entitled to recovery of possession of the suit land by evicting the defendants?

c) Whether the plaintiff is entitled to get the relief(s)?

9. I have heard arguments of Learned Counsel for plaintiff and gone through the case-record.

DISCUSSION, DECISION AND REASONS FOR THE DECISION-

Point for determination a),b) & c)

10. The plaintiff No. 1 as P.W. 1 in his evidence in affidavit reiterated the facts narrated in the plaint. P.W. 2, P.W. 3, P.W. 4 have corroborated the evidence of P.W. 1. As the suit proceeded ex parte against the defendants, the evidence adduced by the plaintiff side has remained unchallenged.

11. Mere fact that the defendants absented themselves on the date of hearing and the suit proceeded ex parte, did not by itself, entitle the plaintiff to get a decree in his favour. Ex parte decree cannot be passed by Court without plaintiff having proved his case and by accepting uncontroverted version of the plaint. Plaintiff must prove his case. That being so, this Court proceed to examine whether the plaintiff in the instant case has been able to prove his case to the satisfaction of the Court. The plaintiff filed the suit, asserting his right as owner over the suit property on strength of the gift deed (Ext.2.). In such a case, no doubt initially the burden is on the plaintiff to prove his case.

12. The claim of the plaintiff over the suit land and other consequential reliefs claimed in this suit rests on gift deed vide No. 3421/1982 dated 11.8.1982 which has been adduced in evidence by the plaintiff before this Court as Exhibit 2. Considering the evidence so adduced it is imperative to this Court to examine the genuineness and validity of the said gift deed. Also, it is paramount importance for this Court to examine whether the right of the plaintiff over the suit land has accrued to him on the strength of the said gift deed subject to finding the said gift deed free from any anomaly.
13. Prior to scrutiny of the Exhibit 2, i.e. the gift deed it is important to understand the concept of Gift under Mohammedan Law. In Mulla's Principles of Mohammedan Law Section 138 defines 'Hiba' .Hiba means gift. A Hiba is a transfer of property made immediately and without any exchange by one person to another and accepted by one or behalf of the latter. A 'Hiba' could even be oral. In the event of a 'Hiba' being written in the form of a document, it requires no registration also. However, in this case, Ext 2 is a registered deed.
14. In Mulla's Principles of Mohammedan Law, 18th Edition in Chapter XI, while dealing with 'Gift' under Section 149, the learned Author has said thus it is essential to the validity of a gift that there should be (1) a declaration of gift by the donor, (2) an acceptance of

the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee as mentioned in Section 150. If these conditions are complied with, the gift is complete.

15. Hence, the three essentials of a gift under the Mohammedan Law are:-

- i) a declaration of the gift by the donor
- ii) an 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.

16. Again sections 120 to 129 in Chapter VII of Transfer of Property Act, 1882 deal with gifts. Section 123 of the T.P. Act provides that a gift of immovable property should be effected by a registered instrument signed by the donor and attested by at least two witnesses. But Section 129 of the T.P. Act declares that nothing in Chapter VII thereof shall be deemed to affect any rule of Mohammedan Law. Thus under Mohammedan Law writing is not essential for the validity of a gift of immovable property. The validity of Muslim gifts has to be decided as per the Mohammedan Law and the Chapter on gifts in the T.P. Act is not applicable. In this case, indeed the gift deed is a registered one yet it will be governed by the principles Mohammedan Law.

17. If the yardsticks of a valid gift under Muslim law are

applied to the Gift Deed (Ext. 2), it appears that there is a declaration by the donor that he has gifted/donated the schedule property to the donees, hence, the first requirement of constituting a valid gift "a declaration of the gift by the donor" under Muslim law has been duly complied with.

18. The second necessary element which constitutes a valid and a complete gift under the Mohammedan Law is acceptance of the gift expressly or impliedly by the donees. But the recitals of the gift deed nowhere shows that the donees admit and confirm to have accepted the gift of the Schedule property from the donor. Further, the two other donees of the gift deed apart from the plaintiff i.e. proforma defendant Nos. 3 & 4 had unequivocally denied the execution of the deed of gift in their written statement cum counter claim. Further the plaintiff also failed to bring on record any evidence supporting acceptance of the gift property by all the donees. From perusal of oral evidence of plaintiff witnesses on record it shows no such acceptance by the donees. Hence, the second condition laid down by MULLA was not fulfilled. Consequently the gift made by donor was not complete.

19. Although the gift deed in this case is a registered gift, but Registration of a deed of gift does not cure the want of express or implied acceptance of the gifted property by the donees under the Mohammedan law.

Although there is declaration of gift which is necessary to constitute Muslim gift but there was no acceptance of the gifted property by donees, hence, the transaction does not satisfy the all the conditions laid down for valid Muslim gift.

20. From a meticulous examination of the evidence on record this Court has no hesitation in holding that Plaintiff failed to establish the factum acceptance of the gifted property by the donees. Hence, Ahed Ali's transfer of 1 Bigha 3 katha 17 lessa of land in K.P Patta No. 6, dag No. 532 situated at village Kaurbaha by way of gift vide Registered gift deed no 3421/1982 dated 11.8.1982 in favour of the plaintiff and proforma defendant Nos.3 & 4 is not valid.

21. Proving the validity of the gift deed by the plaintiff under Muslim law would entail to the examination of whether the plaintiff is entitled to the extent of suit land as prayed for. As the plaintiff has failed to prove the validity of the said gift deed, hence, the relief of declaration to the suit land fails. Thus, the prayer of the plaintiff for right, title over the suit land on the basis of the said gift deed stands rejected. Accordingly, the recovery of khas possession and permanent injunction being the consequential reliefs, hence, prayer for such reliefs stand in the negative. consequential reliefs also consequently fail.

22. Hence, the three points for determination are decided in negative and against the plaintiff. Accordingly the

plaintiff is not liable to get the reliefs of declaration of plaintiff's right, title, interest over the suit land, recovery of khas possession and permanent injunction. Further the plaintiff is also not entitled for issuance of a precept to revenue authority for mutation of the plaintiff's name in respect of the suit land, cancellation and correction of mutation order and also permanent injunction.

ORDER

Plaintiff's suit is dismissed ex-parte without costs.

Draw up the decree accordingly.

Given under my hand and seal of this Court on this
28th day of February, 2022

Dikshya Rani Dutta

(Munsiff, Baksa)

APPENDIX

A. PLAINTIFF' WITNESSES

P.W.1- Md. Soleman Ali
P.W.2- Md. Jakir Hussain
P.W.3-Jaynal Ali
P.W.4-Hakim Ali

B. PLAINTIFF' EXHIBITS

1. Exhibit 1 - Certified copy of Jamabandi of K.P Patta No. 06 situated at village Kaurbaha, Mouza: Kaurbaha.
2. Exhibit 2 - Registered Gift Deed No. 3421/1982 dated 11.8.1982
3. Exhibit 3(1), 3(2), 3(3) – Land revenue payment receipts of Patta No. 6 for the Bangla years 1423,1417,1410

4. DEFENDANT'S WITNESSES

None.

5. DEFENDANT'S EXHIBITS

None.

