IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

F.A. 162 OF 2001

Sahadat Hossain & Ors.

-Versus-

Sabiha Begum & Ors.

Before:
The Hon'ble Justice Indira Banerjee
A n d
The Hon'ble Justice Sahidullah Munshi.

For the Appellants/Petitioner	**:** Mr. Sudhish Dasgupta, Mr. Arun Kumar Deb, Mr. Amitava Ghosh, Mr. Apurba Ghanti.
For the Respondent No.1	**:** Mrs. Soma Panda.
For the Respondent No.2	**:** Mr. Gopal Chandra Ghosh, Mr. Debashis Sinha, Ms. Sharmistha Dhar.
Heard On	**:** 25-07-2014, 19-08-2014, 01-09-2014, 09-09-2014, 22-09-2014, 02-12-2014, 03-03-2016 and 09-03-2016.
Judgment On	**:** 16-03-2016.

INDIRA BANERJEE, J: This appeal is against a judgment and decree dated 9th November, 2000, passed by the learned Civil Judge (Senior Division, Sealdah Court, South 24-Parganas, allowing Title Suit No.171 of 1996 (Mrs.

Sabiha Begum & Ors V. Mrs. Ershad Begum & Ors.)for partition and accounts.

At all material times, Md. Faiyaz, since deceased, was the owner of premises No.189, Park Street, Kolkata 17, comprising of 8 kottas of land and a two storied building standing thereon, which is hereinafter referred to as the suit property. The respondent no.1 in this appeal, Ms. Sabiha Begum (the plaintiff in the suit), is one of the daughters of the said Md. Faiyaz. She is the daughter of Md. Faiyaz, through the original appellant no.1, Mrs. Ershad Begum, (defendant No.1 in the suit) who Md. Faiyaz had married, after the death of his first wife.

It appears that on 27th April, 1973, Md. Faiyaz executed a Deed of Trust whereby he appointed his second wife, Mrs. Ershad Begum, mother of the plaintiff Ms. Sabiha Begum and the defendant Nos. 2 to 6, as the sole trustee to hold the suit property, in trust, for the benefit of his five minor sons, being the appellant nos.2 to 6.

Md. Faiyaz had four sons from his first wife. After the death of his first wife, Md. Faiyaz had remarried Ershad Begum and from his second wife, he had five sons and three daughters, including the plaintiff, Ms. Sabiha Begum.

After the death of Md. Faiyaz, Ms. Sabiha Begum, his eldest daughter through his second wife, instituted the suit being Title Suit No.171 of 1996 in the Court of the Assistant District Judge at Sealdah, for partition of the suit

property, and accounts, claiming that by operation of the Hanif School of law she became the undivided co-sharer of the suit property to the extent of 4.17% share, upon the death of her father. Sabiha's own mother Ershad Begum, named trustee under the deed of trust executed by Md. Faiyaz on 27th April 1973, was impleaded defendant no.1.

The defendants filed their Written Statement and contested the suit. In fact, a common Written Statement was filed on behalf of the defendant nos. 1 to 6 and defendant nos. 8, 9, and 12 filed separate Written Statements. The contesting defendants inter alia contended that the suit was barred by limitation. In their written statement, the contesting defendants also claimed that the Deed of Trust had been acted upon. The suit of the plaintiff for partition was, therefore, liable to be dismissed.

According to the plaintiff after the death of her father, Md. Faiyaz, her mother Mrs. Ershad Begum, being the defendant no.1, had been looking after the suit property and realizing the rent and profits from the suit property, but not giving the plaintiff her share.

The plaintiff stated that she had been compelled to demand partition by a letter dated 18th December, 1995, written through her advocate and also to ask for accounts. In reply to the said letter of the plaintiff, the defendants told her that Md. Faiyaz, the plaintiff's father and husband of the defendant no.1 had executed a Deed of Trust dated 27th April, 1973, whereby he had appointed the defendant no.1, Ershad Begum as trustee for maintenance and

preservation of the suit property and also for the welfare of the defendant nos.2 to 6. In accordance with the direction in the trust deed, the property had vested in the defendant nos.2 to 6.

Under Mohamedan Law every Mohamedan of sound mind, who is not a minor, is entitled to dispose of his property by Will. Such Will (Vasiyyat) may be made either verbally or in writing. However, a Mohamedan cannot by Will dispose of more than a third of the surplus of his estate, after payment of funeral expenses and debts. Bequests in excess of the legal one third cannot take effect unless the heirs consent thereto after the death of the testator.

The plaintiff claimed that the deed of trust, if any, whereby Md. Faiyaz had alienated his entire property, was in contravention of the provisions of Mohamedan Law, restricting the power of a Mohamedan to make any bequest in excess of the legal one third, unless the heirs consented thereto after the death of the testator.

Mr. Gopal Chandra Ghosh, appearing for the plaintiff submitted that the heirs had not consented to the disposition as per the Deed of Trust. In course of trial of the suit, however, the plaintiff had adopted an alternative stand that the Deed of Trust was a “Deed of Gift through the medium of trust”. The deed contravened the essential conditions of a valid gift and was, therefore, invalid and void.

Mr. Ghosh argued that Mrs. Ershad Begum was neither de facto nor de jure guardian of the minor sons, as she had not been appointed guardian by any Will, and under Mohamedan Law she could not act as guardian of her minor children.

The plaintiff questioned the validity of acceptance of the Gift/Trust by Mrs. Ershad, the defendant no.1 on behalf of her minor children and contended that after demise of the original owner, Md. Faiyaz, the legal heirs of the deceased, including the plaintiff had inherited shares in the suit property, in accordance with Mohamedan Law.

By the judgment and order under appeal, the learned Trial Court held that the Deed of Trust/Gift was invalid and conferred no title upon the defendant nos.2-6 over the suit property. The suit was accordingly, decreed in preliminary form, and the parties were directed to effect partition amicably, failing which the suit property would be partitioned by metes and bounds, by appointment of a Partition Commissioner.

The learned Court observed, and rightly, that the maintainability of the suit hinged on the question of whether the Deed of Trust under challenge was void and invalid. Thus, the issue of whether the Deed of Trust executed by Md. Faiyaz on 24th April 1973 was invalid and void and without any force was taken up along with issue No.1, that is, whether the suit was maintainable.

The learned Court held that the gift had not been accepted, even though the trustee that is, Ershad Begum had, in her evidence stated that she had accepted the trust. Moreover, the learned Trial Court doubted the validity of the will since there was no disclosed reason for excluding the daughters of the testator, particularly, when the recital of the Deed indicated that the settlor had transferred the property to the Trustee to hold the same in trust for his minor sons and daughters.

The learned Trial Court concluded that the totality of the circumstances went to show that the deed in question was not a valid one, void and without any force, considering that Md. S. Hossain, whose date of birth was 12th August, 1952 had been shown in the deed as a minor; Md. Faiyaz's sons through his first wife had not been informed in writing of the deed of trust; Md. Faiyaz had transferred the property to the trustee Mrs. Ershad Begum to hold the same in trust for minor sons and daughters, but the daughters had ultimately not been given any interest in the property. Significantly, the learned Trial Court has not referred to any provision of law under which the trustee, Mrs. Ershad being the defendant no.1 was required to inform the sons of Md. Faiyaz through his first wife, of the Deed of Trust;

Mr. Ghosh rightly argued that the date of birth of Md. S. Hossain being 12th August, 1952, he was over 18 years of age on the date of execution of the deed of trust, that is 27th April, 1973. Under the Indian Majority Act, to which reference was made by Mr. Ghosh, the age of majority is 18 years.

This Court is, therefore, required to consider whether the description of Md. S. Hossain as a minor, or the exclusion of the minor daughter renders the Deed of Trust invalid; Whether Mrs. Ershad, the defendant no.1 was obliged to give any prior intimation of the Deed of Trust to the four sons of Md. Faiyaz through his first wife and if so what is the effect of the omission to give such notice? In other words, does the omission to give notice to the said four sons render the Deed invalid?

Mr. Gopal Ghosh submitted that from the recital of the Deed it was clear that Md. Faiyaz intended to create the trust for the benefit of his minor sons and daughters. However, the Deed is invalid, there being a patent inconsistency therein, in that the sole trustee was required to make over the trust property to the minor sons on attainment of majority.

As argued on behalf of the appellants, it was only the recital part of the deed, which mentioned "where as with the object of making proper and adequate provisions for the aforesaid minor sons and daughters and for the management and protection, preservation and disposition of the estate the said settlor is desirous of creating a trust in respect of the aforesaid property in the manner hereinafter appearing".

Mr. Amitava Ghosh led by Mr. Sudhish Das Gupta, appearing on behalf of the appellant submitted, and rightly that the operative part of the deed was to prevail over the recital. In support of such submission Mr. Ghosh cited the judgment of the Supreme Court in ***Ram Gopal V. Nand Lal,*** reported in ***AIR***

1951 Supreme Court, 139 and the judgment of the Supreme Court in ***Narendra Gopal Vidyarthi V. Rajat Vidyarthi***, reported in ***(2009) 3 Supreme Court Cases 287***.

In Ram ***Gopal Vs. Nand Lal (supra)*** the Supreme Court held that in construing a document, whether in English or in vernacular, the fundamental rule was to ascertain the intention from the words used; the surrounding circumstances were to be considered, but that was only for the purpose of finding out the intended meaning of the words which had actually been used. The Supreme Court held that:

> *"I do not think that the mere fact that the gift of property is made for the support & maintenance of a female relation could be taken to be a prima facie indication of the intention of the donor, that the donee was to enjoy the property only during her life time. The extent of interest which the donee is to take, depends upon the intention of the donor as expressed by the language used and if the dispositive words employed in the document are clear and unambiguous and import absolute ownership, the purpose of the grant would not, by itself, restrict or cut down the interest. The desire to provide maintenance or residence for the donee would only show the motive, which prompted the donor to make the gift, but it could not be read as a measure of the extent of the gift."*

In ***Narendra Gopal Vidyarthi (supra)*** the Supreme Court held that the use of word wakf in the will in the aforesaid case might not have been appropriate, but it only showed the intention of the testator to divest himself of the property was a final dedication.

The Supreme Court held that the true intention of the testator has to be gathered, not by attaching importance to isolated expressions, but by reading the document as a whole, with all its provisions and ignoring none of them as redundant or contradictory. The Supreme Court further held that the Court must accept, if possible, such construction as would give every expression some effect, rather than that which would render any of the expressions inoperative. The Court will look at the circumstances under which the testator makes his will, such as the state of his property, of his family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted, instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator.

In ***Delhi Development Authority Vs. Durga Chand Kaushish*** reported in ***AIR 1973 SC 2609***, the Supreme Court held that in construing document one must have regard, not to the presumed intention of the parties, but to the meaning of the words they had used. However, if two interpretations of the document were possible, the one which would give effect and meaning to all its parts should be adopted and for the purpose the words creating uncertainty in the document can be ignored.

The proposition of law, which emerges from the aforesaid judgments cited on behalf of the appellants, is that a document is to be read as a whole and the intention of the maker of the document gathered from the words

actually used. Isolated expressions cannot render a document invalid if conflicting assertions can be reconciled.

Therefore, the mere fact that Md. S. Hossain, who was over 20 years of age, had been described in the deed as a minor along with the other four minor sons, would not render the deed invalid. The word minor was used as a generic description of all the sons of Md. Faiyaz through Mrs. Ershad, including Md. S. Hossain, considering that he was a dependent student and in any case for certain purposes, for example, for the purpose of voting, the minimum age was 21 years at the material time.

In the instant case the Deed of Trust makes the intention of Md. Faiyaz, the settlor was absolutely clear. Mrs. Ershad Begum was, as trustee, to hold the suit property for the benefit of her five sons to whom the property would ultimately be handed over, on their attaining majority. As trustee she would have to use the usufructs of the suit property for the benefit of five sons as well as the minor daughter.

In ***Jameela Begum Vs. the Controller of Estate Duty*** reported in ***AIR 1991 SC 414*** the Supreme Court held that Mohamedan Law makes a distinction between the corpus of a gift (Ayn) and the usufruct (Manafi). A reservation of rights in Manafi so long as the Ayn is transferred did not render the gift bad. Quoting from Mulla's Principles of Mohamedan Law, 18th Edition, the Supreme Court affirmed: -

"Where property is transferred by way of gift, and the donor does not reserve dominion over the corpus of the property nor any share of dominion over the corpus, but stipulates simply for an obtains a right to the recurring income during his life, the gift and the stipulation are both valid. Such a stipulation is not void, as it does not provide for a return of any part of the corpus."

The description of Md. S. Hossain as a minor, does not, therefore, invalidate the deed. Nor does the exclusion of the minor daughter render the deed invalid. There was no requirement in law, on the part of the trustee, Mrs. Ershad to give notice in writing to the four sons of Md. Faiyaz through his wife. Our attention has not been drawn to any such provision of law. The omission of Mrs. Ershad to give notice to the said four sons of Md. Faiyaz through his first wife also does not render the deed invalid.

In Mohammedan Law a 'hiba' or gift is a transfer of property, made immediately, and without any exchange, by one person to another and accepted by or on behalf of the latter. Reference may be made to the 20th updated edition of Mullah's 'Principles of Mohammedan Law'. Every Mohammedan, of sound mind and not a minor, may dispose of his property by gift. However, the gift must be with bona fide intention to transfer, and not with intent to defraud creditors.

As per Paragraph 142 of Chapter XXI of Mulla's Principles of Mohamedan Law (20th Edition), a gift, as distinguished from a will, may be made of the whole of the donor's property and it may be even made to an heir.

In ***Ranee Khujooroonissa Vs. Mussamut Raushun Jehan*** reported in ***(1876) 3 Indian Appeal 291*** the Privy Council held "the policy of the Mahommedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime, the whole, or any part of his property to one of his sons, provided he complies with certain forms."

In ***Hafiz Abdul Basit and Anr. Vs. Hafiz Ahmad Mian and Ors.*** reported in ***AIR 1973 Delhi 280***, a Division Bench of Delhi High Court followed the Privy Council judgment in ***Ranee Khujooroonissa Vs. Mussamut Raushun Jehan (supra)*** and disapproved the dictum of the Court in ***Ahmad Khan Vs. Mt. Zamoot Jar*** reported in ***AIR 1950 Pesh 11*** that a gift intended to disinherit a heir would be a sham transaction and nugatory.

The Division Bench held that a man may lawfully make a gift of his property to another during his lifetime, or he may give it away to someone after his death by will. The first is called a disposition inter vivos and the second a testamentary disposition. Mohammedan Law permits both kinds of dispositions, but while a disposition inter vivos is unfettered as to quantum, testamentary disposition is limited to 1/3rd of the net estate. Mohammedan Law allows a man to give away the whole of his property during his lifetime, though only 1/3rd of it can be bequeathed by will.

We respectfully agree with the view of the Division Bench of Delhi High Court. Both Md. Faiyaz, the settlor and Ershad Begum were residing in the suit property. It is patently clear that Md. Faiyaz divested himself of all rights in the suit property. It was not necessary for Md. Faiyaz to remove himself from the suit property as held in Hafiz Abdul Basit and another Vs. Hafiz Ahmad Mian and others (supra). If the owner called upon the tenant to attorn a donee that would mean transfer of possession.

As argued by Mr. Gopal Ghosh, there are three essentials of a gift as stated by Mullah in paragraph 149 in Chapter XI of 'Principles of Mohammedan Law". 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 paragraph 150. If these conditions are complied with, the gift is complete.

Mr. Gopal Ghosh referred to paragraph 150 where Mullah says that it is essential to the validity of a gift that there should be a delivery of possession of the subject of the gift. The taking of possession of the subject matter of the gift by the donee either actually or constructively, is necessary to complete a gift.

In paragraph 151 Mullah states that a gift may be made through the medium of a trust. The same conditions are necessary for the validity of such

a gift as those for a gift to the donee direct, with this difference that the gift should be accepted by the trustees and possession also should be delivered to the trustees.

A Mohammedan cannot, through the medium of a trust, settle property for the benefit of persons who are incapable of taking under a gift, nor can he through the medium of a trust, create an estate not recognized by the law of gift governing the sect to which he belongs. For example, a Mohammedan cannot through the medium of a trust settle property in favour of an unborn person, since, neither a Sunni nor a Shia can make a gift in favour of an unborn person.

In paragraph 152 of Mulla's Principles of Mohamedan Law it is stated that a gift of 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 the done formally enters into possession. However, in paragraph 152(3) it is stated that no physical departure or formal entry is necessary in the case of a gift of immovable property, in which the donor and the donee are both residing at the time of making the gift. In such a case, the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift.

In paragraph 153, it is stated that in the case of gift by the husband to the wife of immovable property used by them for their joint resident, or let out

to tenants, the fact that the husband continues to live in the house or continues to receive the rents after the date of the gift, will not invalidate the gift, the presumption in such a case being that rent is collected by the husband on behalf of the wife and not on his own account. Similarly, in paragraph 155 it is stated that no transfer of possession is required in the case of a gift by a father to his minor children or by a guardian to his ward. All that is necessary is to establish a bona fide intention to gift.

In this case, the transfer of the property in question is not with any mala fide intent. The transfer has not been effected with a view to defraud any creditors. The creation of a trust for the benefit of young dependent children cannot be mala fide. It is apparent that the intention of Md. Faiyaz was bona fide.

In ***Sugrabai and Ors. Vs. Mahomedalli Ahmedalli and Anr.*** reported in ***AIR 1935 Bombay 34*** , Kania, J., held that in order to constitute a valid gift by a father in favour of his minor children, it is not necessary to transfer possession, but proof of bona fide intention to give must be established.

Kania, J., held that under the Mahomedan Law, in order to transfer ownership of an immovable property, it was essential that possession of the property should be transferred to the transferee or the donee as the case might be. However, relying on the decision of the Privy Council in ***Mohammad Sadiq Ali Khan Vs. Fakhr Jahan Begam*** reported in ***1932***

Privy Council 13 Kania, J., held that in order to constitute a valid gift by a father in favour of his minor children, it was not necessary to transfer possession. What was necessary was proof of bona fide intention to give.

In ***Abdul Sattar Ostagar and Anr. Vs. Abu Bakkar Ostagar and Ors.*** reported in ***AIR 1977 Calcutta 132*** a Division Bench of this Court relied on ***Sugrabai Vs. Mohamedalli Ahmedalli*** reported in ***AIR 1935 Bom 34*** and held that in order to constitute a valid gift by a father in favour of his minor children, it was not necessary to transfer possession, but proof of bona fide intention to give had to be established.

In ***Abdul Sattar Ostagar and Anr. Vs. Abu Bakkar Ostagar and Ors. (supra)*** the Court observed that, since the donor and the donee were residing in the same house which was subject matter of the deed of gift, it could not be said that it was necessary for the father, after executing the deed, to vacate the dwelling house.

Mr. Amitava Ghosh rightly argued that in Mohammedan Law there is no prohibition to execution of a deed of gift or trust. Mohammedan Law permits transfer of property by the donor to his minor children as also to an adult. In this case Mrs. Ershad Begum, mother of the beneficiaries had accepted the Deed on their behalf. In this context it is pertinent to note, that a trust need not necessarily be created for the benefit of minors alone. A trust may be created for the benefit of majors. Therefore, it was permissible for

Mrs., Ershad Begum to hold the suit property on behalf of Sahadat Hossain, who was no longer a minor.

There is a clear distinction between a will and gift or a gift through the medium of trust. It has rightly been argued on behalf of the appellant, that a Mohammedan cannot dispose of more than 1/3rd of his property through a will. There is no such restriction in case of gift or gift through the medium of trust.

It appears that Mrs. Sabiha Begum, the original plaintiff has transferred her alleged undivided share to her sister Ayesha. Such transfer during the pendency of the suit cannot confer any right to Ayesha. Mrs. Sabiha Begum had no share in the property which had been transferred by Md. Faiyaz during his lifetime. The purported transfer is void. Moreover, from the deed of transfer which is annexed to the Written Notes, it appears that Ayesha took the property, with full knowledge of the Dee of Trust.

The appeal is, therefore, allowed.

The judgment and order/preliminary decree is set aside.

The suit is dismissed.

Photostat certified copy of this order, if applied for, be supplied to the learned Advocates appearing for the parties, subject to compliance with all requisite formalities.

(Indira Banerjee, J.)

(Sahidullah Munshi, J.)