

## **HAFEEZA BIBI & ORS. VS. SHAIKH FARID (DEAD) BY LRS. & ORS.**

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DOI: [doi.org/10.55662/JLSR.2022.8406](https://doi.org/10.55662/JLSR.2022.8406)

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### **FACTS**

“Shaik Dawood had three sons and five daughters: Shaik Farid, Mehboob Subhani, and Mohammed Yakub, as well as Sappoor Bibi, Khairunnisa Begum, Noorajahan Begum, Rabia Bibi, and Alia Bibi. All five of his daughters were married. His wife died before him. Shaik Dawood resigned from his position as Reserve Head Constable. He was also a practitioner of Unani medicine. Shaik Farid, Sappoor Bibi, Khairunnisa Begum, Noorajahan Begum, and Mohd. Iqbal (son of Alima Bibi) (hereinafter called "the plaintiffs") filed a suit for partition against Mehboob Subhani, Mohammed Yakub, and Rabia Bibi (hereinafter called "Defendant 1," "Defendant 2," and "Defendant 3," respectively)". The son and daughters of Syed Ali, who was Shaik Dawood's brother, were also named as defendants. They will be called "Defendants 4 through 7" from now on. Sunni law is used to decide who wins and who loses. In their complaint, the plaintiffs said that Shaik Dawood died without a will on December 19, 1968, and that the plaintiffs and Defendants 1–3 were now entitled to A schedule properties and half of B schedule properties. “The plaintiffs said that Defendants 4–7 are entitled to other half-shares in B schedule properties. Mohammed Yakub, the second defendant, disputed the partition claim. He said that on 5/2/1968, Shaik Dawood performed a hiba (gift deed) and gave him his possessions. That day, Shaik Dawood gave him custody of the hiba assets. The plaintiffs were well aware that the 'hiba' had been completed. In his written statement, Defendant 2 also alluded to a prior partition action that was dismissed for lack of prosecution. Several of the original parties have passed away throughout the course of the litigation”. Their legal counsel has been included in the record. The trial court outlined four concerns in the lawsuit. Relevant for the purposes of this appeal before the Supreme Court was Issue 2, which

asked whether the hiba dated 5-2-1968 is true, legitimate, and enforceable against the plaintiffs. After recording the evidence and hearing the parties, the trial court answered Issue 2 in the positive and determined that the plaintiffs were not entitled to the shares demanded in the complaint. Therefore, by decision and decree dated April 27, 1988, the trial court rejected the plaintiffs' claim. Consequently, the original plaintiffs appealed the trial court's ruling and decree to the Supreme Court. "The appellants argued before the High Court, among other things, that the gift dated 5-2-1968, being in writing, was required to be registered and stamped, and in the absence of such registration and stamping, the gift deed could not be accepted or relied upon for any purpose, and such unregistered gift deed would not confer any title upon Defendant 2. The High Court was convinced by the reasoning and ruled that the unregistered gift deed would not transfer any ownership to Defendant 2 as he argued. As stated before, the High Court granted the appeal, vacated the trial court's verdict and decree, and remanded the case to that court for the purpose of issuing a preliminary decree. These appellants are the lawful heirs of Defendant 2 who passed away".

## ISSUE

"The question before the Supreme Court of India in this appeal is whether or not the High Court is correct in its conclusion that the unregistered gift deed dated 5-2-1968 is not a legal gift and transmitted no title to Defendant 2. Regarding the issue at hand, the opinions of the High Courts disagree. This resulted in several issues, including:

- What are the necessary ingredients for a gift to be valid under the Muslim Law?
- Applicability of Section 17(1)(a) of the Registration Act to a written gift signed by a Mohammadan in light of Section 129 of the TP Act and the gift rule of Mohammadan Law?
- The Supreme Court had to determine whether a document similar to the one completed by a Mahomedan donor after he made a donation to demonstrate that he had given it in favour of the doner is required to be registered under the Registration Act".

## **RULE**

“The Supreme Court while answering the issue in the suit referred to Mohd. Abdul Ghani v. Fakhr Jahan Begam [(1921-22) 49 IA 195], a judgement of the Privy Council where they referred to Mohammedan Law and approved the statement made therein that three conditions are necessary for a valid gift by a Muslim”:

- (a) “manifestation of the wish to give on the part of the donor”;
- (b) “the acceptance of the donee, either impliedly or expressly”;
- (c) “the taking of possession of the subject-matter of the gift by the donee, either actually or constructively”.

Next the Supreme Court considered the principles of Mahomedan Law by Mulla, 19th Edition was referred to (paragraph no. 5, SCC pp. 696-97) noting the legal position as:

“5. Under Section 147 of Principles of Mahomedan Law by Mulla, 19th Edn., edited by Chief Justice M. Hidayatullah, envisages that writing is not essential to the validity of a gift either of movable or of 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 Section 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 Section 150. If these conditions are complied with, the gift is complete. Section 150 specifically mentions that for a valid gift there should be 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 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 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 case of immovable property in the possession of the donor, he should completely divest himself physically of the subject of the gift.”

The Supreme Court also referred to Section 123 of the Transfer of Property Act, 1882 which lays down the manner in which gift of immovable property may be effected. It reads thus:

**“123.Transfer how effected:-** For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.”

The Supreme Court also took into consideration the exception to section 123 of TP Act, Section 129 of the TP Act with regard to the gifts by a Muhammadan which read as follows:

**“129.Saving of donations mortis causa and Muhammadan Law:-** Nothing in this Chapter relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan Law.”

The Supreme Court also looked into Section 17 of the Registration Act, 1908 which makes registration of certain documents compulsory. Section 17 of the Registration Act, to the extent it is necessary, reads as follows:

“17. Documents of which registration is compulsory.—(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act 16 of 1864, or the Indian Registration Act, 1866 (20 of 1866), or the Indian Registration Act, 1871 (8 of 1871), or the Indian Registration Act, 1877 (3 of 1877), or this Act came or comes into force, namely—

(a) instruments of gift of immovable property”;

The Supreme Court also referred to Section 49 of the Registration Act which deals with the effect of non-registration of documents required to be registered. It reads thus:

**“49. Effect of non-registration of documents required to be registered.**—No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall—

- (a) affect any immovable property comprised therein, or
  - (b) confer any power to adopt, or
  - (c) be received as evidence of any transaction affecting such property or conferring such power,
- unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (1 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument.”

Answer 1: “Under Muslim Law there are three ingredients of a valid gift under muslim law including: (1) declaration of the gift by the donor; (2) acceptance of the gift by the donee; and (3) delivery of possession”.

Answer 2: “Section 17(1)(a) of the Registration Act is not valid to a written gift executed by a Mohammadan. The same has been further substantiated by Section 129 of the TP Act which preserves the rule of Mohammadan Law by excluding the applicability of Section 123 of TP Act to a gift of an immovable property by a mohammadan”.

Answer 3: “Merely because the gift is reduced to writing by a Mohammadan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by a Mohammadan orally, its nature and character is not changed because of it having been made by a written document. Henceforth registration of such a document is not mandatory”.

## APPLICATION AND CONCLUSION

The supreme court relying upon numerous judgments to come to the final conclusion including the case of:

- “Nasib Ali v. Wajed Ali [AIR 1927 Cal 197] of the Calcutta High Court where in the Calcutta High Court held that the deed of gift, not being registered under the Registration Act, is not admissible in evidence. The Calcutta High Court held that a deed of gift by a Mohammadan is not an instrument effecting, creating or making the gift but a mere piece of evidence”.
- The Supreme court also referred to another full bench judgment of the Andhra Pradesh High Court in the case of Govt. of Hyderabad (Deptt. of Revenue) v. Tayyaba Begum [AIR 1962 AP 199] wherein the High Court was challenged with the question whether the document under consideration therein was a gift deed or it merely evidenced a past transaction. The Hon’ble SC also referred to another case of **Assan Ravther v. Manahapara Charayil** [AIR 1972 Ker 27] where in his lordship V.R. Krishna Iyer, J. (as His Lordship then was) did not agree with the test applied by the Full Bench of the Andhra Pradesh High Court and the reasoning given in Tayyaba Begum [AIR 1962 AP 199] holding ‘I am prepared to go so far as to hold that a document like the present one is not compulsorily registrable under the Registration Act, or the Registration Act does not apply to a so-called deed of gift executed by a Mahomedan.’
- “The Supreme Court further referred to the Full Bench decision of the Jammu and Kashmir High Court in Ghulam Ahmad Sofi v. Mohd. Sidiq Dareel [AIR 1974 J&K 59] where the HC had an occasion to consider the question whether in view of the provisions of Sections 123 and 129 of the TP Act, the rule of gifts in Mohammadan Law stands superseded; and whether it is necessary that there should be a registered. The Full Bench observed that if the document is executed as an instrument and its execution is contemporaneous with the making of the gift then in that case the instrument must be registered as provided under Section 17 of the Registration Act. However, if the making of the gift is an antecedent act and a deed is executed afterwards as evidencing the said transaction that does not require any registration”.

“On the basis of these judgments the Supreme court observed that there are three essentials of a gift under Mohammadan Law i.e. (1) declaration of the gift by the donor; (2) acceptance of the gift by the donee; and (3) delivery of possession. Though, the rules of Mohammadan Law do not make writing essential to the validity of a gift; an oral gift fulfilling all the three essentials makes the gift complete and irrevocable. However, the donor may record the transaction of gift in writing”.

The Supreme court concluded that Section 17(1)(a) of the Registration Act leaves no manner of doubt that an instrument of gift of immovable property requires registration irrespective of the value of the property (subject to exceptions).

“The Supreme Court further observed that merely because the gift is reduced to writing by a Mohammadan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by a Mohammadan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammadan Law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting a valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in Mohammadan Law”.

“The Supreme court reasoned this observation stating that Section 129 of the TP Act preserves the rule of Mohammadan Law by excluding the applicability of Section 123 of TP Act to a gift of an immovable property by a mohammadan. However, it is not the requirement that in all cases where the gift deed is contemporaneous to the making of the gift then such deed must be registered under Section 17 of the Registration Act. Meaning each case would depend on its own facts”.

“The Supreme Court finally observed that regarding the facts of the present case, the gift was made by Shaik Dawood by a written deed dated 5-2-1968 in favour of his son Mohammed Yakub in respect of the properties in A schedule and B schedule appended thereto. The gift—as is recited in the deed—was based on love and affection for Mohammed Yakub as after the

death of the donor's wife, he has been looking after and helping him. Can it be said that because a declaration is reduced to writing, it must have been registered? We think not. The acceptance of the gift by Mohammed Yakub is also evidenced as he signed the deed. Mohammed Yakub was residing in the B schedule property consisting of a house and a kitchen room appurtenant thereto and, thus, was in physical possession of the residential house with the donor. Hence the Supreme Court allowed the appeal while the judgment and order dated 13-9-2004 passed by the High Court was set aside and the judgment and decree dated 27-4-1988 passed by the Principal Subordinate Judge, Vishakhapatnam was restored”.

## **SOCIO-LEGAL ANALYSIS**

That under the Indian legal System, customs and past practices have been given significant importance as they can be an exception to law. The necessary ingredient of the law of customs mandate, the custom has to be continuously in practice for a time immemorial without any disruption and that shall not be prohibited by express understanding under law. The principle applies uniformly to all legally acceptable practices of all cast and creed across the whole of India. Mohammedan Law is based on old and authoritative texts which were promulgated long ago and at that time there were not in contemplation of anyone any Transfer of Property Acts, or Registration Acts, or any Revenue Courts to record transfers of possession of land. Through this judgement the Supreme Court of India reiterated the principles of the old law which defines the three necessary conditions for a valid gift by a Muslim including:

- (a) manifestation of the wish to give on the part of the donor;
- (b) the acceptance of the donee, either impliedly or expressly;
- (c) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively.

“This judgement is of paramount significance as it validates the law of gift defined under the Mohammedan Law and further expands its applicability to modern times as the Mohammedan Law of gifting is limited to gifts made by a Mohammadan orally. This judgement clears the



confusion that the nature of a gift made under Mohammadan Law, and its characteristics do not change because of it having been made by a written document.”

