

**IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH**

DATED THIS THE 6TH DAY OF JULY 2022

PRESENT

THE HON'BLE MR.JUSTICE SREENIVAS HARISH KUMAR

AND

THE HON'BLE MR.JUSTICE S. RACHAIAH

REGULAR FIRST APPEAL No.200204/2019

Between:

1. Dharmrao S,
2. Sarubai
3. Sharanappa
4. Siddanna S/
5. Basawaraj S

...Appellants

(By Sri Deepak V. Barad, Advocate)

And:

Syed Arifa Parveen

...Respondent

**(By Sri Ameet Kumar Deshpande, Senior Counsel for
Sri Ganesh S. Kalburgi, Advocate)**

This Regular First Appeal is filed under Order 41 Rule 1 of CPC, praying to allow the appeal and consequently be pleased to set aside the judgment and decree dated 11.11.2019 passed by Prl. Senior Civil Judge at Kalaburagi in O.S.No.212/2013, further prayed to dismiss the suit of the plaintiff.

This RFA having been heard and reserved on 09.06.2022 and coming on for pronouncement this day, **SREENIVAS HARISH KUMAR J.**, delivered the following:

JUDGMENT

The respondent herein initially filed the suit for declaration of title in respect of 24 acres 28 guntas of land in Sy.No.107 of village Kusnoor, taluk and district Kalaburagi (for short, 'suit property') and perpetual injunction to restrain the defendants from disturbing her peaceful possession over the suit property. By amending the plaint, she claimed further declaration that three sale deeds dated 25.02.1995 executed by Abdul Basit in

favour of the defendants did not bind her interest and that they were null and void.

2. For the sake of clarity and convenience, the parties are referred with respect to their ranks in the suit. Khudija Bee, the mother of the plaintiff became the owner of the suit property by virtue of a decree passed in O.S.No.68/1973. The plea put forward by the plaintiff was that her mother made orai gift of 10 acres of land out of the suit property in her favour on 05.12.1985 by delivering its possession to her and then on 05.01.1989, she executed a memorandum of gift evidencing the past oral gift. After the gift, there remained 14 acres 28 guntas in the possession of Khudija Bee. The plaintiff succeeded to the remaining extent of land of 14 acres 28 guntas after the death of Khudija Bee and thereby she became the owner of entire suit property.

3. The allegation against the defendants in the plaint is that on 14.10.2013, the defendants came near

the suit property and tried to dispossess her on the strength of sale deeds said to have been executed on 25.02.1995 in favour of defendants 1 to 5 by one Abdul Bas who was not the owner of the suit land. The name of the plaintiff's father was Abdul Basit Saheb. Neither the plaintiff's mother nor the father executed any sale deed in favour of the defendants and therefore the sale deeds might have been created. Defendants asserted their right on the property and asked the plaintiff to hand over the possession to them. In these circumstances, the plaintiff was constrained to file the suit.

4. The defendants 1 to 5 in their written statement, admitted that Khudija Bee was the original owner of the suit property. They denied the gift made by Khudija Bee in favour of the plaintiff and delivery of possession of 10 acres of land consequent to the gift. They also denied that the plaintiff succeeded to the remaining extent of 14 acres 28 guntas after the death

of Khudija Bee. Their specific case is that they are the bonafide purchasers of suit land for valid consideration from one Abdul Bas @ Abdul Basit S/o Syed Hussain Saheb. They stated that the three names Abdul Bas, Abdul Basit and Syed Abdul Basit referred to the same person who was the husband of Khudija Bee. They denied the relationship of the plaintiff with Khudija Bee as according to them, the couple did not have issues. After the death of Khudija Bee, revenue records were mutated in the name of Abdul Basit and ascertaining the fact that Abdul Basit was the absolute owner, all the defendants individually purchased certain extent of land in Sy.No.107. In fact in the year 1981, Abdul Bas @ Abdul Basit sold them a house property. The plaintiff being the stranger cannot claim declaration of title over the suit property. There was no valid gift in her favour and therefore suit is to be dismissed.

5. The trial court framed the following issues and additional issues based on the pleadings.

ISSUES

1. *Whether the plaintiff proves that, she is having right, title and ownership over the suit schedule property?*
2. *Whether the plaintiff further proves that, she is in lawful possession and enjoyment over the suit schedule property as on the date of filing of this suit?*
3. *Whether the plaintiff further proves that, defendants have interfered in the peaceful possession and enjoyment of suit schedule property as alleged in the plaint?*
4. *What order or decree?*

ADDITIONAL ISSUES

1. *Whether suit of plaintiff is barred by limitation?*

2. *Whether suit of the plaintiff in present form is maintainable?*

6. Assessing the oral evidence of the witnesses, P.Ws.1 to 4 from the plaintiff's side and D.Ws.1 and 2 from the defendants' side, as also the documentary evidence Exs.P.1 to 8 marked on behalf of plaintiff and Exs.D.1 to 44 produced by the defendants, the trial court moulded the relief in its judgment dated 11.11.2019 declaring the plaintiff to be the absolute owner of 18 acres 21 guntas in Sy.No.107 of Kusnoor village and declared further that the sale deeds executed by Abdul Bas @ Syed Abdul Basit in favour of defendants were bad to the extent of 18 acres 21 guntas and did not bind the interest of the plaintiff. Ancillary relief of permanent injunction was also granted restraining the defendants from interfering with plaintiff's possession of 18 acres 21 guntas. Hence this appeal by the defendants.

7. We have heard the arguments of Sri Deepak V. Barad, learned counsel appearing for the appellants/defendants and Sri Ameet Kumar Deshpande, learned senior counsel appearing for the respondent/plaintiff and perused the records.

8. The points raised by the learned counsel during the arguments will be referred contextually, but from their arguments, the following points are formulated for discussion.

1. *Has the trial court correctly held that the plaintiff is the daughter of Khudija Bee and Abdul Basit?*
2. *Is the finding of the trial court that there was no delivery of possession of 10 acres of land in Sy.No.107 of Kusnoor village by virtue of oral gift and thereby the gift was not acted upon correct?*
3. *Could the trial court have granted the relief of declaration of title without there being a claim for possession?*

4. *Are there grounds to mould the relief by exercising power under Order 41 Rule 33 of the Code of Civil Procedure?*
5. *Has the trial court correctly held that suit is not time barred?*

9. **POINT NO.1:** Sri Deepak V. Barad, learned counsel for the appellants/defendants argued that the plaintiff founded the relief of declaration of title on an oral gift said to have been made by Khudija Bee. The defendants denied the plaintiff to be the daughter of Khudija Bee. Therefore the trial court ought to have framed an issue regarding relationship. In the absence of an issue, the judgment of the trial court is not sustainable.

10. He further argued that according to the plaintiff herself, she studied upto 10th standard, and for that reason, she could have produced her SSLC marks card or any document obtained from the school to prove that she is the daughter of Khudija Bee and Abdul Basit.

His argument was that the evidence of P.Ws.2 and 3 should not have been believed by the court and he emphasized that the trial court should have framed an issue regarding relationship. The defendants were thus deprived of an opportunity to rebut the case of the plaintiff that she is the daughter of Khudija Bee and Abdul Basit.

11. Sri Ameet Kumar Deshpande met this argument by arguing that the trial court applied section 50 of the Indian Evidence Act to hold that the evidence given by the P.Ws.2 and 3 was relevant. These two witnesses stand in close relation to the plaintiff and that they knew very much that plaintiff was the daughter of Khudija Bee and Abdul Basit. Merely because a school document was not produced, it is not a ground for discarding the testimonies of P.Ws.2 and 3. Regarding non-framing of an issue, his argument was that the plaintiff and the defendants knew the point of controversy and they adduced evidence knowing the

case of each other. In this view, mere non-framing of an issue cannot be viewed seriously in the appellate court.

12. It is true that the trial court has not framed an issue regarding relationship. Since the defendants denied the relationship with Khudija Bee and Abdul Basit and since she claimed declaration of title over the suit property, issue regarding relationship could have been raised by the trial court. That issue would have been an ancillary issue to the main issue of proving the title. Anyway the evidence on record shows that the plaintiff adduced evidence as P.W.1 and stated in her evidence affidavit that she was the daughter of Khudija Bee and Abdul Basit. Her cross-examination discloses a suggestion being given to her that she was not the daughter of Khudija Bee and Abdul Basit. P.W.2, Mohammad Khaya Mulla and P.W.3, Maqbool Ahmed have given evidence that the plaintiff is the daughter of Khudija Bee. P.W.2 has stated that his mother and

Khudija Bee's mother were first cousins. P.W.3 has stated that Syeda Arifa Parveen i.e., the plaintiff is the daughter of Syed Abdul Basit and he (P.W.3) married one Siraj Fatima who is the sister of Syed Abdul Basit. Evidence of these two witnesses is believed by the trial court to hold that the plaintiff is the daughter of Khudija Bee and Syed Abdul Basit. The trial court has referred to section 50 of the Indian Evidence Act to hold that the testimonies of P.Ws.2 and 3 are relevant in this context.

13. We do not think that the trial court has given a wrong finding with regard to relationship. It is true that plaintiff could have produced a school document having studied upto 10th standard. Mere non-production of a school document does not take away the evidentiary value of P.Ws.2 and 3 in support of evidence of P.W.1 for establishing the relationship. The two witnesses have clearly stated how they are related to the plaintiff. The close relationship with the plaintiff's family makes their testimony believable. Section 50 of

the Indian Evidence Act states that whenever the court has to form an opinion regarding relationship of one person with the other, the opinion of any person, who, as a member of the family or otherwise, has a special means of knowledge is relevant. If the evidence of P.Ws.2 and 3 is assessed in the light of scope of section 50, they being close relatives of the plaintiff are in a better position to speak whether the plaintiff is the daughter of Khudija Bee and Abdul Basit or not. We do not see any reason to discard their evidence.

14. Regarding issue being not framed, it may be stated that once the defendants came to know that relevant issue had not been framed by the court and if in their opinion an issue was very much essential, nothing prevented them from applying to the court under Order 14 Rule 5 of CPC for raising an issue regarding relationship. Order 14 Rule 5 of CPC is meant for the purpose of drawing the attention of the court of

first instance to frame or reframe an issue so that the party on whom burden is cast can adduce evidence. Having failed to draw the attention of the court that an issue regarding relationship was necessary, the defendants cannot, in the appeal, complain of non-framing of an issue. It is not as though non-framing of an issue cannot be urged in the appellate court; it can be very much urged before the appellate court if the trial court declined to frame the issue or reframe the issue in spite of request made by a party during pendency of the suit. Otherwise, in our opinion, a party to the suit cannot complain of the same in the appeal.

15. Moreover, as has been rightly argued by Sri Ameet Kumar Deshpande, in spite of there being no issue, the parties went into trial regarding the relationship and therefore the point of argument of Sri Deepak V. Barad in this regard cannot be appreciated. The trial court has rightly come to the

conclusion that the plaintiff is the daughter of Khudija Bee and Abdul Basit.

16. **POINT NO.2:** The plaintiff has founded her title on the suit property referring to a *hiba* or an oral gift made by her mother. Ex.P.8 is the memorandum of gift deed. The trial court has held that Khudija Bee did execute Ex.P.8 evidencing the oral gift made by her on 05.12.1988, but has given a further finding that the gift was not acted upon as there was no delivery of possession of the property. Sri Deepak V. Barad argued that Ex.P.8 is actually a gift deed and not a memorandum of oral gift. It required registration. The second point of argument was that delivery of possession is the essential ingredient of gift made by a Mohammadan and since the evidence shows that there was no delivery of possession, the trial court has rightly come to conclusion that the gift was not acted upon.

17. Sri Ameet Kumar Deshpande controverted the argument of Sri Deepak V. Barad by submitting that actual handing over of possession to the donee should not be understood in the ordinary sense. Mother made a gift in favour of the daughter and therefore what is required is inference with regard to delivery of possession in the sense that donee taking over possession was an obvious consequence of the gift. If the gift is in favour of a third person, then there is some meaning in saying that actual delivery of the property must be proved. In view of closeness of relationship between the donor and donee, delivery of possession can be presumed. The trial court has therefore erred in giving a finding that there was no delivery of possession. He further argued that the plaintiff being the respondent in the appeal can urge this point according Order 41 Rule 22 of CPC without cross-objection being filed.

18. The evidence on record is required to be assessed. Ex.P.8 is the memorandum of gift. It contains a recital that Khudija Bee made oral gift of 10 acres of land out of 24 acres 28 guntas in Sy.No.107 of Kusnoor village on 05.12.1988 freely and voluntarily. It is recited that Khudija Bee delivered the possession of the gifted property situated on the southern side of Sy.No.107 to the plaintiff and that the latter accepted the same. Ex.P.8 contains the signature of plaintiff for having accepted the gift. Since this is a memorandum of gift which came into existence in proof of the oral gift as permitted under Mohammadan law, its registration was not necessary. P.W.1 has stated in her examination-in-chief that she took over possession on 05.12.1988 itself. While cross-examining her she was questioned with regard to boundaries of the land gifted to her and as to why she did not make an application for effecting mutation of the land in her name on the basis of *hiba* or

gift. Yes, she has given admission that she did not apply for mutation of revenue records to her name.

19. P.W.2 has given evidence that Khudija Bee gifted the property to her daughter out of love and affection and that she handed over the possession also. His affidavit discloses the names of the persons who were present at the time when Khudija Bee made the gift and delivered possession. His further evidence is that he was present when Khudija Bee executed the memorandum of gift as per Ex.P.8 on 05.01.1989. He has stated that Syed Abdul Basit and Abdul Rahman Sab were present as witnesses at the time of execution of Ex.P.8. If the cross-examination of P.W.2 is read, it appears that he has asserted that 10 acres of land situate on the southern side was gifted to plaintiff and thereafter Khudija Bee gave one plough and two cows to her daughter for the purpose of cultivation of the land. Though nothing is mentioned in the affidavit of P.W.2 about giving a plough and two cows, since it was elicited

from him in the cross-examination, it can be considered and the effect of this answer is that handing over of plough and two cows symbolized the delivery of possession for the purpose of cultivation.

20. The evidence of P.W.4 is important. In his affidavit he has stated that his land is situated near Sy.No.107 measuring 24 acres 28 guntas and that he has seen plaintiff personally cultivating the land by engaging agricultural labours. His cross-examination contains only suggestions which have been refuted by him and therefore there are no reasons to discard his testimony.

21. It is true that the plaintiff did not apply for mutation on the basis of gift deed. The trial court has held that this cannot be a reason for disbelieving the gift but it has held that gift was not acted upon because the identity of gifted property does not get established because of discrepancy in the evidence with regard to

boundaries. The finding is to the effect that if a part of 24 acres 28 guntas was gifted to plaintiff, one of the four boundaries of the gifted property should have been indicated as remaining land in Sy.No.107. But the boundaries given in Ex.P.8 show that remaining land in Sy.No.107 is not mentioned on any of the four sides and in this view question of handing over possession would not arise as the identity of the gifted property is not established.

22. In Ex.P.8, the boundaries are shown as:

Towards east: Govt. road and thereafter
Sy.No.108

Towards west: Sy.No.151

Towards North: Sy.No.106

Towards South: Sy.No.119.

If the boundaries are seen, it appears that they are not correctly mentioned as opined by the trial court. If 10 acres of land was a part of 24 acres 28 guntas in Sy.No.107, obviously one of the boundaries should have been shown as remaining land in Sy.No.107. It is not

written like that. Whether this could be a reason for holding that gift was not acted upon is the question.

23. While cross-examining P.W.1, she was questioned with regard to the boundaries and she gave the boundaries as mentioned in Ex.P.8. Merely because the boundaries appear to be not correctly written in Ex.P.8 and that P.W.1 asserts the same, taking a view that there was no delivery of possession consequent to oral gift is incorrect. All attending circumstances must be gathered. For this purpose reference may be made to Ex.D3 to D7, the sale deeds which the defendants rely upon for asserting their right and title. The sale deeds pertain to land in Sy.No.107 and if the boundaries mentioned in these sale deeds are seen, the Government road exists on the western side whereas in Ex.P.8 the road is shown to be in existence on the eastern side. Therefore there is discrepancy with regard to mentioning of the road in all these deeds. Moreover,

P.W.1 has not been questioned in the cross-examination as to why one of the boundaries is not shown as remaining part of land in Sy.No.107. If she had been questioned, probably she would have given an explanation. In this view, the oral testimonies of P.Ws.2 and 4 can be given weightage as lending support to the testimony of P.W.1 that she took over possession of 10 acres of gifted land. The oral testimonies of these witnesses has not been impeached in the cross-examination. Therefore the finding of the trial court that the gift deed has not been acted upon cannot be accepted. We hold that the evidence on record discloses delivery of possession and thereby the gift became complete and that the plaintiff held its possession.

24. **POINT NO.3**: This is a question of law. The accepted principle is that if the plaintiff is not in possession of the immovable property, he must seek relief of possession. Many a time the plaintiff files a suit

for declaration of title and injunction by pleading possession being with him. The evidence brought on record negatives plaintiff's possession and in that event the suit will have to be dismissed invariably. It was in this background, Sri Deepak V. Barad argued that possession of the plaintiff is not forthcoming in respect of the entire extent of 24 acres 28 guntas. The defendants purchased the entire land from Abdul Basit. Their names were entered in the revenue records. If really there was a gift in favour of the plaintiff in respect of 10 acres of land and that she succeeded to remaining extent of land after the death of Khudija Bee, she should have obtained revenue records to her name in order to presume possession being with her. She has admitted in her cross-examination that she did not apply for mutation; and Exs.D.9 to 16 clearly show that mutation was accepted in the name of the defendants based on the sale deeds, Exs.D.3 to 7. He also refers to Ex.D8 regarding sale of the property by Abdul Basit, which the

plaintiff did not question. Therefore he argued that the plaintiff did not have actual possession and that the trial court should not have decreed the suit even applying the Mohammadan law of succession.

25. Sri Ameet Kumar Deshpande replied that the possession being with the plaintiff on the basis of gift and inheritance after the death of Khudija Bee can be inferred. Here in this case, because of relationship between Khudija Bee and the plaintiff being mother and daughter respectively, it is not necessary to prove actual handing over of possession, it is a matter of inference. Moreover evidence of P.Ws.2 and 4 establishes the possession being with the plaintiff.

26. What the trial court has held is, though delivery of possession on the basis of oral gift is not proved, after the death of Khudija Bee, the plaintiff and her father succeeded to their respective shares according to Mohammadan law of succession and

therefore the possession of the plaintiff to the extent of her share is forthcoming. This finding of the trial court is for the purpose of moulding the relief in the background of Order 7 Rule 7 of CPC. We do not find it inappropriate. But we do not agree with the argument of Sri Deepak V. Barad that the suit could not have been decreed in the absence of claim for the relief of possession.

27. While answering point No.2, we have already held that there is proof for delivery of possession of 10 acres of land by Khudija Bee to the plaintiff. It is not only on the basis of evidence of P.Ws.2 and 4 that we have come to this conclusion, but as argued by Sri Ameet Kumar Deshpande, particularly in the background of the relationship of mother and daughter between Khudija Bee and the plaintiff, the delivery of possession can be inferred. It is not necessary to discuss the same aspect once again.

28. The possession of the plaintiff can be said to have continued on the remaining extent of her share in the suit property after the death of her mother. The plaintiff and her father simultaneously succeeded to the property to the extent of their respective shares according to their personal law. So the joint possession of the plaintiff with her father can be inferred. It is not the case of the defendants that there had taken place a division of property between the plaintiff and her father. Plaintiff's father could not have sold the entire land of 24 acres 28 guntas as he had no right over the entire extent. That means the defendants purchased undivided share of plaintiff's father and therefore it was necessary for them to file a suit for partition and possession. This kind of a suit having not been filed by the defendants, it can be said that the plaintiff continued to be in possession of the suit property with her father and after the death of her father, the possession of entire land remained with her. She continues to hold the

possession of entire land until the defendants seek partition and possession of whatever the share they are entitled to as per discussion on point No.4.

29. Here is a case where the transfer was from mother to daughter. As we are of the opinion that not only delivery of possession by Khudija Bee in favour of the plaintiff could be inferred, but also there is evidence which shows that there was actual delivery of possession. For this reason, the argument of Sri Deepak V. Barad does not stand. We do not find any error in the decision of the trial court to grant declaratory relief.

30. **POINT NO.4:** The trial court, as stated above, has moulded the relief to grant declaration in respect of 18 acres 21 guntas of land out of 24 acres 28 guntas in Sy.No.107 applying Mohammadal law of succession. As we have held that Khudija Bee made a gift of 10 acres of land and it was accepted by the

plaintiff taking over possession of the land, we may state that the plaintiff would become entitled to more extent of land than what the trial court has held. Despite the fact that the plaintiff has not questioned the finding of the trial court, here is a case for further moulding the relief notwithstanding no cross-objection being filed by the plaintiff. In fact, cross-objection was not necessary to be filed because the plaintiff claimed declaration of title in respect of entire extent of land basing her claim on the gift deed to the extent of 10 acres and succession to the remaining land after the death of her mother. But the plaintiff's father executed sale deeds in favour of defendants in respect of entire extent of land. The trial court has rightly held that Abdul Basit could not have executed the sale deeds for the entire 24 acres 28 guntas and that those sale deeds can be sustained only to the extent of his share.

31. According to Mohammadan law of inheritance, the plaintiff and Abdul Basit being the

daughter and husband of Khudija Bee respectively are sharers. After the death of Khudija Bee, in the property left behind by her, the plaintiff succeeded to $\frac{1}{2}$ share and Abdul Basit to $\frac{1}{4}$ th share. Still there remained $\frac{1}{4}$ th residue, and if the Rule of Return or Radd, is applied, the plaintiff became entitled to $\frac{1}{4}$ th residue and thus her total entitlement in the property left behind her mother enlarged to $\frac{3}{4}$ th. Therefore the sale deeds executed by Abdul Basit in favour of the defendants was valid and enforceable only to the extent of his $\frac{1}{4}$ th share in the properties that remained with Khudija Bee after she made oral gift of 10 acres in favour of the plaintiff. The plaintiff succeeded to $\frac{3}{4}$ th in the remaining property of her mother in addition to 10 acres of land that she got by gift. This is how the reliefs can be moulded in accordance with Order 41 Rule 33 of the Code of Civil Procedure.

32. **POINT NO.5:** The trial court has held that suit is not time barred. According to Sri Deepak V.

Barad, the plaintiff challenged the sale deeds by amending the plaint and by that time, the limitation period for seeking the relief of declaration had expired. But this argument of Sri Deepak V. Barad cannot be accepted because the principle is that whenever amendment of pleading is permitted, it relates back to the date of suit unless the order granting amendment specifies the day on which amendment comes into effect. In this case, it is not the argument of Sri Deepak V. Barad that the amendment came into effect from the date of granting of application for amendment. Moreover, the plaintiff could have just averred in the body of the plaint that the sale deeds did not bind her interest without specifically claiming declaration as regards the validity of the sale deeds. Merely because the plaint was amended at a later stage, the suit did not become time barred. In the plaint, the plaintiff has stated that it was on 14.10.2013, the defendants tried to dispossess her on the strength of the sale deeds and

that the limitation should be reckoned from the first date of invasion on the right and title of the plaintiff. The suit was filed on 20.08.2013. Therefore suit was filed within time.

From the above discussion, we come to conclusion to dismiss the appeal with a modification in the judgment to the effect that the plaintiff is declared to be the absolute owner of 10 acres of land gifted by her mother and $3/4^{\text{th}}$ of 14 acres 28 guntas in Sy.No.107 of village Kusnoor, taluk and district Kalaburagi. Till the defendants carve out their share in accordance with law, they shall not disturb the possession of plaintiff in respect of entire land. There is no order as to costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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