

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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FAO NO.82/1996

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Date of decision: 12th January, 2010

DR. NATHU LAL VAISHI & ANR.

....Appellants

Through: Mr. V.B. Andley, Sr. Advocate with Mr.
Rajinder Mathur, Advocate

Versus

G.S.KAMAL ADVOCATE & ANR.

... Respondents

Through: Mr. Hem Kumar, Advocate for Respondent
No.2.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. This appeal under Section 39 of the Arbitration Act, 1940 (hereinafter called the "Act") is preferred against the judgment/order dated 6th February, 1995 of the Additional District Judge dismissing the petition filed by the arbitrator/respondent no.1 herein under Section 14 and 17 of the Act for making the arbitration award dated 17th September, 1992 a rule of the Court. The said arbitration was between the appellants on the one hand and the respondent no.2 on the other hand. Neither of the parties preferred objections to the arbitral

award before the Additional District Judge. The respondent no.2 has not opposed the present appeal also. Notwithstanding, there being no objection to making the award a rule of the court, the Additional District judge dismissed the petition inter alia on the ground that the arbitration award was contrary to law and also being required to be registered and being not registered could not be made a rule of the court. Aggrieved there-from the appellants have preferred this appeal.

2. As per the arbitration record, forming part of the record of the court of Additional District Judge summoned in this court, the appellants and the respondent no.2 entered into an arbitration agreement dated 8th September, 1992. It is recorded therein that disputes and differences had arisen between the appellants (described in the agreement as first party) on the one hand and the respondent no.2 (described in the agreement as second party) on the other hand regarding property no.43, Silver Park, Chander Nagar, Delhi (Khasra No.19/3, Khureji Khas), measuring 90'.x120'; that the parties had agreed to refer to said disputes and differences to the arbitration of the respondent no.1; that two questions framed in the agreement and referred to the arbitrator are as under:-

- (i) Whether the first party is the exclusive and absolute owner of the property in dispute bearing no.43, Silver Park, Chander Nagar, Delhi-110051 (Khasra No.19/3, Khureji Khas), measuring 90'x 120' better known and described in the annexed site plan in red colour, in lieu of the Oral Gift made on 1st June, 1990 by the Second Party.
- (ii) Whether the second party, Peer Abdul Majid, can revoke or cancel the oral gift made on 1st June, 1990 in favour of the first party in respect of the aforesaid property shown in the site plan bearing

no.43 (Khasra No.19/3, Khureji Khas) measuring 90'x120', situated at Chawla Park, Chander Nagar, Delhi-110 051.

3. The arbitration record further reveals that respondent no.1/arbitrator on 12th September, 1992 recorded the statements of appellants, one Mr. A.K. Arora, witness of the appellants and the respondent. In the said statements, parties admitted that the respondent no.2 was the owner of the property aforesaid; that the respondent no.2 on 1st June, 1990 made an oral gift of the said property in the presence of the aforesaid Mr. A.K. Arora and in favour of the appellants and also handed over the proprietary possession of the said property to the appellants; that the appellants, at the time of making of the statements, were in possession of the property. The only dispute was that the respondent no.2 wanted to cancel or revoke the said oral gift. While the respondent no.2 claimed to be entitled to so revoke and cancel the gift, the same being oral and wanted back the possession of the property and custody of the title documents with respect thereto, the appellants denied his entitlement to do so.

4. On the basis of the aforesaid statements of the parties and the witness aforesaid, the respondent no.1/arbitrator made an award holding that under the Mohammedan Law, the oral gift was permissible; that all the ingredients required to complete the gift had been satisfied making the gift valid and legal and hence the respondent no.2 could not revoke the gift for the reason of the same being oral. The arbitrator thus answered the first question referred to him by holding that the appellants are the full fledged legal and valid owners/landlord of the property by virtue of the oral gift made on 1st June, 1990 and by answering the second question by holding that the respondent no.2 had no right, title and interest in the aforesaid property and could not revoke or cancel the gift. While holding so, the arbitrator also observed that the appellants are also authorized and

at liberty to get the property mutated in their name at any time in the records of house tax, MCD, Delhi.

5. The Additional District Judge, inspite of there being no objection to the petition for making the award rule of the Court, refused to do so for the reason that Section 17 of the Registration Act required any gift of immovable property to be by way of a registered document; that in the present case, the gift was oral and not by a registered document. It was further held that Section 17 of the Registration Act also requires an award, which purports or operates to create or assign any right, title and interest in immovable property, to be compulsorily registered. The award in the present case had not been registered, though purporting to create rights in immovable property in favour of the appellants herein. The Additional District Judge thus held that the award not being in accordance with law could not be made the rule of the Court.

6. This court had at the outset enquired from the senior counsel for the appellants as to whether the principle of Mohammedan Law permitting an oral gift applies to a gift by a Mohammedan to a non Mohammedan (in this case Hindu) also. The senior counsel for the appellants relied upon *Mt. Tabera Vs. Ajodhya Prasad* AIR 1929 Patna 417 where the Division Bench held the law of gifts relating to Mohammedans being applicable irrespective of whether the gift was to another Mohammedan or to a Hindu. I find that this view was also followed in *Someshwar Vs. Barkat Ullah* AIR 1963 All 469. However, in this case, it was also held that a Shia Muslim could revoke a gift made out of love and affection. To that extent the arbitration award holding the respondent No.2 not entitled to revoke the gift is contrary to this judgment. However, the respondent No.2 having not preferred any objections to the award, I do not deem it proper to consider that aspect as I find the Gauhati High Court in *Anwar Ali*

Vs. Mozibul Haque MANU/GH/0205/2004 and the Patna High Court in *Bibi Riyajan Khattoon Vs. Sadrul Alam* AIR 1996 Pat 156 to have held that revocation of gift under Mohammedan law is possible only as long as donor has not relinquished his control and dominion over the property; but once the donor relinquished his control and dominion over the property gifted, the donor retains no power to revoke the gift.

7. The judgment under appeal in spite of the award holding oral gift to be valid and legal in accordance with Mohammedan law does not deal with this aspect of the matter. The Additional District Judge has solely referred to the provisions of the Registration Act without any discussion whatsoever as to the provisions of Mohammedan Law relating to gifts. The Supreme Court in *Mahboob Sohab Vs. Syed Ismail* AIR 1955 SC 1205 has examined the essentials of a gift under Mohammedan law and clearly stated that writing is not essential to the validity of a gift either of moveable or immovable property under Mohammedan law. I may also add that the Karnataka High Court recently in *K.M. Kahdir Ahmed Vs. Suriya Parveen* MANU/KA/0069/2009 has held that once the oral gift under the Mohammedan Law is held to be valid, the court cannot enter into the controversy which in that case revolved around the non-payment of the requisite stamp duty on the gift deed (oral ‘Hiba’).

8. There being no opposition to the award and in view of the aforesaid position in law, this court holds the reasoning of the trial court of the gift being illegal and the award being not in accordance with law to be erroneous and sets aside the same.

9. The senior counsel for the appellants, to meet the other reasoning in the order under challenge, of the award itself being required to be registered relies upon *N. Khosla Vs. Rajlakshmi* AIR 2006 Supreme Court 1249; in that case it

was held that where the dispute referred to arbitrator was with respect to a gift deed and the arbitrator in the award simply recorded findings on the basis of pre-existing facts namely revocation of gift etc. and made a declaration of pre-existing rights, the award could not be said to be creating any rights or extinguishing any right in present or in future in immovable property and was not compulsorily registerable. The senior counsel for the appellants thus contends that the award in the present case also is by itself not creating any rights between the parties and is merely adjudicating on the claims of the appellants of the respondent no.2 having gifted the property to the appellants and the claim of the respondent no.2 to be entitled to revoke/cancel the gift. It is urged that the reasoning of the trial court holding the award to be compulsorily registrable is erroneous. There is merit in the said contention also of the senior counsel of the appellants. The award in the present case merely holds the respondent no.2 to have gifted the property to the appellants (and which fact in fact the respondent no.2 also admitted before the arbitrator) and holds the appellants to have become the owners of the property by virtue of the said gift and does not by itself create any rights in the property. It thus cannot be said that the award required registration or that it was not entitled to be made rule of the court for the said reason.

10. Both the reasons given by the trial court having been set aside by this Court, the order/judgment of the trial court is liable to be set aside and the appeal succeeds. However, I may add a word of caution. Though the only questions referred to the arbitrator were qua the gift and the entitlement of the respondent no.2 to revoke the said gifts; the arbitrator has in the award also held the appellants entitled to get the property mutated in their name in the records of the house tax, MCD, Delhi. MCD, Delhi was not a party of the arbitration proceedings. The award would thus be binding on the MCD only to the extent of

the rights inter se the appellants and the respondent no.2. If the MCD has any other objection to the said transfer/mutation, be it is on the ground of non payment of transfer duty, non payment of any taxes, or for the reason of the land subject matter of the property having been acquired or being subject matter of acquisition notification and the requisite permissions for transfer having not been taken or on any other ground whatsoever, then the MCD or any other party would be entitled to refuse mutation/transfer. At this stage, I may also deal with another ground taken in memorandum of appeal. It was sought to be contended that no objections having been preferred, to the award the court was obligated to make the same rule of the court. That is not the correct position in law. Under Section 17 of the Act, the court is to pronounce judgment according to the award only if the court sees no cause to remit the award or any of the matter referred to arbitration for reconsideration or to set aside the award and after the time for making application to set aside award has expired or such application having been made has been refused. The requirements of Section 17 are two fold. Firstly, the court has to satisfy itself that there is no cause to remit or to set aside the award and secondly, that the time for making application to set aside the award has expired or such application has been dismissed. The Court under Sections 15 and 16 of the Act is empowered to modify or remit the award also on the ground of objections to the legality of the award being apparent on the face of it and under Section 30 on the ground of the award having been improperly procured. The court is thus entitled and required to examine the said aspects, even in the absence of any objections to the award. Arbitration should not be permitted to devise ways to transfer property contrary to as provided in law or to deprive the exchequer of revenue.

11. The appeal thus succeeds. The judgment / order under appeal is set aside. The arbitration award is made rule of the Court save with the modification that the appellant would be entitled to get the property mutated in their name subject to what has been observed herein above. Decree sheet in terms of the award and with the modification aforesaid be drawn up. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

January 12, 2010
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