REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1714 OF 2005

Hafeeza Bibi & Ors. …. Appellants

Versus

Shaikh Farid (Dead) by LRs. & Ors. ….Respondents

JUDGMENT

R.M. Lodha, J.

This appeal, by special leave, arises from the judgment of the High Court of Andhra Pradesh dated September 13, 2004 whereby the Single Judge of that Court set aside the judgment and decree dated April 27, 1988 passed by the Principal, Subordinate Judge, Vishakhapatnam and remitted the matter back to the trial

court for the purpose of passing a preliminary decree after determining the shares to which each party would be entitled.

2. Shaik Dawood had three sons; Shaik Farid, Mehboob Subhani and Mohammed Yakub. He also had five daughters; Sappoora Bibi, Khairunnisa Begum, Noorajahan Begum, Rabia Bibi and Alima Bibi. All the five daughters were married. His wife predeceased him. Shaik Dawood retired as Reserve Head Constable. He was also a Unani Medical Practitioner.

3. Shaik Farid, Sappoora Bibi, Khairunnisa Begum, Noorajahan Begum and Mohd. Iqbal (son of Alima Bibi) – hereinafter referred to as 'plaintiffs' – filed a suit for partition against Mehboob Subhani, Mohammed Yakub and Rabia Bibi (hereinafter referred to as 'defendant 1', 'defendant 2' and 'defendant 3' respectively). The son and daughters of Syed Ali, who was brother of Shaik Dawood, were impleaded as other defendants (hereinafter referred to as 'defendants 4 to 7').

4. The parties are governed by Sunni Law. The plaintiffs averred in the plaint that Shaik Dawood died intestate on December 19, 1968 and the plaintiffs and defendants 1 to 3 became entitled to 'A' schedule properties and half share in 'B' schedule properties. The

plaintiffs stated that the defendants 4 to 7 are entitled to other half share in 'B' schedule properties.

5. Mohammed Yakub — defendant 2 — contested the suit for partition. He set up the defence that Shaik Dawood executed hiba (gift deed) on February 5, 1968 and gifted his properties to him. Shaik Dawood put him in possession of the hiba properties on that day itself. The hiba became complete and the plaintiffs were fully aware of that fact. The defendant 2 in his written statement also referred to a previous suit for partition filed by some of the parties which was dismissed in default.

6. Some of the original parties have died during the pendency of the suit. Their legal representatives have been brought on record.

7. The trial court framed four issues. The issue relevant for the purpose of the present appeal is issue no.2 which is to the effect whether hiba dated February 5, 1968 is true, valid and binding on the plaintiffs. The trial court, after recording the evidence and on hearing the parties, answered issue no. 2 in the affirmative and, held that plaintiffs were not entitled to the shares claimed in the plaint.

Consequently, vide judgment and decree dated April 27, 1988, the trial court dismissed the plaintiffs' suit.

8. The plaintiffs challenged the judgment and decree of the trial court before the High Court. Inter alia, one of the arguments raised before the High Court on behalf of the appellants was that the gift dated February 5, 1968 being in writing was compulsorily required to be registered and stamped and in absence thereof, the gift deed could not be accepted or relied upon for any purpose and such unregistered gift deed would not confer any title upon the defendant 2. The High Court was persuaded by the argument and held that the unregistered gift deed would not pass any title to the defendant 2 as pleaded by him. The High Court, as indicated above, allowed the appeal; set aside the judgment and decree of the trial court and sent the matter back to that court for the purposes of passing a preliminary decree.

9. The present appellants are legal heirs of the deceased defendant 2.

10. As to whether or not the High Court is right in its view that the unregistered gift deed dated February 5, 1968 is not a valid gift

and conveyed no title to the defendant 2 is the question for determination in this appeal.

11. There is divergence of opinion amongst High Courts on the question presented before us.

12. The Privy Council in the case of *Mohammad Abdul Ghani* (since deceased) & Anr.v. *Fakhr Jahan Begam & Ors.*[1] referred to 'Mohammadan Law'; by Syed Ameer Ali 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.

13. In *Mahboob Sahab* v. *Syed Ismail and others*[2], this Court referred to the Principles of Mahomedan Law by Mulla, 19th Edition and in paragraph 5 (pp. 696-697) noticed the legal position, in relation to a gift by Muslim incorporated therein, thus :

> **"5.** Under Section 147 of the *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 moveable or of immovable property. Section 148 requires that it is essential to the validity of a gift that the donor should divest himself

[1] 1922 (49) IA 195
[2] (1995) 3 SCC 693

> 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 Mohammedan 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……."

14. Section 123 of the Transfer of Property Act, 1882 (for short, 'T.P. Act') lays down the manner in which gift of immoveable property may be effected. It reads thus :

> "S.123. Transfer how effected. — For the purpose of making a gift of immoveable 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 moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.
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> Such delivery may be made in the same way as goods sold may be delivered."

15. However, an exception is carved out in Section 129 of the T.P. Act with regard to the gifts by a Mohammadan. It reads as follows:

> "S.129. Saving of donations *mortis causa* and Muhammadan Law. — Nothing in this Chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law."

16. At this stage, we may also refer to 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 :

> "S.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 No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—
> (a) instruments of gift of immovable property;
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> (b) . . . . . ;
> (c) . . . . . ;

(d) . . . . ;

(e) . . . .”

17. Section 49 of the Registration Act deals with the effect of non-registration of documents required to be registered. It reads thus:

> “S.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—
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> (a) affect any immovable property comprised therein or
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> (b) confer any power to adopt, or
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> (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:
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> 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 (3 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument.”

18. Section 17(1)(a) of the Registration Act leaves no manner of doubt that an instrument of gift of immoveable property requires registration irrespective of the value of the property. The question is about its applicability to a written gift executed by a Mohammadan in

the light of Section 129 of the T.P. Act and the rule of Mohammadan Law relating to gifts.

19. In the case of *Nasib Ali* v. *Wajed Ali*[3], the contention was raised before the Division Bench of the Calcutta High Court 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. This is what the High Court said :

> "……The position under the Mahomedan Law is this : that a gift in order to be valid must be made in accordance with the forms stated above; and even if it is evidenced by writing, unless all the essential forms are observed, it is not valid according to law. That being so, a deed of gift executed by a Mahomedan is not the instrument effecting, creating or making the gift but a mere piece of evidence. It may so happen after a lapse of time that the evidence of the observance of the above forms might not be forthcoming, so it is sometimes thought prudent; to reduce the fact that a gift has been made into writing. Such writing is not a document of title but is a piece of evidence.
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> 3. The law with regard to the gift being complete by declaration and delivery of possession is so clear that in a case before their Lordships of the Judicial Committee *Kamarunnissa Bibi v. Hussaini Bibi* [1880] 3 All. 266, where a gift was said to have been made in lieu of dower, their Lordships held that the requisite forms having been observed it was not necessary to enquire whether there was any consideration for the gift or whether there was any dower due. The case of *Karam Ilahi v. Sharfuddin* [1916]

[3] AIR 1927 Cal 197

38 All. 212 is similar in principle to the present case. There also a deed relating to the gift was executed. The learned Judge held that if the gift was valid under the Mahomedan Law it was none the less valid because there was a deed of gift which, owing to some defect, was invalid under Section 123, Transfer of Property Act, and could not be used in evidence.

4. The next, question that calls for consideration is whether a document like the present one executed by a Mahomedan donor after he made a gift to show that he had made it in favour of the donee is compulsorily registrable under the Registration Act. Under Section 17 of the Registration Act an instrument of gift must be registered. By the expression 'instrument of gift of immovable property' I understand an instrument or deed which creates, makes or completes the gift, thereby transferring the ownership of the property from the executant to the person in whose favour it is executed. In order to affect the immovable property, the document must be a document of transfer; and if it is a document of transfer it must be registered under the provisions of the Registration Act.

5. The present document does not affect immovable property. It does not transfer the immovable property from the donor to the donee. It only affords evidence of the fact that the donor has observed the formalities under the Mahomedan Law in making the gift to the donee. 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. But for purposes of the present case it is not necessary to go so far because I hold that this document is only a piece of evidence, and conceding that it should, have been registered, the effect of its non-registration is to make it inadmissible in evidence under Section 49 of the Registration Act……”

20. In *Sankesula Chinna Budde Saheb* v. *Raja Subbamma*[4], the Andhra Pradesh High Court, after noticing the three essentials of a gift under the Mohammadan Law, held that if a gift was reduced to writing, it required registration under Section 17(1)(a) of the Registration Act. It went on to hold that even if by virtue of Section 129 of the T.P. Act, a deed of gift executed by Mohammadan was not required to comply with the provisions of Section 123 of the T.P. Act, still it had to be registered under Section 17(1)(a) of the Registration Act when the gift related to immoveable property.

21. A Full Bench of the Andhra Pradesh High Court in the case of *Inspector General of Registration and Stamps, Govt. of Hyderabad* v. *Smt. Tayyaba Begum*[5], was called upon to decide on a reference made by the Board of Revenue under Section 55 of the Hyderabad Stamp Act whether the document under consideration therein was a gift deed or it merely evidenced a past transaction. The High Court applied the test – whether the parties regarded the instrument to be a receptacle and appropriate evidence of the transaction; was it intended to constitute the gift or was it to serve as a record of a past event – and held as under :

[4] 1954 2 MLJ 113
[5] AIR 1962 Andhra Pradesh 199

"12. We have to examine the document in question in the light of these rules. No doubt, there was recitals therein which relate to past transaction. But that is not decisive of the matter. What is the purpose which it was designed to serve? That the executant did not treat it as a memorandum of a completed hiba is evident from some of the sentences. In the deed, such as "I deemed it necessary to execute a deed also making a declaration in favour of my son…in accordance with the Muslim law", and the last portion of the document. The anxiety of the donor to free the title of the donee to the property from all doubts and to save him from future litigation is clearly exhibited in the last sentence.

> "I pray that no one may have any kind of doubt regarding the ownership of Syed Ehasan Hussain and that if per chance any doubt at all should arise, this deed of Ekrarnama may prove sufficient."

This sentence is expressive of her intention to silence all doubts regarding the ownership of the property with the aid of this document. She did not want anyone to challenge the title of the donee to the house in question. This object could be attained only if it is regarded as a conveyance, a document which effected the transfer by its own force. If, on the other hand, if it is a mere record of a past transaction, that would not have the desired effect. There is one circumstance which gives some indication as to the intention of the executant of the document. The document is attested by two witnesses as required by Section 123 of the Transfer of Property Act. No doubt, this is not conclusive of the matter. But it is indicative of the desire of the executant that it should serve as evidence of the gift and not as a memorandum of a past transaction."

22. In *Makku Rawther's Children: Assan Ravther and others* v. *Manahapara Charayil*[6], V.R. Krishna Iyer, J. (as His Lordship then

[6] AIR 1972 Kerala 27

was) did not agree with the test applied by the Full Bench of Andhra Pradesh High Court and the reasoning given in *Tayyaba Begum*[5] . He held in paragraphs 8 and 9 of the report thus :

> "8. I regret my inability to agree with the reasoning in these decisions. In the context of Section 17, a document is the same as an instrument and to draw nice distinctions between the two only serves to baffle, not to ill mine. Mulla says: "The words 'document' and 'instrument' are used interchangeable in the Act". An instrument of gift is one whereby a gift is made. Where in law a gift cannot be effected by a registered deed as such, it cannot be an instrument of gift. The legal position is well-settled. A Muslim gift may be valid even without a registered deed and may be invalid even with a registered deed. Registration being irrelevant to its legal force, a deed setting out Muslim gift cannot be regarded as constitutive of the gift and is not compulsorily registerable."
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> 9. Against this argument counsel invoked the authority of the Andhra Pradesh Full Bench. One may respect the ruling but still reiect the reasoning. The Calcutta Bench in AIR 1927 Cal 197 has discussed the issue from the angle I have presented. The logic of the law matters more than the judicial numbers behind a view. The Calcutta Bench argued:
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> > "The essentials of a gift under the Mahomedan law are ..... A simple gift can only be made by going through the above formalities and no written instrument is required. In fact no writing is necessary to validate a gift; and if a gift is made by a written instrument without delivery of possession, it is invalid in law ..... That being so, a deed of gift executed by a Mahomedan is not the instrument effecting, creating or making the gift but a mere piece of evidence ..... Under Section 17 of the Registration Act an instrument of gift must be

> registered. By the expression 'instrument of gift of immovable property' I understand an instrument or deed which creates, makes or completes the gift thereby transferring the ownership of the property ..... The present document does not affect immovable property. It does not transfer an immovable property from the donor to the donee which only affords evidence of the fact that the donor has observed the formalities under the Mahomedan law in making the gift ..... 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."
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> These observations of Suhrawardy, J. have my respectful concurrence. So confining myself to this contention for the nonce, I am inclined to hold that Ext. B1 is admissible notwithstanding Ss. 17 and 49 of the Indian Registration Act. This conclusion, however, is little premature if I may anticipate my opinion on the operation of Section 129 of the Transfer of Property Act expressed later in this judgment. Indeed, in the light of my interpretation of Section 129, Ext. B1 needs to be registered. For the present I indicate my conclusion, if the law of gifts for Muslims were not to be governed by Section 129."

23. The Full Bench of Jammu and Kashmir High Court in *Ghulam Ahmad Sofi* v. *Mohd. Sidiq Dareel and others*[7] had an occasion to consider the question whether in view of the provisions of Sections 123 and 129 of the T.P. Act, the rule of gifts in Mohammadan Law stands superseded; and whether it is necessary that there should be a registered instrument as required by Sections

[7] AIR 1974 Jammu & Kashmir 59

123 and 138 of the T.P. Act in the case of gifts made under that Law. The Full Bench noticed the statutory provisions and also decisions of different High Courts including the decision of Calcutta High Court in the case of *Nasib Ali*[3]. The Full Bench held as follows :

> "14. The ratio of the above cited authorities is therefore in favour of the proposition that an oral gift made under the Muslim law would not be affected by Section 123 of the Transfer of Property Act and the gift if it has otherwise all the attributes of a valid gift under the Muslim Law would not become invalid because there is no instrument in writing and registered. Therefore the answer to the question formulated would be in the negative i.e. that Sections 123 and 129 of the Transfer of Property Act do not supersede the Muslim law on matters relating to making of oral gifts, that it is not essential that there should be a registered instrument as required by Sections 123 and 138 of the Transfer of Property Act in such cases. But if there is executed 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. If, however, the making of the gift is an antecedent act and a deed is executed afterwards as evidencing the said transaction that does not require registration as it is an instrument made after the gift is made and does not therefore create, make or complete the gift thereby transferring the ownership of the property from the executant to the person in whose favour it is executed."

24. The Single Judge of the Andhra Pradesh High Court in the case of *Chota Uddandu Sahib* v. *Masthan Bi (died) and others*[8], was concerned with the question about the gift by Mohammadan. The

[8] AIR 1975 Andhra Pradesh 271

Single Judge referred to some of the decisions noticed above and few other decisions and held in paragraph 10 of the report thus :

> "10. Under Section 129 of the Transfer of Property Act, nothing in Chapter VII relates to gifts of movable property made in contemplation of death or shall be deemed to affect any rule of Mohammadan Law. According to the Mohammedan Law, there can be a valid gift, if three essentials of the gift are satisfied. (1) a declaration of the gift by the donor, (2) the acceptance of the gift express or implied by or on behalf of the donee and (3) delivery of possession of the subject of gift by the donor to the donee. If these conditions are complied with the gift is complete. According to Muslim law it is not necessary that there should be a deed of gift in order to make it a valid gift, but of course, if there is a deed it should be registered. But if the deed is merely a memoranda of an already effected gift, then it stands on a separate footing. In view of this specific provision of Muslim Law, which is saved by Section 129, it cannot be held that the gifts amongst muslims also should satisfy the provisions of Chapter VII. . . . . Hence if all the formalities, as prescribed by Muslim Law, regarding the making of gifts are satisfied, the gift is valid notwithstanding the fact that it is oral and without any instrument. If there is a contemporaneous document it should be registered. But if the gift is antecedent and the deed is subsequent merely evidencing the past transaction, it does not require registration, because it does not by itself make or complete the gift. . . . . ."

25. In the case of *Amirkhan* v. *Ghouse Khan*[9], one of the questions that arose for consideration before the Madras High Court was : whether the gift of the immoveable property by Mohammadan, if reduced to writing, required registration. The Single Judge of the

[9] (1985) 2 MLJ 136

Madras High Court concluded that though a Mohammadan could create a valid gift orally, if he should reduce the same in writing, the gift will not be valid unless it is duly registered.

26. In the case of *Md. Hesabuddin and others* v. *Md. Hesaruddin and others*[10], the question with regard to gift of immoveable property written on ordinary unstamped paper arose before the Gauhati High Court. That was a case where a Mohammadan mother made a gift of land in favour of her son by a gift deed written on ordinary unstamped paper. The Single Judge of the High Court relying upon an earlier decision of that Court in *Jubeda Khatoon* v. *Moksed Ali*[11] held as under:

> "….. But it cannot be taken as sine qua non in all cases that wherever there is a writing about a Mahomedan gift of immovable property, there must be registration thereof. The facts and circumstances of each case have to be taken into consideration before finding whether the writing requires registration or not. The essential requirements, as said before, to make a Mahomedan gift valid are declaration by the donor, acceptance by the donee and delivery of possession to the donee. It was held in Jubeda Khatoon v. Moksed Ali, AIR 1973 Gau 105 (at p. 106)-
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> "Under the Mahomedan Law three things are necessary for creation of a gift. They are (i) 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. The deed of

[10] AIR 1984 Gauhati 41
[11] AIR 1973 Gauhati 105

gift is immaterial for creation of gift under the Mahomedan Law. A gift under the Mahomedan Law is not valid if the above mentioned essentials are not fulfilled, even if there be a deed of gift or even a registered deed of gift. In other words even if there be a declaration of acceptance of the gift, there will be no valid gift under the Mahomedan Law if there be no delivery of possession, even though there may be registered deed of gift." In that case there was a deed of gift which was not produced during trial. Still it was found in that case that had the defendants produced the deed of gift, at best it would have proved a declaration of the gift by the donor and acceptance thereof by the donee. It was further held that despite this the defendants would have to lead independent oral evidence to prove delivery of possession in order to prove a valid gift. Therefore it was found in that case that deed of gift under the Mahomedan Law does not create a disposition of property. Relying on this it cannot be said that whenever there is a writing with regard to a gift executed by the donor, it must be proved as a basic instrument of gift before deciding the gift to be valid. In the instant case a mere writing in the plain paper as aforesaid containing the declaration of gift cannot tantamount to a formal instrument of gift. Ext. A (2) has in the circumstances of the present case to be taken as a form of declaration of the donor. In every case the intention of the donor, the background of the alleged gift and the relation of the donor and the donee as well as the purpose or motive of the gift all have to be taken into consideration. In the present case, it is recited in the said writings that the 3rd defendant has been maintaining and looking after the donor and that the other children of the donor were neglecting her. The gift was from a mother to a son and it was based on love and affection for the son in whose favour the gift was made. Therefore, it cannot be held that because a declaration is contained in the paper Ext. A (2) the latter must have been registered in order to render the gift valid. Admittedly, the 3rd defendant has been possessing the land and got his name mutated in the revenue records with respect to the land. It is therefore implied that there was acceptance on behalf of the donee and also that the possession of the property was delivered to the donee by the donor. It should be remembered that unless there was possession on behalf of the 3rd

> defendant, no mutation would have taken place with regard to the property. It may be repeated that Ext. A (2) has to be taken in the present case as a mere declaration of the donor in presence of the witnesses who are said to have attested the writing."

27. The position is well settled, which has been stated and restated time and again, that the three essentials of a gift under Mohammadan Law are; (i) 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 make the gift complete and irrevocable. However, the donor may record the transaction of gift in writing. Asaf A. A. Fyzee in Outlines of Muhammadan Law, Fifth Edition (edited and revised by Tahir Mahmood) at page 182 states in this regard that writing may be of two kinds : (i) it may merely recite the fact of a prior gift; such a writing need not be registered. On the other hand, (ii) it may itself be the instrument of gift; such a writing in certain circumstances requires registration. He further says that if there is a declaration, acceptance and delivery of possession coupled with the formal instrument of a gift, it must be registered. Conversely, the author says that registration,

however, by itself without the other necessary conditions, is not sufficient.

28. Mulla, Principles of Mahomedan Law (19th Edition), Page 120, states the legal position in the following words :

> "Under the Mahomedan law the three essential requisites to make a gift valid : (1) declaration of the gift by the donor: (2) acceptance of the gift by the donee expressly or impliedly and (3) delivery of possession to and taking possession thereof by the donee actually or constructively. No written document is required in such a case. Section 129 Transfer of Property Act, excludes the rule of Mahomedan law from the purview of Section 123 which mandates that the gift of immovable property must be effected by a registered instrument as stated therein. But it cannot be taken as a sine qua non in all cases that whenever there is a writing about a Mahomedan gift of immovable property there must be registration thereof. Whether the writing requires registration or not depends on the facts and circumstances of each case."

29. In our opinion, 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 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

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.

30. In considering what is the Mohammadan Law on the subject of gifts inter vivos, the Privy Council in *Mohammad Abdul Ghani*[1] stated that when the old and authoritative texts of Mohammadan Law were promulgated there were not in contemplation of any one any Transfer of Property Acts, any Registration Acts, any Revenue Courts to record transfers of possession of land, and that could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed.

31. Section 129 of T.P. Act preserves the rule of Mohammadan Law and excludes the applicability of Section 123 of T.P. Act to a gift of an immovable property by a Mohammadan. We find ourselves in express agreement with the statement of law reproduced above from Mulla, Principles of Mahomedan Law (19th

Edition), page 120. In other words, 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. Each case would depend on its own facts.

32. We are unable to concur with the view of the Full Bench of Andhra Pradesh High Court in the case of *Tayyaba Begum*[5]. We approve the view of the Calcutta High Court in *Nasib Ali*[3] that a deed of gift executed by a Mohammadan is not the instrument effecting, creating or making the gift but a mere piece of evidence, such writing is not a document of title but is a piece of evidence.

33. We also approve the view of the Gauhati High Court in the case of *Md. Hesabuddin*[10] . The judgments to the contrary by Andhra Pradesh High Court, Jammu and Kashmir High Court and Madras High Court do not lay down the correct law.

34. Now, as regards the facts of the present case, the gift was made by Shaik Dawood by a written deed dated February 5, 1968 in favour of his son Mohammed Yakub in respect of the properties '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 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 residential house with the donor. The trial court on consideration of the entire evidence on record has recorded a categorical finding that Shaik Dawood (donor), executed the gift deed dated February 5, 1968 in favour of donee (Mohammed Yakub), the donee accepted the gift and the donor handed over the properties covered by the gift deed to the donee. The trial court further held that all the three essentials of a valid gift under the Mohammadan Law were satisfied. The view of the trial court is in accord with the legal position stated by us above. The gift deed dated February 5, 1968 is a form of declaration by the donor and not an instrument of gift as contemplated under Section 17 of the Registration Act. As all the three essential requisites are satisfied by the gift deed dated February 5, 1968, the gift in favour of defendant 2 became complete and irrevocable.

35. The High Court in the impugned judgment relied upon the Full Bench decision in the case of *Tayyaba Begum*[5] but we have already held that the view of the Full Bench in *Tayyaba Begum*[5] is not a correct view and does not lay down the correct law.

36. Consequently, the appeal is allowed and the judgment and order dated September 13, 2004 passed by the High Court of Andhra Pradesh is set aside. The judgment and decree dated April 27, 1988 passed by the Principal, Subordinate Judge, Vishakhapatnam is restored. The parties shall bear their own costs.

…….. J.
(R.M. Lodha)

…….. J.
(Surinder Singh Nijjar)

NEW DELHI.
MAY 5, 2011.