

IN THE HIGH COURT OF KARNATAKA CIRCUIT BENCH  
AT GULBARGA

Dated this the 31<sup>st</sup> day of January, 2012

BEFORE

**THE HON'BLE MR.JUSTICE N.KUMAR**

**R.F.A. No. 1274/2007 C/W 1404/2007**

**IN R.F.A. 1274/2007**

BETWEEN:

Abdul Suboor @ Gafforsab  
S/o. Abdul Gafoor,  
Aged about 61 years,  
Agriculturist,  
R/o Gangavathi,  
Raichur District.- 584101.

... Appellant

( By Sri: Ameet Kumar Deshpande Adv )

AND:

Sayeeda Begum (deceased)  
W/o. Abdul Gafoor,  
Since deceased by her LRs

1. M.A. Hadi  
S/o Abdul Gafoor,  
Aged about 56 years,  
R/o. Jawahar Road, Koppal-583231



2. M.A. Ameer  
S/o Abdul Gafoor,  
Aged about 51 years,  
R/o. Koppal.- 583231.
3. Abdul Wahad  
S/o Abdul Gafoor,  
Aged about 54 years,  
R/o. Gadag Raod,  
Koppal- 583231.
4. Smt. Shamida Begum  
W/o Nurulla Baig,  
Major, aged 50 years,  
R/o Karnataka Garrage,  
Bijapur Road,  
Hunasagi-585101,  
Gulbarga District.
5. Sefia Begaum  
W/o. Hyder Ali,  
Major, Aged: 52 years,  
R/o Hasan Raod,  
Ear Yusuliya Man Road,  
Koppal 583231.
6. Hasina  
W/o. B.S. Dadapeer,  
Major Aged: 48 years,  
R/o. Opp ESI Hospital,  
Gandhinagar Street,  
Harihar-577601.
7. Mumtaz Begum  
W/o Iqbal Ahmed,  
Aged 35 years,  
C/o Amin Store,



Ameenapur, Koppal-583231.

8. Aleema Begum  
W/o Usmansab Mantar,  
Aged 54 years,  
R/o. Islampur,  
Gangavathi-584101.
9. Smt. Nayeem Begum  
W/o late Abdul Rehman Maniar,  
Aged 56 years,  
R/o Islampur,  
Gangavathi.
10. Town Municipal Council  
Gangavathi-584101.
11. B. Suresh  
S/o B. Sangappa,  
Major Aged 42 years,  
Agriculture,  
R/o. Gangavathi-584101.

...Respondents

(By Sri: S.S. Kumman Adv for R-2  
Sri: Prakash R. Kulkarni Adv for R-3,  
Sri: Veeresh B. Patil Adv for R-5 to R-9,  
Sri: Ashok B. Mulage Adv for R-10,  
Sri: Amresh S. Roja Adv for R-11)

This RFA is filed under Section 151 of CPC praying to pass an order of temporary injunction against the respondent No.8-9 (Original defendant No.9-10) from changing the nature of the land and from alienating or creating any charge to the schedule B property till the



disposal of the suit and pass such other order in the interest of justice and equity.

**C/W 1404/2007**

**BETWEEN**

Abdul Wahad  
S/o Abdul Gafoor,  
Aged about 53 years,  
Occ: Business,  
R/o Gadag Road, Koppal- 583231. ... Appellant

( By Sri: Prakash R. Kulkarni, Adv. )

**AND**

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- 1) Abdul Suboor @ Gafforsab  
S/o Abdul Gafoor,  
Aged about 60 years,  
Occ: Business,  
R/o Gangavathi  
Dist: Raichur-583227
  - 2) Smt. Sayeeda Begum  
W/o Abdul Gafoor,  
Aged about 85 years,  
Occ: Household,  
R/o Aninapur Koppal, Since deceased,  
By her LRs who are
  - 3) M.A. Hadi S/o Abdul Gafoor  
Aged about 55 years, Occ: Business,  
R/o Jawahar road, Koppal.- 583231

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- 4) M.A. Ameer S/o Abdul Gafoor  
Aged about 50 years,  
Occ: Business,  
R/o Koppal.
- 5) Smt. Shamida Begum W/o Norulla Baig  
Age: Major, Occ: Household,  
R/o Karnataka Gurrage, Bijapur road,  
Hunasigi Dist: Gulbarga-585101.
- 6) Sefia Begum W/o Hyder Ali  
Aged: Major, Occ: Household,  
R/o Hasan road, Near Yusufiya,  
Main Road, Koppal- 583231.
- 7) Smt. Hasina W/o B.S.Dadepper  
Aged: Major, Occ: Household,  
R/o Opp: E.S.I. Hospital,  
Gandhinagar Street, Harihar- 577601.
- 8) Mumtaz Begum W/o Iqubal Ahmed  
C/o Amin Store,  
Ameenapur, Koppal- 583231.
- 9) Smt. Aleema Begum  
W/o Usmansab Manier,  
Aged about 53 years, Occ: Household,  
R/o Islampur, Gangavathi-583227.
- 10) Smt. Nayeem Begum  
W/o Late Abdul Rehman Manier,  
Aged: 55 years, Occ: Household,  
R/o Islampur, Gangavathi-583227.

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11) Town Municipal Council  
Gangavathi.- 583227.

12) B. Suresh S/o Sangappa  
Age: Major, Occ: Business,  
R/o Gangavathi. ...Respondents

( By Sri: Ameet Kumar Deshpande Adv for R-1,  
By Sri: S.S. Kumman Adv for R-4  
Sri: Veeresh B. Patil Adv for R-6 to R-8,  
Sri: Chaitanyakumar Adv for R-9 & R-10,  
R-3, R-5, R-11, & R-12 are served )

This RFA is filed under Section 96 of CPC against the judgment and decree dated: 26-3-2007 passed in O.S.No.3/1991 on the file of the Prl. Civil Judge (Sr.Dn) and CJM, Raichur, Partly decreeing the suit in respect of 'A' schedule property & dismissing the suit in respect of schedule 'B' properties for declaration and injunction.

These RFAs coming on for Orders this day, the Court delivered the following:

### **J U D G M E N T**

As these two appeals are preferred against the common judgment and decree of the trial Court, they are taken up for consideration together and disposed of by this common order.



2. For the purpose of convenience, the parties are referred to as they are referred to in the original proceedings.

3. The plaintiff, Abdul Suboor alias Gafoorsab, is seeking partition and separate possession of his legitimate share in the Schedule A properties. He is seeking a declaration that he is the absolute owner of Suit B schedule properties. His case is that, first defendant is his mother, as well as defendants-2 to 8. Defendants, 2, 3, 4 and plaintiffs are brothers. Defendants-5, 6, 7 and 8 are sisters of the plaintiff and defendants-2, 3 and 4. These sisters are also married and are residing with their husbands. The defendants-9 and 10 are the purchasers of plot made in the properties described at Sl.No.4 and 5 of the plaint, i.e., in suit B schedule properties.

4. The 4<sup>th</sup> defendant is separated from the family during the lifetime of the father of the plaintiff, by taking hardware shop run at Kushtagi. He has separated from his father relinquishing all his future rights and interest in the



property that may accrue to him after the demise of his father in consideration of having taken hardware shop run at Kushtagi. The plaintiff has been carrying on the business of hardware at Gangavati since 1956. He has a residential house at Gangavati built by his own earnings. The business of the plaintiff is flourishing from the beginning.

5. The father of the plaintiff expired in November 1977 leaving behind the scheduled properties detailed and described in Schedule-A annexed to the plaint. On his death, the plaintiff and defendants-1 to 3 and 5 to 8 have become entitled to shares in the said properties according to Muslim Law, as per which, each of the sons of Late Gafoorsab are entitled to  $7/40^{\text{th}}$  share and each of the daughters to  $7/80^{\text{th}}$  shares and the widow to  $1/8^{\text{th}}$  share. During the pendency of the suit, the first defendant died. The plaint was amended contending that due to the death of the widow, the first defendant recently pending the suit, plaintiff and defendants-2 to 8 succeeded to  $1/8^{\text{th}}$  share of deceased defendant-1 and accordingly the plaintiff will





get  $1/48^{\text{th}}$  share more in the properties and thus the total share of the plaintiff will be  $47/240^{\text{th}}$  share.

6. The Schedule B property is the exclusive property of the plaintiff, as it was purchased in the year 1963 by the plaintiff himself, but as his father was alive then, out of respect to him, the plaintiff got the sale deed executed and registered in the name of his father, nominally. But the vendor of the said property had contracted to sell the said properties to plaintiff only and the possession of the said properties was also given to the plaintiff only on the completion of sale deed. Since then, it is the plaintiff alone, who is in possession of the said properties. He has paid the land revenue and conversion charges when they were converted into non-agricultural lands. The relevant records were produced. None of the defendants have got any rights or share in the said schedule B properties or on any portion of them. The father of the plaintiff was owning certain other properties apart from the properties shown in Schedule A of the plaint. During his lifetime, only in 1963, he gifted the



said properties to the plaintiff and defendant Nos.1 to 3, through a registered gift deed. Since then, plaintiff and defendants-1 to 3 are in exclusive possession and enjoyment of the properties so gifted. Apart from the said gift, Late Abdul Gafoorsab had also made a Trust of one his properties, which is now known as Canara Bank Building at Koppal for the benefit of himself and defendants-2 and 3 and the plaintiff and their descendants and thereafter for charitable purpose. After making the gift of his erstwhile possessed and owned properties, the father of the plaintiff purchased one more shop Malagi at Koppal described at Sl.No.1 in Schedule A and also retained the properties at Sl.No.2 and 3 of the Schedule A, which he got in partition with his brother. Late Abdul Gafoorsab held the Schedule B properties in his name standing in a fiduciary capacity. Late Abdul Gafoorsab prior to his death had orally gifted the Schedule B property to the plaintiff recognizing the fact that these properties were purchased nominally in his name by the plaintiff only in order to avoid any conflict regarding these properties between his heirs after his



demise and admitted and recognized the plaintiff as the absolute and exclusive owner in possession of them. It is exactly for this reason that, when he made gift of his properties two months after the purchase of Schedule B properties, he did not include these properties in the said gift. This oral gift was acted upon and was accepted by plaintiff and it was made on the same day the properties were purchased soon after the registration of the sale deed in his name, in the presence of the witnesses of the sale deeds at Gangavati.

7. The plaintiff to his utter surprise, found in the year 1988-89 the defendants who know the facts regarding Schedule B properties, with a view to lay false claim to them and to cause loss and harassment to the plaintiff and usurp the properties, without the knowledge and without notice to the plaintiff, filed a false and baseless suit regarding these Schedule properties collusively, against the father of the plaintiff Abdul Gafoorsab and without at any time getting any notice or summons served on him of this suit, managed in making some other person



appear as Abdul Gafoorsab and got a consent written statement filed, making the Court to believe that the father has admitted their claim of rights over the Schedule B properties. But at no time, till his death, the father of the plaintiff was aware of such suit and he never appeared or filed any consent written statement and signed any papers of the said suit. Anyhow, while the suit was pending he died and after his death, no legal representatives were brought on record and subsequently the said suit came to be dismissed as settled out of Court by filing a Memo by the plaintiff therein. This clearly establishes the fact that the plaintiffs in the said suit had filed a false suit and fearing that if the LRs are impleaded on the death of Abdul Gafoorsab, their misdeed will be exposed, allowed the suit to abate and later filed a false memo of settlement out of Court, when the suit itself had abated.

8. The plaintiff came to know of the unsustainable and baseless acts committed by defendants-2 and 3 only when he came to know that these defendants have got Schedule B

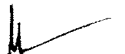


properties mutated and entered in their names in Municipality at Gangavati and immediately thereafter, the plaintiff filed a revision petition against the said order before the Divisional Commissioner, Gulbarga, who dismissed the revision petition by order dated 03.10.1989 directing the plaintiff to establish his rights in a Civil Court.

9. The defendant-3 has executed a registered sale deed in favour of defendants-9 and 10 regarding a portion of Schedule B property proposing to have sold it for consideration. The defendant-3 has no right or title to do so and for this reason, defendants-9 and 10 do not get any rights and title over the said portion of Schedule B properties. The entire Schedule B property continues to be under the title of the plaintiff and in his possession and enjoyment only. The sale deed bearing registered document No.462/89-90 dated 13.06.1989 executed by defendant No.3 in favour of defendants-9 and 10 of the suit is null and void and not binding on the plaintiff and it is fit to be declared as such as prayed. But for the illegal acts of



defendants-2 and 3 regarding Schedule B properties, these properties would not have been included in this suit, but as the defendants have been insisting that Schedule B properties are also the properties of late Abdul Gafoorsab, the plaintiff has to include them in the suit and seek appropriate reliefs regarding them. In the alternative, it was pleaded that if the Schedule B properties are held as the properties of late Abdul Gafoorsab left behind him to be shared by his heirs, according to their shares in the Muslim Law, then these properties would also be included for the purpose of partition in the decree for partition. To avoid further litigation, this comprehensive suit is filed. The plaintiff approached defendants for partition and separate possession. Defendants refused and therefore he was constrained to file this suit. The plaint was amended introducing paras 18-A, 18-B and 18-C. By way of such amendment, it was pleaded that defendant-12 has illegally constructed a building in the suit lands bearing Sy.No.148/1A and 148/3B of Gangavati. The plaintiff noticed this illegal construction activity on the suit land in the year 1998 and he



filed an application before defendant-11, Gangavati, to stop such illegal construction. But the Town Municipality failed to take any action against defendant-12 and in respect of illegal construction. The defendant-12 has no right whatsoever on any portion of the Schedule B properties. Still he has illegally constructed the building on the portion of Schedule B lands, purporting to have done so by taking lease of the said plot from defendant-3 of the suit. The third defendant has no right whatsoever to lease any portion of Schedule B lands and he has no rights to lease the plots in Schedule B lands to defendant-12. The construction put up by defendant-12 by making encroachment of an area of 75' x 100' in the portion of Schedule B lands adjacent to Gangavati-Koppal road, which runs as the northern boundary of the said lands. Hence the building constructed by defendant-12 is during the pendency of the suit and with the knowledge of the pendency of the suit and in spite of the objections raised by plaintiff. Therefore the plaintiff is entitled to a decree of mandatory injunction as prayed for. The defendant-3 in his objections filed by him to



I.A.No.24 has stated that he has leased three plots in land described in Schedule B of the plaint and for this reason, the plaintiff has also become entitled to claim declaration about illegal and unauthorised lease transactions made between defendants-3 and 12. Therefore the plaintiff sought for other reliefs as set out in the plaint.

10. After service of summons, the defendants entered appearance. Defendants-2 and 3 filed common written statement. They denied the allegation that defendant-4 has separated from the family during the life time of his father by taking hardware shop run at Khustagi. They denied the allegation that Schedule B properties are the exclusive properties of the plaintiff and that they were purchased by the plaintiff himself and out of respect to his father, he got the sale deed executed nominally in the name of his father. The allegation that the vendors had contracted to sell the said properties to the plaintiff only and the possession of the properties was given to him only and the plaintiff ever was, or





now is in possession of the same by paying land revenue and conversion charges when they were converted for non-agriculture purpose, is denied as false. The allegation that the father held the property in his name standing in a fiduciary capacity is also denied. They also denied the oral gift set up by the plaintiff in respect of Schedule B properties. It is denied that the father recognized and admitted that the plaintiff is the absolute owner in possession of the same as alleged. The allegation that gift was acted upon was also denied. The plaintiff is not in possession of the said property. They admitted filing of the suit in O.S.No.26/1979. They contend that suit summons were served on the said Abdul Gafoorsab and he appeared through his lawyer in the said suit and continued to be represented through out the proceedings until his death. During the trial of the said suit he has only filed written statement admitting the claim of these defendants but also filed a compromise petition admitting the claim of the defendants. The allegation that after the death of Abdul Gafoorsab, his legal representatives were not brought on record



is false. In fact, defendant-1 had applied to bring her on record as the legal representative of the deceased defendant, which was not objected to by the plaintiff therein. However, no orders were passed by the Court.

11. Defendants-2 and 3 contended that late Abdul Gafoorsab, out of love and affection towards these defendants for their faithful and dutiful services rendered to him during his old age, had orally gifted the Schedule B properties in favour of these defendants on 15.08.1973 in the presence of the witnesses. These defendants had accepted the said gift and the doner had delivered the possession of the gifted properties to the donees. Since the date of the said gift, these defendants came to in exclusive possession of the said properties as absolute owners thereof. The plaintiff has no right, title or interest in or over the same. The said properties may be partitioned and these defendants-2 and 3 may be put in separate possession of their shares in the same for which these defendants are ready and prepared to pay the Court fee at the



time of drawing up of the decree. By way of abundant caution, these defendants 2 and 3 submit that in the unlikely event the Court comes to the conclusion that the properties mentioned in the Schedule B of the plaint are also Matrka properties of the late Abdul Gafoorsab, then the legal shares of these defendants-2 and 3 may also be partitioned and separate possession of the same may be given to these defendants. Therefore they prayed for a decree in respect of A schedule property and they want the suit in respect of B schedule property to be dismissed or in the alternative, grant a share in the said properties also.


12. The 4<sup>th</sup> defendant has filed a separate written statement. He contends that all the properties shown in schedule are the properties belonging to late Gafoorsab. Apart from these, the lands shown in the Sy.No.112 measuring 3 acres 18 guntas situated at Kutganhalli village, Koppal Taluk is also the property of late Abdul Gafoorsab. Apart from this, late Abdul Gafoorsab was the owner of house bearing M.No.627/7



near Railway Station, at Koppal with open land of 460 Sq.yards and another open land of 460 Sq.yards abutting the house No.627/7 of Koppal and two open plots bearing M.No.2-6-74 and 1370 bearing M.No.469/1 and both these plots have got an area of 297 Sq.yards situated at Koppal and one plot situated at Bannigol Tota of Koppal bearing Plot No.1145 and M.No.209/4 560 Sq.yards and RCC building bearing No.214/5 situated at Koppal. These are the properties belonging to late Abdul Gafoorsab and the said properties are also to be partitioned among their heirs.

13. The defendant-4 has not been separated from the family, during the lifetime of late Abdul Gafoorsab. He consents for a decree being passed in respect of A Schedule properties granting legitimate share to all the legal heirs. He denies that the Schedule property is the exclusive property of the plaintiff. It was purchased by him in the name of late Abdul Gafoorsab. It is in joint possession of the plaintiff and all the defendants. The plaintiff has not paid the land revenue nor conversion

charges. The gift deed alleged of 1963 is denied. The deceased has not gifted his properties to the plaintiff and defendants-1 to 3 nor those properties are in enjoyment of the plaintiff and defendants-1 to 3. The Trust alleged is also denied. The building known as Canara Bank building, situated at Koppal was not the subject matter of any Trust made by late Abdul Gafoorsab. The properties in Schedule A are all the properties belonging to late Abdul Gafoorsab. The late Abdul Gafoorsab has not orally bequeathed by way of gift, the Schedule B properties to the plaintiff, recognizing that these properties were purchased nominally in the name of late Abdul Gafoorsab by the plaintiff. There was no oral gift nor the said gift was acted upon. The suit initiated by defendants-2 and 3 against their father is collusive and fraudulent one. The sale deed executed by defendant-3 in favour of defendants-9 and 10 is unauthorised, illegal and not binding on defendant-4. The plaintiff is only entitled to partition and separation of his share in the properties of late Abdul Gafoorsab and he is not entitled for a decree regarding Schedule B properties as the owner.



Plaintiff is not entitled to the said relief. He has no objection for declaration that the sale deed dated 13.06.1989 is null and void. Therefore, he prayed for appropriate relief.


14. Defendants-9 and 10 have also filed their written statement. They contend that defendant-3 is the absolute owner of the Schedule B properties. Defendants-9 and 10 are the bonafide purchasers of an area measuring 60' x 60' and 65' x 75' out of Sy.No.148/1-A and 148/3-B (M.No.3-2-60/2) situated at Gangavathi for valid consideration of Rs.86,500-00 and Rs.85,000-00 through a registered sale deed bearing document No.462/89-90 dated 13.06.1989 and 1746/1990-91 dated 21.12.1990 respectively from the third defendant. The third defendant put the 9<sup>th</sup> defendant and 10<sup>th</sup> defendant in possession of the property under sale and since the date of purchase, defendants-9 and 10 are in actual possession and enjoyment of the properties covered under the sale deeds. After the purchase, the mutation has been effected in favour of defendants-9 and 10 and have also obtained the construction



permission from the CMC, Gangavathi. Thus, defendants-9 and 10 are the absolute owners in possession and enjoyment of the properties covered under the said sale deeds.

15. In all other aspects they have reiterated the stand of defendants-2 and 3. They contend that they are the bonafide purchasers of valuable consideration. Without prejudice to the said contention, they pleaded that in the event it is held that Schedule B properties are also Matruka properties of late Abdul Gafoorsab, the properties purchased by defendants-9 and 10 be allotted to the share of defendant-3. Therefore they sought for dismissal of the suit.

16. On the aforesaid pleadings, the trial Court framed the following issues:

- 1) Whether the plaintiff proves that, schedule "B" properties are his self acquired properties, that none of the defendants have got any share or rights in it?
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- 2) Whether the plaintiff proves that his father had gifted schedule "B" property orally to he plaintiff as contended in para no.9 of the plaint?
- 3) Whether the plaintiff proves that, earlier suit regarding the suit schedule properties and the orders made there on are not binding on him as contended in para no.10 of the plaint?
- 4) Whether the plaintiff proves that, the sale deed bearing reg.document no.461/89-90 dated 13-6-89 executed by the defendant no.3 in favour of the defendant no.9 and10 is null and void and not binding on him?
- 5) Whether the plaintiff proves that, his father left behind schedule "A" properties and that each of the sons on his death are entitled to  $7/48^{\text{th}}$  share and daughters  $77/96^{\text{th}}$  share and widow  $1/8^{\text{th}}$  share according to Muslim law?
- 6) Whether plaintiff is entitled to the relief of declaration and other reliefs in respect of schedule "B" properties?
- 7) Whether plaintiff is entitled to decree for partition and separate possession regarding schedule "A" properties?





- 8) Whether the plaintiff proves that the defendant no.3 separated from the family during the life time of Abdul Gafoor taking his share in the joint property?
  - 9) Whether the plaintiff proves that the deceased Abdul Gafur bequeathed "A" during 1963 to the plaintiff and defendants no.1 to 3 as alleged in para no.8 of the palint?
  - 10)Whether plaintiff proves that apart from the said gift the late Abdul Gafur sab has also made a trust one of his property which is known as Canara Bank building at Koppal for the benefits of himself and defendants no.2 and 3 and plaintiff and their descendents, as contended in para no.8 of the plaint?
  - 11)Whether suit is under value an the court fee paid is insufficient?
  - 12)What order?
- The Court has framed additional issue on 18-9-1996 as under:-
- 13)Whether the plaintiff proves that defendants no.4 separated from the family during the life time of his father by taking the hardwere shop run at Kustagi?



The court has framed another additional issues on 22-7-96 as under:-

14)Whether late Abdul Gafur had gifted the schedule "B" properties on 15-8-1973 in favour of defendant no.2 and 3 as alleged in para no.6 of the written statement?

15)Whether the defendant no.4 proves that several properties mentioned in para no.2 of his written statement are also the Matruka properties of late Abdul Gafur and the same are also liable to be partitioned?

Again on 17-7-1997 the court has framed the following additional issues:

16)Whether the plaintiff proves that defendant no.4 separated from the family during the life time of his father by taking hardware shop run at Kustgi and relinquished all his future right and interest in the property that may accrue to him after the demise of his father in consideration of having taken hardware shop at Kustagi?

17)Whether he further proves that the plaintiff and defendants no.1 to 3 and 5 to 8 have become entitled to 7/40<sup>th</sup> share



and each of the daughters 7/80<sup>th</sup> share and widow 1/8<sup>th</sup> share as contended in the para no.6 of the palint?

This issued was deleted as per orders on I.A.No.22 on 19-1-1998. And substituted by following issue:

“Whether he further proves that the plaintiff and defendant no.2 and 3 entitled to 7/40<sup>th</sup> share each and the defendant no.5 and 6 are entitled to 7/80<sup>th</sup> share each and the defendant no.1 is entitled to again on 2-12-2000 the court has farmed the additional issue:

18) Whether the defendants proves that the suit is not maintainable in present from by claiming number of reliefs in the prayer column?

17. The plaintiff in order to substantiate the claim, examined himself as P.W-1, examined 5 witnesses as P.Ws-2 to 6 and also produced 35 documents, which are marked as Exs.P-1 to P-35. On behalf of defendants, second defendant was examined as D.W-1 and purchaser from defendant-3, Nayeena Begum was examined as D.W-7. They also examined another



three witnesses. The also produced 42 documents, which are marked as Exs.D-1 to D-42.

18. The trial Court on appreciation of the aforesaid oral and documentary evidence on record held that the plaintiff has failed to establish his case that he paid the consideration for purchase of B Schedule property and out of respect to his father, the sale deed was obtained in the name of his father. It was held that on the date of purchase of B schedule property, the plaintiff was a minor. It also held that the case of the plaintiff that on the date of the sale deed itself, the father admitting and recognizing the fact that the plaintiff has paid the sale consideration, gifted the property in his favour is also not proved, as possession of the property was never given to the plaintiff. Therefore it declined to grant a decree for declaration of title in favour of the plaintiff in respect of B Schedule property. However, it held that defendants-2 and 3 have established their case that the B Schedule property was gifted by their father in their favour, acting on the said gift, they got

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the mutation entries in their names. Thereafter, they have effected partition of these properties into two equal halves. The third defendant after such partition has sold two portions of the property, which fell to his share to defendants-9 and 10. He has also leased a portion of the property in favour of 12<sup>th</sup> defendant, who in turn, has put up construction and therefore, the B Schedule property exclusively belong to defendants-9 and 10 and the said property is not available for partition. It also held that the father of the plaintiff, during his lifetime, under a registered gift deed dated 23.09.1963, gave the property to his wife, to the plaintiff and defendants-2 and 3. Acting on the said gift, the properties have been mutated in their names, they are put in possession and they are enjoying the properties as absolute owners and those properties are not the subject matter of this suit and therefore as requested by the 4<sup>th</sup> defendant, the said property cannot be partitioned. In so far as A schedule property is concerned, there is no dispute among the parties. The same belong to their father and after his death, all of them are entitled to a share in the said property as per Mamomedan



Law, where the sons take double the share of the daughters. Therefore the trial Court decreed the suit of the plaintiff for partition and separate possession in respect of A schedule property and dismissed the suit of the plaintiff in respect of B schedule property.

19. Aggrieved by the said judgment and decree refusing to grant a declaration, the plaintiff has preferred the appeal RFA 1274/07. The 4<sup>th</sup> defendant also has filed the connected appeal RFA 1404/07, challenging the finding of the trial Court that defendants-2 and 3 have established the oral gift in their favour and also that the property which are the subject matter of the registered gift deed dated 23.09.1963 is not available for partition. That is how, both the appeals are listed for final hearing before me.

20. The learned Counsel appearing for the plaintiff assailing the impugned judgment and decree contends that the material on record, in particular, the witnesses examined on

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behalf of the plaintiff who were present at the time of negotiations, clearly establishes that the plaintiff negotiated with the vendor, paid the sale consideration, purchased the property for himself, but took the sale deed in the name of his father, which has not been properly appreciated by the trial Court. Even otherwise, the evidence of these witnesses would clearly establish the factum of oral gift of the B schedule properties on the date of the sale deed itself. Therefore, he contends that the trial Court committed a serious error in rejecting his case outright. He also contends that defendants-2 and 3, who have set up oral gift has not proved the same. The legal proceedings relied upon by them is a collusive one. At any rate, no order came to be passed in the said suit, as before the so called compromise is recorded, his father died, the LRs were not brought on record, suit came to be abated and thereafter a memo is filed stating that the matter is settled out of Court. None of these will prove the oral gift. The evidence of other witnesses also does not establish the oral gift and the trial Court committed serious error in holding that the gift is proved.



Similarly, the sale deed executed by the third defendant in favour of defendants-9 and 10 do not convey absolute title to them. It was null and void. Similarly, the lease deed executed by the third defendant in favour of the 12<sup>th</sup> defendant is also illegal and void and therefore, the plaintiff was entitled to all the reliefs, which he had sought for in the suit.

21. Per contra, the learned Counsel appearing for defendants-2 and 3 submitted that in the legal proceedings prior to his death, the father filed written statement, admitting the oral gift in respect of B schedule property. He also signed a compromise petition, which was filed in the Court. Merely because no decree was passed because of the death of his father, the legal effect of the said admission in the written statement as well as in the compromise petition cannot be lost sight of. Even otherwise, they have proved by examining the witnesses in whose presence the oral gift was given by their father to them. They also pointed out that acting on the oral gift, the revenue authorities mutated their name. The



representation filed challenging the said mutation entry was dismissed. It is thereafter, the third defendant has sold the property to defendants-9 and 10, has leased a portion of the property to defendant-12. A cumulative effect of these materials on record clearly establishes the gift in his favour, which has been rightly up held by the trial Court.

22. Therefore, in the light of the aforesaid facts and rival contentions, the points that arise for consideration in this appeal, are as under:

*(1) Whether the finding recorded by the trial Court that the plaintiff has failed to establish that he is the absolute owner of the B schedule property, calls for interference?*

*(2) Whether the finding recorded by the trial Court that the plaintiff has failed to establish the oral gift in his favour calls for interference?*



(3) *Whether the finding recorded by the trial Court that the gift set up by defendants-2 and 3 stands established, calls for interference?*

(4) *Whether the properties which are the subject matter of the registered gift deed dated 29.03.1963 is partible and available for partition?*

(5) *What are the reliefs to which the parties are entitled to?*

23. In so far as A schedule properties are concerned, it is not in dispute that they belong to the father of the plaintiff and defendants-2, 3 and 4. On his death, his wife, sons and daughters are entitled to inherit the same. During the pendency of the proceedings, the wife died. Therefore it is only the plaintiff and the defendants-2 and 4, sons and defendants-5 to 8, daughters are entitled to a share in the said property under the Mahomedan law. It is not in dispute. It is not the

subject matter of these two appeals. Therefore, the decree granted by the trial Court granting a share in respect of A schedule property stands affirmed.

POINT NO.1

24. In so far as the declaration of title sought for by the plaintiff is concerned, the specific case pleaded by the plaintiff is that he negotiated for purchase of the B schedule property from its previous owners one Mari Singh and Ram Singh and paid a sum of Rs.2,000-00 as earnest money and thereafter paid the sale consideration. As his father was very much alive, as he had respect towards him, he purchased the property in his name. To substantiate this contention, he has examined two witnesses. The trial Court on careful appreciation of his evidence and the evidence of two witnesses, has recorded a categorical finding that on 29.06.1963, when the sale deed came to be executed, the plaintiff was a minor. He had no independent source of income. His father was carrying on Hardware business. Therefore the case of the plaintiff that he



paid the sale consideration, obtained sale deed in the name of his father, is not established. The said finding is based on legal evidence and the attendant circumstances, which justify the said conclusion of the trial Court. Therefore no case for interference is made out.

POINT NO.2

25. In the alternative, the plaintiff has pleaded that on the very same day of the sale deed, his father admitting and recognizing the fact that plaintiff paid the entire sale consideration and obtained the sale deed in the name of his father, gifted the property to the plaintiff. Admittedly, it is a oral gift, which is said to have taken place on 01.07.1963, when the plaintiff was a minor. Two witnesses have been examined to support the said contention. As is clear from the pleadings and the evidence, the consideration for the gift is the acknowledgment of the fact that the plaintiff paid consideration on taking the sale deed in favour of his father. If that case is not proved, the consideration for the gift fails. Even otherwise,

the evidence on record does not establish the factum of oral gift by the father to the son on 01.07.1963 or any other day. Therefore the trial Court was justified in holding that the oral gift set up by the plaintiff to claim exclusive title to the B Schedule property is also not established and there is no justification whatsoever for this Court to interfere with the said finding of fact recorded, which is again based on legal evidence. Hence, the said finding also stands affirmed.

POINT NO.3

26. The trial Court has accepted the case of defendants-2 and 3. It is their case that on 15.08.1973, their father, out of love and affection have gifted the B schedule properties under a oral gift. After such gift, the mutation entries were made in their name. They have affected partition, a portion of the property falling to one brother and one more portion falling to another brother. Thereafter, the third defendant in turn has sold the two plots of land in favour of defendants-9 and 10 under two registered sale deeds which are




marked as Exs.D-30 and D-31, whose name is now mutated in the revenue records. Similarly, yet another portion was leased to 12<sup>th</sup> defendant, who has now put up a construction. In support of the case of gift, they have also examined witnesses who have deposed. They also rely on a suit filed by them against their father in O.S. No. 26/1976 in which their father entered appearance, filed a written statement admitting the oral gift. Thereafter, they also entered into a compromise where the oral gift was affirmed. But, unfortunately before the compromise was recorded and a decree was passed, the father died. No application was filed to bring the legal representatives on record. Suit abated. Thereafter, a memo is filed reporting settlement out of Court and that is how the suit came to an end. Therefore, the reliance is placed on the so called admission of the father both in the written statement as well as in the compromise petition. Because the plaintiff contended that other person was taken to the Court representing he is their father, the compromise petition and the written statement do not bear his signature. Defendants took the trouble of



examining DW4-the advocate who represented their father in the said proceedings. The trial Court on consideration of this material has come to the conclusion that the oral gift set up by defendants 2 and 3 is proved. It is that finding which is challenged in this appeal.

27. In the first place it is to be noticed that, when the father wanted to give the property to his wife-the plaintiff and defendants 2 and 3, he executed a registered gift deed dated 23.9.1963 gifting 4 properties to them. Therefore, their father was an educated man, he knows the consequences of what he is doing, when he wanted to give the properties, he has taken the trouble of executing a registered gift deed as far back as in the year 1963. It is because of this, when the plaintiff pleaded oral gift again of 1973, the trial Court was justified in rejecting the said case. Now, the oral gift pleaded by defendants 2 and 3 is of the year 1973, 10 years after the registered gift deed. If really the father wanted to give 'B' schedule properties to defendants 2 and 3 he would have followed the same procedure



which he has followed while gifting these properties. He has not chosen to execute any gift deed and register the same. Earlier when he gifted the properties he did not gift it only to defendant No.3. He gifted for the plaintiff as well as defendant No.1-his widow and defendants-2 and 3. Therefore, this conduct which is evident from the material on record points out to the fact the said gift pleaded by defendants 2 and 3 is not a probable one.

28. The second circumstance which casts a doubt on the case of defendants 2 and 3 is, if the father has gifted the property in 1973 and they have mutated their names in the revenue records, I fail to understand why it became necessary for them to file a suit. If really the father had disputed their claim he would not have appeared in Court and filed a written statement admitting the gifting of the property. This conduct do not lend any credence to the case of defendants 2 and 3. Though in the written statement gift was admitted, a compromise was entered into, it was not recorded and no decree was passed. Unfortunately for defendants 2 and 3 their father





died and their manipulation came to an end with the death of their father.

29. Therefore, these two circumstances point out to the fact that this case of oral gift pleaded by defendants 2 and 3 is not probable. What has weighed with the trial Court is that the third defendant has executed sale deeds in favour of defendants 9 and 10. He has leased the property to defendant No.12. The said facts are not proof of oral gift. They are all instances which are subsequent to oral gift and by no stretch of imagination those acts could be construed as proof of the oral gift. Unfortunately, the trial Court has not appreciated this fact in a proper perspective and committed a serious error in coming to the conclusion that the oral gift is proved because of those instances. Therefore, the said finding is perverse and cannot be sustained.

30. The trial Court has looked into the oral evidence and that is also a factor which has weighed with the trial Court.



No doubt oral evidence could be given due respect. But, in the light of these attendant circumstances which shows the conduct of the parties, the course of events over a period of 2 decades should out weigh the oral evidence in this case and therefore if we look into the totality of the circumstances and the evidence on record, it is not possible to hold that the case of defendants 2 and 3 that Schedule 'B' property was gifted to them by their father exclusively is not established. In that view of the matter, the finding recorded by the trial Court in this regard cannot be sustained and accordingly it is hereby set aside. In this property also, all the legal heirs would be entitled to the shares in accordance with the Mohammadan Law. In fact that is the plea of defendants 2 and 3 in the alternatively as well as the plea of the plaintiff.

POINT NO.4

31. The fourth defendant contends that the registered gift deed dated 23.9.1963 is not valid and legal and the property which is the subject matter of that gift deed is to be partitioned



and he should be given his legitimate share. The said gift deed was executed on 23.9.1963. The executant of the document, i.e., the plaintiff's father died in the year 1977. He did not choose to get the said gift deed annulled. From 1977 till 1991 the fourth defendant also did not take steps for cancellation of the said gift deed. In a suit filed by the plaintiff for partition or declaration, defendant by way of a defence cannot set up the plea that the said gift deed is not valid and the subject matter of that gift deed should also be made part of the suit schedule properties and he should be given a share. Because of the registered gift deed which is acted upon and the said gift deed confer exclusive title on the persons on whom the properties are gifted the said property was not included in the present suit. Fourth defendant did not choose to bring in those properties if really he is serious about claiming a share in the said property. He has not taken any steps to get the registered gift deed dated 23.9.1963 annulled. Even otherwise, his evidence on record do not support his case why the said gift deed should be annulled. In those circumstances, the trial Court was justified in holding



that the properties which are the subject matter of gift deed dated 23.9.1963 are not the subject matter of the suit and it is not partiable. The said finding is well founded and do not suffer from any legal infirmity which calls for interference. Therefore, the said finding is also affirmed.

POINT NO.5

32. In the light of the aforesaid discussion, the plaintiff and defendants 2 to 8 would be entitled to a share in the 'B' schedule property in accordance with the Mohammadan law. In so far as alienation by the third defendant in favour of defendants 9 and 10 is concerned, the sale deed would not become void. The sale deeds would be valid to the extent of the share of the third defendant. They have sought for allotment of the said properties to the share of the third defendant in the event of a partition. That is an exercise to be done at the time of final decree proceedings and that cannot be the subject matter of a preliminary decree and therefore it is open to defendants 9 and 10 to urge the said ground in the final decree



proceedings. Similarly, 12<sup>th</sup> defendant is a lessee. He has been lawfully inducted into possession of the leased property, may be by a person who was not the absolute owner. Now that, it is declared that the property in his possession belongs to the plaintiff and defendants 2 to 8, third defendant cannot claim any exclusive title nor to the rent exclusively. Therefore, it is also open to him to seek appropriate reliefs in the final decree proceedings. Under these circumstances, I pass the following order:-

- (i) *Both the appeals are partly allowed.*
- (ii) *Plaintiff and defendants 2 to 8 are entitled to shares in 'B' schedule property in accordance with Mohammadan Law, i.e., as both of them are residuaries, the sons take double the share that of daughters. Therefore, daughters would take 1/12<sup>th</sup> share each and sons would take 2/12<sup>th</sup> share each.*



- (iii) *In respect of 'A' schedule property, the trial Court decree stands affirmed as it is not the subject matter of this appeal at all.*
- (iv) *The sale deed executed by defendant No.3 in favour of defendants 9 and 10 as well as the lease deed executed in favour of the 12<sup>th</sup> defendant are not binding on the plaintiff and defendants 2, 4 to 8 to any extent whatsoever.*

Parties to bear their own costs.

**Sd/-  
JUDGE**

ksp/-