

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT  
SRINAGAR

Reserved on: 15.12.2022

Pronounced on: 23.12.2022

CFA No.208/2007

MST. HALEEMA & ORS

... APPELLANT(S)

Through: - Mr. Tasaduq H. Khawaja, Advocate.

Vs.

MST. DILSHADA & OTHERS

...RESPONDENT(S)

Through: - Mr. A. M. Dar, Advocate.

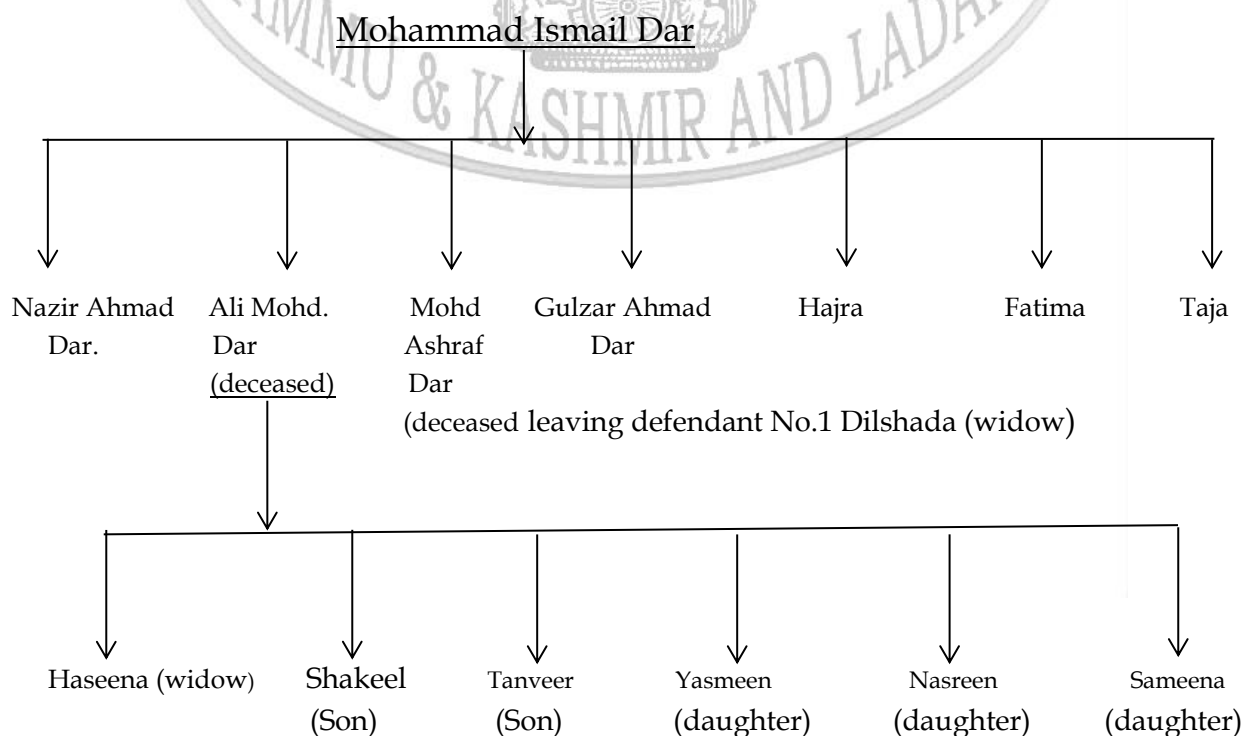
CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The appellant/legal heirs of the plaintiff before the trial court, have challenged the judgment and decree passed by the learned Additional District Judge, Srinagar (hereinafter referred to as the trial court), whereby decree for partition of one of the properties which was subject matter of the suit has been granted whereas a similar relief for the other property has been declined. Vide the impugned judgment and decree passed by the trial court, suit of the plaintiff to the extent of house and land at Rajbagh, Srinagar, has been dismissed whereas suit of the plaintiff to the extent of property situated at Zaldagar, Srinagar, has been allowed and a preliminary decree of partition as was prayed by the plaintiff has been passed.

2) The plaintiff, who happened to be the predecessor-in-interest of the appellants, had filed a suit before the trial court contending therein that

the parties to the suit own two joint properties, viz. one house at Zaldagar, Srinagar, and another at Rajbagh, Srinagar. According to the case of the plaintiff, the land at Zaldagar, Srinagar, was purchased by the ancestors of the parties, namely, Mohammad Ismail Dar and Habibullah, in the ratio of 2/3<sup>rd</sup> and 1/4<sup>th</sup> in terms of sale deed dated 26<sup>th</sup> Badoon, 2002 (BK). The ancestor of the plaintiff and defendants 1 to 11, Shri Mohammad Ismail Dar, constructed a house at Zaldagar, Srinagar, leaving the land of Habibullah vacant, whereafter the parties started living in the said house as owners and legal heirs of deceased Mohammad Ismail Dar as a joint family till his death. It was pleaded by the plaintiff that the land at Rajbagh, Srinagar, was purchased in the name of his brother, Shri Mohammad Ashraf Dar, during the life time of their father, Mohammad Ismail Dar by way of a sale deed dated 16.10.1976, on which a house was constructed. The pedigree table of the parties is as under:



1) It is averred in the plaint that Mohammad Ismail Dar died leaving two sons and three daughters and a widow whereas Mohammad Ashraf Dar died issueless leaving only his widow i.e., defendant No.1. Thus, according to the plaintiff, it is he and defendants 2 to 11 who were entitled to inherit the aforesaid properties as per the Muslim Personal Law. It is averred that Mohammad Ashraf Dar, the predecessor-in-interest of defendant No.1, died in the year 1989 leaving behind his widow, defendant No.1, and plaintiff and defendants 2 to 11, who are his brothers and sisters, as his legal heirs. It is contended that defendant No.1 is entitled to 1/4<sup>th</sup> share of the property in question. It is further averred that defendant No.1 was given her share out of the property situated at Zaldagar Srinagar, to which she was entitled under Shariat in the shape of cash and kind in presence of respectable persons and, as such, she is not entitled to any share in the said property. It is averred that defendant No.1 is entitled to only 1/4<sup>th</sup> share in the property at Rajbagh, Srinagar. It has been further averred in the plaint that defendant No.1 in the absence and knowledge of the parties has got the property situated at Rajbagh, Srinagar, mutated in her name though she was never in possession of the said property since the death of her husband. It has been submitted that the parties are willing to effect partition of the suit properties but defendant No.1 is not willing to do so, which has given a cause of action to the plaintiff to file the suit.

2) While defendant No.1 contested the suit by filing her written statement, defendants 2 to 16 admitted the claim of the plaintiff in their

written statement. In her written statement, defendant No.1, has, while admitting that the property situated at Zaldagar, Srinagar, is joint property of the parties, submitted that the property situated at Rajbagh is not the ancestral property of the parties. According to defendant No.1, the said property is her exclusive and self-acquired property. It has been submitted that defendant No.1 and her deceased husband while living separately from the plaintiff and other defendants raised construction of a residential house at Rajbagh and utilised their own money for the purpose. It has been further submitted that the land at Rajbagh has been purchased in the name of deceased husband of defendant No.1 and payment for cost of the said land was made by defendant No.1 after disposing of her gold ornaments and other valuable belongings. It is also averred that during his life time, Shri Mohammad Ashraf Dar, the deceased husband of defendant No.1, transferred the property at Rajbagh in her name and confirmed his act of alienation by execution of a deed which has been annexed as Annexure-D1 to the written statement. It is claimed by defendant No.1 that the said property was mutated in her name in the revenue records. It has been submitted that the deceased husband of defendant No.1 has, on moral considerations and in view of his relationship with defendant No.1 and having regard to the fact that even after the death of common ancestor of the parties, had extended every kind of support and help to the plaintiff and other defendants by bearing marriage expenses of the sisters etc., gifted the property at Rajbagh in her favour. Thus, according to defendant No.1, she is the rightful and exclusive owner of the property situated at Rajbagh. It has

been further submitted in the written statement of defendant No.1 that vide the deed, Annexure-D1, her husband relinquished his share in the property situated at Zaldagar in favour of his brothers thereby divesting defendant No.1 of her share in the said property.

3) On the basis of the pleadings of the parties, the following issues were framed by the trial court:

- 1) *Whether the court lacks territorial jurisdiction in view of the fact that suit property is situated at Rajbagh, which fall within District Budgam.(OPD)*
- 2) *Whether the husband of defendant No.1 during his life time executed a relinquishment deed in favour of his brothers regarding the property situated at Zaldagar, Srinagar. (OPD)*
- 3) *Whether the suit in the present form is not maintainable because the suit has been undervalued and insufficient court fee has been paid. (OPD)*
- 4) *Whether the property situated at Rajbagh cannot be subject of partition between the parties as the same has been acquired by the husband of defendant No.1 and is, as such, self-acquired. (OPD)*
- 5) *If the issues struck hereinabove are replied in negative, whether this court has jurisdiction to try this suit. (OPP)*
- 6) *In case it is proved that both the properties situated at Zaldagar and Rajbagh are dispute between the parties, whether the same is joint as yet and is as such subject to partition (OPP)*
- 7) *In case issue No.6 is replied in affirmation, whether the parties are governed by Muslim Personal Law regarding inheritance and are accordingly entitled to share in the property.(OPP)*
- 8) *Relief.*

4) After framing of issues, plaintiff Nazir Ahmad (now deceased), besides examining himself as a witness, has examined PWs Nazir Ahmad S/o Sonaullah, Naseer Ahmad (Patwari Halqa Rajbagh), Ali Mohammad Mir, Ghulam Mohi-ud-din, Nazir Ahmad S/o Mohammad Usman and PW Ghulam Jeelani, as witnesses in support of his case whereas defendant No.1, Mst. Dilshada, besides examining herself as a witness, has examined DWs Noor-ud-Din Rangrez, Ab. Ahad Mir, Ab. Rehman Dar, Advocate, Gh. Mohammad Sheikh and Gh. Rasool Bhat, as witnesses in support of her case.

5) The learned trial court upon appreciation of the evidence led by the parties decided issue No.1 against defendant No.1, whereas issue No.2 was decided in her favour. Issue No.3 was decided in favour of plaintiff whereas issue No.4 was decided in favour of defendant No.1 and against the plaintiff. Issue No.6 has been decided partly in favour of plaintiff and partly in favour of defendant No.1 whereas issue No.5 has been decided in light of the finding on issue No.1.

6) After rendering its findings on the issues framed in the suit, the learned trial court, in the light of finding on issue No.4, dismissed the suit of the plaintiff to the extent of house and land situated at Rajbagh, Srinagar. It was further held by the trial court that the land and house situated at Zaldagar is joint and unpartitioned property of the plaintiff and defendants 2 to 16 and, accordingly, a preliminary decree was passed to this extent in favour of plaintiff and against defendant No.1. Shri Syed Maqbool, Advocate, was appointed as Commissioner to effect partition



of the property located at Zaldagar between the plaintiff and defendants 2 to 16 by metes and bounds

7) The appellants are aggrieved of the impugned judgment and decree only the extent of finding on issue No.4. The learned trial court while deciding this issue has rendered a finding that deceased Mohammad Ashraf Dar had gifted the house along with land underneath and appurtenant thereto situated at Rajbagh to Mst. Dilshada, defendant No.1, by way of an oral gift that was confirmed by him in terms of deed EXDW-1. On this ground it has been held that the property situated at Rajbagh was self-acquired property of deceased husband of defendant No.1 who had gifted away the said property in her favour and, as such, the same cannot be a subject matter of partition.

8) It has been contended by the appellants that from the evidence led by the plaintiff before the trial court, it was established that the property at Rajbagh was not the self-acquired property of late Mohammad Ashraf Dar and that it belonged to his father, namely, Mohammad Ismail Dar, who was the grandfather of the appellants 2 to 5. It has been further contended that even if it is assumed that the property in question was self-acquired property of Mohammad Ashraf Dar, still then after his death, it has devolved upon his heirs in accordance with Muslim Personal Law and that defendant No.1 is only entitled to 1/4<sup>th</sup> share in the said property. It has also been contended that the deed dated 11.08.1988, alleged to have been executed by late Mohammad Ashraf Dar, is only a deed of will and the same cannot be construed as a deed acknowledging

the oral gift, as is clear from the language of the said deed. It has been further submitted that defendant No.1 was never in actual or constructive possession of the property in question, as such, it cannot be a case of oral gift. According to the appellants, because the parties belong to Sunni Sect of Muslims, as such, the will in respect of the property in question could not have been executed in favour of one legal heir without the consent of other legal heirs.

9) I have heard learned counsel for the parties and perused the record of the case including the trial court record.

10) Since the only challenge that has been urged in the instant appeal by the appellants pertains to the finding of the learned trial court on issue No.4, which relates to the status of the property situated at Rajbagh, Srinagar, it would be apt to notice the evidence on record as regards the status of the said property.

11) The onus of proving that the property at Rajbagh was a self-acquired property of deceased husband of defendant No.1 rests on her. She in her statement has deposed that her husband had purchased some land at Rajbagh from his personal income. She has stated that she disposed of her gold ornaments and other valuable articles for the construction of the house on the said land. She has also stated that after construction of the said house, she along with her husband lived there for about 2/3 years and neither plaintiff nor any other defendant ever visited the said house. She has also stated that the said land was purchased



during the life time of her father-in-law. The document of sale in respect of the property in question is in the name of her husband Mohammad Ashraf Dar. She has stated that after the death of her husband, when she was out of station, the plaintiff forcibly trespassed into the house and took over possession of the same. She has further stated that at that time her servant was there who was also thrown out. The other witnesses produced by defendant No.1 have supported her version that the land in question was purchased by her husband Mohammad Ashraf Dar

12) So far as the sale deed in respect of the land at Rajbagh is concerned, the same is, admittedly, in the name of Mohammad Ashraf Dar, the husband of defendant No.1. It is claimed by the appellants that the property in question was acquired out of the joint family funds which were contributed by their predecessor-in-interest, Shri Mohammad Ismail Dar. A perusal of the evidence led by the plaintiff shows that they have miserably failed to prove this fact. In fact, from the evidence led by the plaintiff, it gets confirmed that the property in question was acquired by Late Mohammad Ashraf Dar in his own right. So, the finding of the trial court that the property situated at Rajbagh Srinagar was the self-acquired property of Late Mohammad Ashraf Dar is based on correct appreciation of evidence on record.

13) It has been contended by learned counsel for the appellants that the document EXDW-1 on the basis of which defendant No.1 has claimed that her husband had confirmed the oral gift of Rajbagh property in her favour, has not been proved by defendant No.1 as, according to the

learned counsel, the evidence led by defendant No.1 in this regard is contradictory and unreliable.

14) If we have a look at the statement of defendant No.1, who has also signed the document EXDW-1, she has clearly stated that the said document bears her signatures and that its contents are correct. She has further stated that the said document was executed by her late husband Mohammad Ashraf Dar in her favour and by virtue of the said document, it was admitted by Mohammad Ashraf Dar that he has transferred the property situated at Rajbagh in her favour. The witness to the document, DW Ab. Ahad Mir has admitted the contents of the documents executed by deceased Mohammad Ashraf Dar in favour of defendant No.1. He has stated that the document was executed in his presence and that at the relevant time, deceased Mohammad Ashraf Dar and Mst. Dilshada and DW Bashir Ahmad Bhat were present on spot. He has admitted the contents of the document and in cross-examination there is nothing that would cast any doubt with regard to credibility of his statement.

15) DW Abdul Rehman Dar, Advocate, who has attested the document EXDW-1, has stated that he read over the contents of the document to the executant and the witnesses who signed the document in his presence. The witness, however, when asked in cross-examination to produce the Notary register maintained for the purpose, stated that the same is not traceable. On this basis, it has been contended by the learned counsel for the appellants that the execution of the document has not been proved.

16) Mere non-production of the register does not make execution of the document EXDW-1 doubtful, particularly when DW Abdul Rehman Dar has clearly stated that the document was executed in his presence and that he read over the contents of the document to its executant. It is not a case where the document, whether it is document confirming oral gift or a will deed was compulsorily required to be attested by a Notary Public under law. In both the eventualities, whether it was confirmation of the act of gifting away property to defendant No.1 or it was a will deed, the document was not required to be executed before a Notary Public. So, even if it is assumed that the act of notarizing the document by DW Ab. Rehman Dar, Advocate, has not been proved in accordance with law, it will have no effect on the validity and evidentiary value of the document. There is sufficient evidence on record to show that the document was executed in presence of aforesaid witness and the other witnesses to the document. Thus, the contention of learned counsel for the appellants that the execution of the document EXDW-1 has not been proved is without any substance.

17) Now the crucial question which is required to be determined is as to what is the nature of the document EXDW-1. According to learned counsel for the appellants, the covenants of the document show that it is a will deed as the executant of the document has repeatedly used the expression “after his death” meaning thereby that he intended to convey the property to his wife, defendant No.1, after his death and if that be so, it is document of will and a will deed cannot be executed by a Sunni

Muslim in favour of one of his legal heirs without the consent of other legal heirs. On this ground, it is urged that the plaintiff and defendants No.2 to 11 cannot be excluded from their share in the property situated at Rajbagh, Srinagar.

18) On the other hand, learned counsel for the respondents has submitted that the document in question clearly indicates the intention of its executant to confirm his act of oral gift of the property in question in favour of his wife, defendant No.1, and, as such, it is a document recording the confirmation of oral gift executed by Mohammad Ashraf Dar in favour of his wife, defendant No.1.

19) If we have a look at the contents of the document EXDW-1, in the initial portion of the document, it has been labeled as 'Wasiyat Nama' i.e., will deed. The document records that the property in question is in possession of the executant and after his death, the same would vest in his wife-defendant No.1. In the later portion of the document, it is recorded that the executant has already by virtue of an oral gift (Hibba) transferred the property to defendant No.1 and that he has already put her in possession of the property. It is also recorded in the document that the three storied building has been constructed on the land in question out of the funds contributed by defendant No.1. Thereafter it is recoded in the document that defendant No.1 is and would be entitled to sell and lease out the property in question after his death. It is also recorded in the document that defendant No.1 is and would be entitled to get the property transferred in her name. The document further records that the executant

relinquishes his share in the joint property located at Zaldagar Nawabazar in favour of his brothers in equal shares and that his wife will have no right or interest in the said joint property.

**20)** From the foregoing contents of the document EXDW-1, there appears to be some amount of confusion and contradiction as regards its nature. The question would be as to how to construe such a document so as to come to a definite conclusion as to whether it is a document confirming the oral gift or it is a document of will. A somewhat similar question came up for consideration before the Supreme Court in the case of **Mathai Samuel and others vs. Eapen Eapen (Dead) by LRs and others**, (2012) 3 SCC 80. While interpreting the contents of a document which had both the characteristics of settlement and testamentary disposition, the Supreme Court laid down the basic and fundamental differences between a testamentary disposition and a settlement in the following manner:

*“12. Will is an instrument whereunder a person makes a disposition of his properties to take effect after his death and which is in its own nature ambulatory and revocable during his lifetime. It has three essentials:*

- 1) It must be a legal declaration of the testator's intention;*
- 2) That declaration must be with respect to his property; and*
- 3) The desire of the testator that the said declaration should be effectuated after his death.*

*13. The essential quality of a testamentary disposition is ambulatoriness of revocability during the executants' lifetime. Such a document is dependent upon executants' death for its vigour and effect.*

14.   xxx                   xxx                   xxx                   xxx

15. *Gift/settlement is the transfer of existing property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. Gift takes effect by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Section 122 of the Transfer of Property Act defines the "gift" as a voluntary transfer of property in consideration of the natural love and affection to a living person.*

16. *We may point out that in the case of a Will, the crucial circumstance is the existence of a provision disposing of or distributing the property of the testator to take effect on his death. On the other hand, in case of a gift, the provision becomes operative immediately and a transfer in praesenti is intended and comes into effect. A Will is, therefore, revocable because no interest is intended to pass during the lifetime of the owner of the property. In the case of gift, it comes into operation immediately. The nomenclature given by the parties to the transaction in question, as we have already indicated, is not decisive. A Will need not be necessarily registered. The mere registration of 'Will' will not render the document a settlement. In other words, the real and the only reliable test for the purpose of finding out whether the document constitutes a Will or a gift is to find out as to what exactly is the disposition which the document has made, whether it has transferred any interest in praesenti in favour of the settlees or it intended to transfer interest in favour of the settlees only on the death of the settlors."*

21) In the same judgment, the Supreme Court has observed that for construction of a document the intention of the executant should be the guiding factor. In this regard, paras 19 to 23 are relevant to the context and the same are reproduced as under:

*"19. The primary rule of construction of a document is the intention of the executants, which must be found in the words used in the document. The question is not what may be supposed to have been intended, but what has been said. We need to carry on the exercise of construction or interpretation of the document only if the document is ambiguous, or its meaning is uncertain. If the language used in the document is unambiguous and the meaning is clear, evidently, that is what is meant by the executants of the document. Contemporary events and circumstances*



*surrounding the execution of the document are not relevant in such situations.*

20. Lord Hale in *King v. Meling* (1 Vent. At p. 231), in construing a testamentary disposition as well as a settlement, pointed out that the prime governing principle is the “law of instrument” i.e. the intention of the testator is “the law of the instrument”. Lord Wilmot, C.J. in *Doe Long v. Laming* (2 Burr. At pp. 11-12) described the intention of the testator as the “pole star” and is also described as the “nectar of the instrument. In *Re Stone, Baker v. Stone* [(1895) 2 Ch. 196 at p. 200] the Master of the Rolls said as follows:

*“...when I see an intention clearly expressed in a Will, and find no rule of law opposed to giving effect to it, I disregard previous cases.”*

21. Coleridge, J. in *Shore v. Wilson* [9 Cl. & F. 355, at p. 525] held as follows:

*“The intention to be sought is the intention which is expressed in the instrument, not the intention which the maker of the instrument may have had in his mind. It is unquestionable that the object of all expositions of written instruments must be to ascertain the expressed meaning or intention of the writer; the expressed meaning being equivalent to the intention ... It is not allowable ... To adduce any evidence however strong, to prove an unexpressed intention, varying from that which the words used import. This may be open, no doubt, to the remark that although we profess to be explaining the intention of the writer, we may be led in many cases to decide contrary to what can scarcely be doubted to have been the intention, rejecting evidence which may be more satisfactory in the particular instance to prove it. The answer is, that the interpreters have to deal with the written expression of the writer’s intention, and courts of law to carry into effect what he has written, not what it may be surmised, on however probable grounds, that he intended only to have written.”*

22. In *Halsbury’s Laws of England, 4th Edn., Vol.50, p.239*, it is stated:

*“408. Leading principle of construction.- The only principle of construction which is applicable without qualification to all wills and overrides every other rule of construction, is that the testator’s intention is collected from a consideration of the whole will take*

*in connection with any evidence properly admissible, and the meaning of the will and of every part of it is determined according to that intention.”*

23. *Underhill and Strahan in Interpretation of Wills and Settlements (1900 Edn.), while construing a will held that*

*“the intention to be sought is the intention which is expressed in the instrument not the intention which the maker of the instrument may have had in his mind. It is unquestionable that the object of all expositions of written instruments must be to ascertain the expressed meaning or intention of the writer; the expressed meaning being equivalent to the intention...”*

22) From the foregoing enunciation of law on the subject, it is clear that in construing a document which is of a composite character, the fundamental rule is to ascertain the intention adopted from the words used in the document.

23) That takes us to the nature of the words used in the document EXDW-1. Although in the initial part of the document, it has been clearly indicated by the executant that after his death, the property in question would devolve upon defendant No.1 yet he has conveyed in the document that the three storied building on the land in question has been constructed with the funds contributed by defendant No.1-Mst. Dilshada. He has also indicated in the document that he has already, by way of an oral gift, transferred the property in favour of defendant No.1 and has put her in possession of the said property. Although he has used the expression “after his death” in the document at many places but he has also indicated that defendant No.1 is and would be entitled to transfer the property in her name and that she is and would be entitled to transfer the property in favour of any third person or to lease it out to any third

person, meaning thereby that the executant intended to make it clear that defendant No.1 even at the time of execution of the document is entitled to transfer the property in question in her favour or to sell it off and that she would be entitled to do so ever after his death. The intention of the executant deceased Mohammad Ashraf Dar can be given effect to in its real sense only if the document is interpreted in the aforesaid manner.

24) The Supreme Court in the case of **Ram Gopal vs. Nand Lal**, 1950 SCC 702, has observed that in construing a document, the fundamental rule is to ascertain the intention from the words used and the surrounding circumstances are to be considered so as to find out the intended meaning of the words that have been actually employed.

25) Again, in **Ramkishorelal vs. Kamal Narayan**, 1963 Sup (2) SCR 417, a Constitution Bench of the Supreme Court has observed as under:

*“The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has, to a trained conveyancer, a clear and definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of conveyancing. Sometimes' it happens in the case of documents as regards disposition of properties, whether they are testamentary or non-testamentary instruments, that there is a clear conflict between what is said in one part of the document and in another. A familiar in-stance of this is where in an earlier*

*part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion. What is to be done where this happens? It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. (See Sahebzada Mohd. Kamgar Shah v. Jagdish Chandra Deo Dhabal Deo). (1) It is clear, however, that an attempt should always be made to read the two parts of the document harmoniously, if possible. It is only when this is not possible, e. g., where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void."*

**26)** In **Bhaskar Waman Joshi vs. Narayan Rambilas Agarwal**, (1960) 2 SCR 117, the Supreme Court has, while laying down the guidelines for determination of real character of a transaction to be ascertained from the covenants of a deed, observed as under:

*"The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of surrounding circumstances. If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the documents may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance; but evidence as to subsequent conduct of the parties is inadmissible."*

**27)** From the foregoing enunciation of the law on the subject, it is clear that when there is some ambiguity or contradiction in the covenants of a

deed, it is open to a Court to interpret the words used in the deed with the help of extrinsic evidence and surrounding circumstances.

28) In the instant case, it has come in evidence on record that deceased Mohammad Ashraf Dar, husband of defendant No.1, has died issueless. It has also come in evidence on record that he was suffering from a serious ailment and it is defendant No.1 who has taken his care till he breathed his last. As per the evidence on record, defendant No.1 even after his death did not re-marry. Besides this, the deceased husband of defendant No.1 relinquished his share in the joint property situated at Zaldagar in favour of his brothers and sisters thereby divesting defendant No.1, his wife, from the share in the said property. It does appear that in order to compensate his wife, deceased Mohammad Ashraf Dar intended to transfer his self-acquired property at Rajbagh in favour of defendant No.1 so as to ensure her financial and social security.

29) Keeping the aforesaid surrounding circumstances in view, the document EXDW-1 has to be interpreted as a deed confirming the oral gift made by deceased Mohammad Ashraf Dar in favour of his wife, defendant No.1.

30) It has been contended by learned counsel for the appellants that for making a valid oral gift under the Muslim law, it was necessary for late Mohammad Ashraf Dar to put defendant No.1 into the possession of the property, which in the instant case has not been proved from the evidence

on record. According to the learned counsel, defendant No.1 was never and is not even today in possession of the property in question.

31) Under the Mohammadan Law, for validity of a gift, three essential features namely, (1) declaration of gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift, either actually or constructively, to the donee, are to be satisfied. In the instant case, the declaration of gift by Mohammad Ashraf Dar in favour of defendant No.1 has been established as the contents of the document EXDW-1 clearly indicate that deceased Mohammad Ashraf Dar had gifted the property situated at Rajbagh in favour of his wife. The said document EXDW-1 is signed by defendant No.1 also, which impliedly means that she has accepted the gift.

32) The only question which is required to be determined is whether defendant No.1 was put into the possession of the property in question. There is evidence on record that deceased Mohammad Ashraf Dar had constructed the house in question during his lifetime and one of his business partners was residing there and he had even employed a person to look after the property in question. There is also evidence on record that deceased Mohammad Ashraf Dar and defendant No.1 used to reside in the said house off and on, as has been stated by defendant No.1 in her statement. There is, however, no evidence on record to show that defendant No.1 was at any point in time put in exclusive possession of the property in question by her husband. The question would be whether



in such circumstances the oral gift made by deceased husband of defendant No.1 in her favour is valid.

33) It has to be noted that in the instant the relationship between the donee and the donor is of husband and wife. Where a husband makes a gift to the wife either of the matrimonial home occupied by both of them or any other property belonging to him, there is no need for any actual physical departure by the donor. The reason is that the relationship of husband and wife is different from any other relationship. Joint residence is an integral aspect of this relationship and the fact that the husband manages and looks after the property of the wife is backed by an implied presumption that he does it on behalf of his wife. I am supported in my aforesaid view by the judgment of Gujarat High Court in the case of **Fatmabibi vs. Abdulrehman Abdulkarim**, AIR 2001 Gujarat 175. To the similar effect is the ratio laid down by Bombay High Court in the case of **Kadarbhai Gulamhusein and others vs. Nanibibi and others**, AIR 1926 Bom 559, and **Mohammad Hussein Haji Ghulam Mohamed Ajam vs. Aishabai and others**, AIR 1935 Bom 84.

34) Applying the aforesaid position of law to the facts of the instant case, the fact that the evidence on record does prove that deceased Mohammad Ashraf Dar was in possession of the property in question impliedly means that his wife, defendant No.1, was in possession of the property and that after the execution of oral gift, her husband was looking after the said property on her behalf. The argument of learned counsel for

the appellants that the exclusive possession of defendant No.1 having not been proved makes the oral gift invalid, is, therefore, without any merit.

35) For what has been discussed hereinbefore, it is clear that the property at Rajbagh was the self-acquired property of late Mohammad Ashraf Dar, who by virtue of oral gift transferred it to defendant No.1. Hence, the said property cannot be the subject matter of partition between the parties to the suit. Therefore, I find no ground to interfere with the finding recorded by the learned trial court on issue No.4, quoted hereinabove.

36) The judgment and decree passed by the learned trial court, therefore, calls for no interference from this Court. The appeal is, accordingly, dismissed.

37) The trial court record along with a copy of this judgment be sent back.

(Sanjay Dhar)  
Judge

Srinagar  
23.12.2022  
"Bhat Altaf, PS"

*Whether the order is speaking: Yes/No*  
*Whether the order is reportable: Yes/No*