NC: 2025:KHC-K:7901
RSA No. 200424 of 2015

HC-KAR

IN THE HIGH COURT OF KARNATAKA

KALABURAGI BENCH

DATED THIS THE 18TH DAY OF DECEMBER, 2025

BEFORE

THE HON'BLE MR. JUSTICE M.G.S.KAMAL

REGULAR SECOND APPEAL NO.200424 OF 2015

(DEC/INJ)

BETWEEN:

1. RAJIYABI W/O MOHAMMED ISHAQ SHIRAGUR,
   AGE: 45 YEARS,
   OCC: GOVT SERVANT & AGRI,
   R/O. SHIVANAGI VILLAGE AND ALSO
   RAJAJI NAGAR, VIJAYAPUR-586101.

2. GULAMNABI S/O MOHAMMED ISHAQ SHIRAGUR,
   AGE: 21 YEARS, OCC: STUDENT,
   R/O. SHIVANAGI VILLAGE AND ALSO
   RAJAJI NAGAR, VIJAYAPUR-586101.

3. IMRAN S/O MOHAMMED ISHAQ SHIRAGUR,
   AGE: 19 YEARS, OCC: STUDENT,
   R/O. SHIVANAGI VILLAGE AND ALSO
   RAJAJI NAGAR, VIJAYAPUR-586101.

4. KUMARI SUMAYYA
   D/O MOHAMMED ISHAQ SHIRAGUR,
   AGE: 17 YEARS, OCC: STUDENT
   R/O SHIVANAGI VILLAGE AND ALSO
   RAJAJI NAGAR, VIJAYAPUR-586101,
   THE APPELLANT NO. 4 IS MINOR REPRESENED BY
   HER NATURAL MOTHER I.,E APPELLANT NO.1.

...APPELLANTS

(BY SRI. K.N. BALRAJ, AND
SRI SIRAJIN BASHA ADVOCATES)

AND:

1. MAKTUMBI W/O MAKTUM @ JANESAB SHIRAGUR,
   AGE: 65 YEARS, OCC: GOVT SERVANT
   R/O. SHIVANAGI VILLAGE,
   TQ. & DIST. VIJAYAPUR-586101.

2. IRFAN S/O MAKTUM @ JANESAB SHIRAGUR,
   AGE: 37 YEARS, OCC: COOLIE
   R/O SHIVANAGI VILLAGE,
   TQ. & DIST. VIJAYAPUR-586101.

3. MOHAMMED RIZWAN
   S/O MAKTUM @ JANESAB SHIRAGUR,
   AGE: 32 YEARS, OCC: COOLIE
   R/O. SHIVANAGI VILLAGE,
   TQ. & DIST. VIJAYAPUR-586101.

4. MEHABOOB S/O MAKTUM @ JANESAB SHIRAGUR,
   AGE: 30 YEARS, OCC: COOLIE,
   R/O. SHIVANAGI VILLAGE,
   TQ. & DIST. VIJAYAPUR-586101.

5. SHARIFABI W/O AYYUB BAGALI,
   AGE: 41 YEARS, OCC: COOLIE,
   R/O. SHIVANAGI VILLAGE,
   TQ. & DIST. VIJAYAPUR-586101.

6. JAHEDA W/O MOHAMMED SIRAJ INAMDAR,
   AGE: 34 YEARS, OCC: HOUSEHOLD,
   R/O. UKKALI VILLAGE,
   TQ. & DIST. VIJAYAPUR-586101.

7. TAJABI W/O NABISAB SHIRAGUR,
   AGE: 88 YEARS, OCC: NIL,
   R/O. SHIVANAGI VILLAGE,
   TQ. & DIST. VIJAYAPUR-586101.

8. BHASHA S/O NABISAB SHIRAGUR,
AGE: 65 YEARS,
OCC: PEON IN ANJUMAN DEGREE COLLEGE,
VIJAYAPUR
R/O. SHIVANAGI VILLAGE,
TQ. & DIST. VIJAYAPUR-586101.

9. AMINABI W/O ALI PATEL BAGALI.
AGE: 68 YEARS, OCC: HOUSEHOLD,
R/O. SHIVANAGI VILLAGE,
TQ. & DIST. VIJAYAPUR-586101.

10. ASHABI W/O KHAWISHAKHAN MALLI,
AGE: 60 YEARS, OCC: HOUSEHOLD
R/O. TORAVI VILLAGE,
TQ. & DIST. VIJAYAPUR-586101.

…RESPONDENTS

(BY SRI. SANJEEVKUMAR C. PATIL, ADVOCATE FOR R1 TO R6;
R7 TO R10 ARE SERVED)

THIS REGULAR SECOND APPEAL IS FILED UNDER SECTION 100 OF CPC, PRAYING TO ALLOW THE APPEAL BY SETTING ASIDE THE JUDGMENT AND DECREE DATED 29.07.2011 PASSED IN O.S.NO.163/2005 BY THE PRL. CIVIL JUDGE, VIJAYAPUR AND THE JUDGMENT AND DECREE DATED 27.06.2015 PASSED IN R.A.NO.34/2011 BY THE III ADDL. SENIOR CIVIL JUDGE, VIJAYAPUR AND CONSEQUENTLY DISMISS THE SUIT OF THE PLAINTIFFS.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 31.10.2025, COMING ON FOR 'PRONOUNCEMENT OF JUDGMENT' THIS DAY, THE COURT DELIVERED THE FOLLOWING:

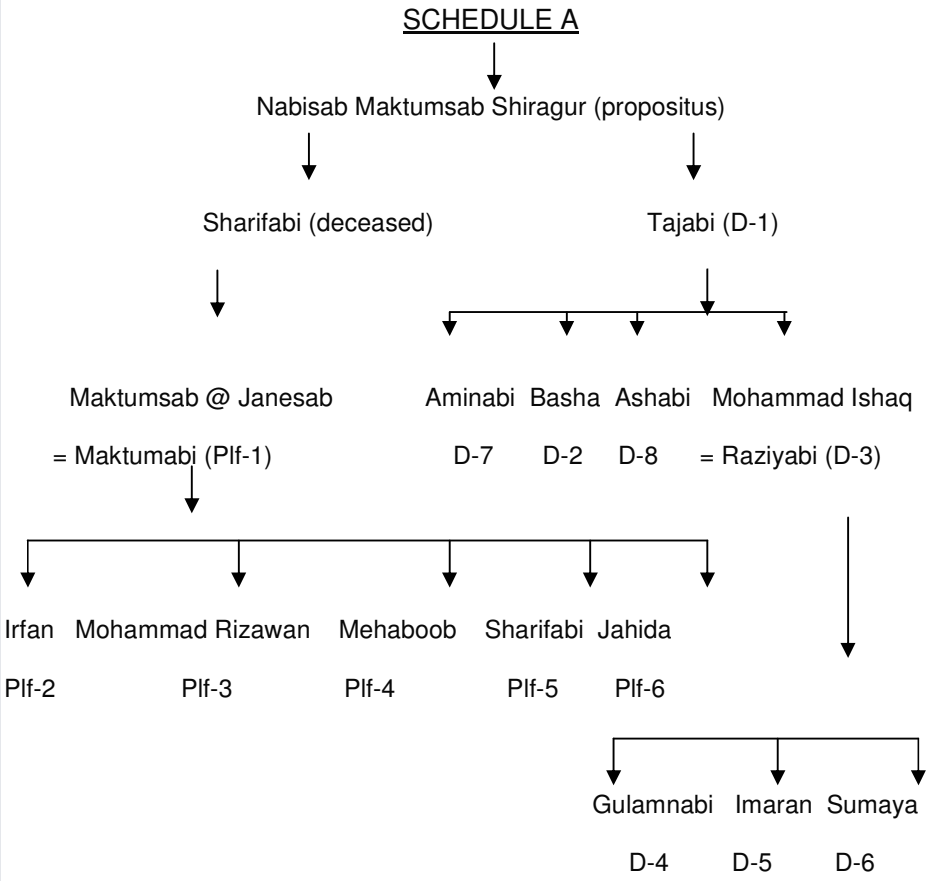
CORAM: HON'BLE MR. JUSTICE M.G.S.KAMAL

CAV JUDGMENT

Defendants Nos.3 to 6 are in this appeal being aggrieved by the judgment and decree dated 29.07.2011 passed in O.S.No.163/2005 on the file of the Principal Civil Judge, Vijayapur [hereinafter referred to as the 'Trial Court' for brevity], which is confirmed by the judgment and order dated 27.06.2015 in R.A.No.34/2011 on the file of the III Additional Senior Civil Judge, Vijayapur [hereinafter referred to as the 'First Appellate Court' for brevity].

02. Subject matter of the above suit is property bearing Sy.No.217/1A measuring 03 acres 39 guntas situated at Shivanagi Village, Taluk and District Vijayapura [hereinafter referred to as the 'suit property' for brevity].

03. Genealogy of the parties is as under :-



04. The above suit is filed by the plaintiffs seeking relief of declaration and consequential relief of permanent injunction contending *inter alia;*

4.1. That plaintiffs are the absolute owners in possession of the suit property. That the defendant No.1 is the step mother-in-law of plaintiff No.1 and step

grandmother of plaintiff Nos.2 to 6. That one Nabisab Maktumsab Shiragur was the father-in-law of the plaintiff No.1 and grandfather of plaintiff Nos.2 to 6. Defendant Nos.2, 7 and 8 and the husband of defendant No.3 i.e., father of defendant Nos.4 to 6 are the daughters and sons respectively of Tajabi i.e., second wife of Nabisab Shiragur.

4.2. Husband of plaintiff No.1 and father of plaintiff Nos.2 to 6 was not looked after properly by his father and step mother. As such, he was forced to do agricultural work. Whereas defendant No.2 and husband of defendant No.3 were given good education and got employment. The relatives of father of plaintiff Nos.2 to 6 were the residents of Deginal village. Looking at the condition of husband and father of plaintiffs, they had gifted suit property in his favour when he was minor aged about 6 to 7 years. Though, the property was given as a gift, a deed of sale was executed in his favour represented by Nabisab Maktumsab Shiragur as his natural father and his minor guardian. Accordingly, his name was mutated in the revenue records vide M.E.No.3632.

4.3. Father of the plaintiff Nos.2 to 6 died on 12.05.2002. Plaintiffs being heirs of deceased became owners and are in possession of the property. That the

grandfather of the plaintiff Nos.2 to 6 and the father-in-law of plaintiff No.1 had love and affection towards his second wife and children born to him through her. Though the suit property was standing in the name of father of plaintiff Nos.2 to 6, the father of defendant No.2 and husband of defendant No.3, in collusion and behind the back of the father of the plaintiff Nos.2 to 6, with an intention of depriving legitimate right of the father of the plaintiff Nos.2 to 6, created a false mutation entry vide M.E.No.7348 by submitting a false waradi to the Village Accountant, striking out name of father of the plaintiffs, though he was in actual possession and enjoyment of the suit property. The said mutation entries were effected without issuing any notice to the father of the plaintiff Nos.2 to 6, which cannot create any right, title or interest in their favour over the suit property.

4.4. That about 2 years ago, husband of defendant No.3, who was working as a High School teacher, passed away. After his death, names of defendant Nos.3 to 6 were entered in respect of the suit property in the revenue records vide M.E.No.12497 without notice or knowledge of the plaintiffs. Defendant No.3, in collusion with anti-social elements, came to the suit

property and stated that she had put the suit property for sale, which constrained the plaintiffs to file the suit against the defendants for the reliefs as sought for.

05. Defendant Nos.1, 2, 7 and 8 appeared through counsel. Defendant Nos.1 and 2 filed the written statement which is adopted by defendant Nos.7 and 8 by filing a memo. Defendant Nos.3 to 6 appeared through their counsel and filed their separate written statement.

06. Defendant Nos.1, 2, 7 and 8, in their written statement admitted the genealogy submitted by the plaintiffs. It is contended that after the demise of his first wife, grandfather of the plaintiffs contracted second marriage with defendant No.1. Defendant Nos.2, 7 and 8 and husband of defendant No.3 were born to them. They admitted that the suit property was gifted in favour of the father of plaintiffs who was then minor by way of sale deed. The defendants also admitted that after the demise of father of plaintiffs, plaintiffs became the owners of the

suit property and they are in possession and enjoyment of the suit property as owners thereof. Deceased son of defendant No.1 and deceased brother of defendant No.2 Mohammed Ishaq has not claimed the ownership of the property at any time as he was in service. However, after filing the suit, a false entry in the name of said Mohammed Ishaq was noticed. After the demise of Mohammed Ishaq, defendant No.3 is creating the problem with the family at the instigation and ill-advice of certain members of the family with an intention to grab the property belonging to the plaintiffs. Hence, sought for decreeing of the suit of the plaintiffs as prayed for.

07. Defendant Nos.3 to 6 in their written statement denied the plaint averments and contended that;

7.1. Defendant No.1 is the first wife of Nabisab Maktumsab Shiragur. That Sharifa Bi was the second wife. It is denied that the suit property was gifted by the relatives of the plaintiff Nos.2 to 6 in favour of their father when he was minor as claimed by the

plaintiffs. It is also denied that after the demise of their father, plaintiff Nos.2 to 6 have become his legal heirs being entitled for the suit property. Allegation of revenue entries made vide M.E.No.7348 behind the back of the plaintiffs is also denied.

7.2. It is specifically contented that plaintiffs and defendant Nos.1, 2, 7 and 8 are not having any right, title or interest over the suit property as they are trying to knock off the property which belongs to defendant Nos.3 to 6.

7.3. That originally one Nabisab Maktumsab Shiragur was the absolute owner in possession of the house property bearing VPC No.488, 521 and 581 of Shivanagi Village and landed properties bearing Sy.No.506/1 measuring 7 acres, Sy.No.214/1 measuring 7 acres 26 guntas, Sy.No.214/2 measuring 4 acres 23 guntas, Sy.No.217/1A measuring 3 acres 39 guntas, Sy.No.217/1B+2A measuring 5 acres 8 guntas, all situated at Shivanagi Village and another land bearing Sy.No.277/3 measuring 3 acres 39 guntas of Hadalagi Village.

7.4. That the said Nabisab Maktumsab Shiragur had effected partition by way of gift, conveying the aforesaid properties on the basis of mutual

understanding between himself and his children. The said oral gift/partition was effected long ago between the family members of the plaintiffs and the defendants. In terms of the said partition, land bearing Sy.No.506/1 measuring 7 acres situated at Shivanagi Village was transferred in the name of Maktumsab Uraf Janesab Shiragur, land bearing Sy.No.214/1 measuring 7 acres 26 guntas and Sy.No.214/2 measuring 4 acres 23 guntas situated at Shivanagi Village were transferred in the name of Sri Badsha also known as Bhasha S/o Nabisab Shiragur (defendant No.2) of this suit, land bearing Sy.No.217/1A measuring 3 acres and 39 guntas and Sy.No.217/1B+2A measuring 5 acres and 8 guntas situated at Shivanagi Village was transferred in the name of Mohammed Ishaq S/o Nabisab Shiragur i.e. in the name of husband of defendant No.3 and father of defendant Nos.4 to 6 in the suit. The land bearing Sy.No.277/3, measuring 3 acres and 39 guntas situated at Hadalagi Village was transferred in the name of Nabisab Maktumsab Shiragur. After his death, the said land has been sold by defendant Nos.1, 2, and 8 in terms of registered deed of sale dated 13.11.1996 to one Sharanappa S/o Saibanna

Kalagi. As such, his name has been mutated in the revenue records vide M.E.No.6127.

7.5. After the partition, defendant No.2 has transferred land bearing Survey No.214/2 measuring 4 acres 23 guntas through Bakshish i.e. Gift as per Muslim personal law to an extent of 1 acre 22 guntas to one Kumar Gulamnabi S/o Mohammed Ishaq and Kumari Sumayya D/o Mohammed Ishaq i.e., defendant Nos.4 to 6 represented by their mother/natural guardian Raziya Begum Shiragur i.e., defendant No.3. Ever since then, defendant Nos.4 to 6 are in possession of the suit property.

7.6. It is contented that after the demise of Mohammed Ishaq S/o Nabisab Shiragur, the name of defendant Nos.3 to 6 is entered in the records of the properties bearing Sy.Nos.217/1A and 217/1B+2A as the legal heirs of Mohammed Ishaq. Since the date of mutual partition by way of gift between the plaintiffs and defendants' family the husband of defendant No.3 i.e. Mohammed Ishaq and defendant No.3 are in possession and enjoyment of the said property. After the birth of defendant Nos.4 to 6, they are in possession and enjoyment of the suit property. Defendant Nos.3 to 6 have received crop insurance amount through Union Bank of India, Shivanagi

branch. It is also contented that in the said partition, house property bearing VPC No.488 was allotted to Janesab Shiragur i.e. husband of plaintiff No.1, property bearing VPC No.521 was allotted to Mohammed Ishaq, husband of defendant No.3, property bearing VPC No.581 was allotted to the Bhasha @ Badsha Shiragur i.e. defendant No.2. After the partition of the house, husband of plaintiff No.1 has transferred property bearing VPC No.488 to one Ameensab. Defendant Nos.3 to 6 are in possession and enjoyment of the suit property and the plaintiffs, defendants Nos.1, 2, 7 and 8 are not in possession and enjoyment of the suit property. That they have now developed the suit property by investing huge amounts by digging bore-well and constructing a well with the help of pension amount of the husband of defendant No.3. Defendant Nos.3 to 6 are thus the owners in possession and enjoyment of the property. Hence, sought for dismissal of the suit.

08. Based on the pleadings, the Trial Court framed the following issues:

1. *Whether plaintiffs prove that they inherited the suit property from their ancestors and they are in possession of the same as on the date of suit ?*

2. *Whether they further prove that defendants by creating documents got mutated their name illegally to the suit land?*

3. *Whether they further prove the alleged interference caused by the defendants?*

4. *Whether plaintiffs are entitled for suit reliefs as prayed?*

5. *What order or decree ?*

09. Plaintiff No.1 examined herself as PW-1 and four witnesses as PWs-2 to 5 and exhibited sixteen documents marked as Exs.P-1 to P-16. Defendant No.3 examined herself as DW-1 and three witnesses as DWs-2 to 4 and marked nineteen documents as Exs.D-1 to D-19.

10. On appreciation of evidence, the Trial Court answered issue Nos.1 to 4 in the affirmative and consequently decreed the suit as prayed for. Being aggrieved, the defendant Nos.3 to 6 preferred a regular appeal in R.A.No.34/2011. The First Appellate Court framed the following points for consideration:

1) *Whether the plaintiffs have made sufficient grounds to show that, the judgment and decree passed by the Trial Court is perverse and capricious?*

2) Whether the judgment and decree of Trial Court required for interference?

3) What order?

11. On re-appreciation, answered the above points in the negative and consequently dismissed the appeal and confirmed the judgment and decree passed by the Trial Court.

12. Being aggrieved, defendant Nos.3 to 6 are before this Court.

13. Sri D.P.Ambekar appearing for Sri K.N.Balraj, learned counsel appearing for the appellants/defendant Nos.3 to 6, taking this Court through the records, submitted;

13.1. That the Trial Court and the First Appellate Court have erred in holding that partition could not have been effected during the lifetime of Nabisab Maktumsab Shiragur-the propositus.

13.2. The Trial Court and the First Appellate Court have failed to appreciate the partition, which was effected by way of gift in respect of various other properties as described in the written statement filed by the defendants/appellants herein, has been

acted upon as evidenced by the revenue records. That in the said partition, suit schedule properties were allotted to the share of defendant Nos.3 to 6, which has been duly reflected in revenue records as evidence at Ex.P4, perusal of which would indicate that the same is in the nature of settlement referred to as 'Apasat Watni'.

13.3. The Co-ordinate bench of this Court in the case of ***Sultan Mohiyuddin and others vs. Smt.Habeebunnissa and others***, passed in ***RFA No.626 of 2013, decided on 25.04.2024*** has held that conveyance of property by way of settlement is permissible and same is valid. In that view of the same, the suit of the plaintiffs could not have been decreed as sought for.

13.4. That the settlement had taken place as far back as in the year 1981 to the knowledge of the plaintiffs and the suit is filed in 2005. As such, the suit is time barred. Further in terms of the said settlement, the possession of the property was delivered to defendant Nos.3 to 6/appellants herein. That PW-3 has admitted the possession of defendant Nos.3 to 6. As such, the suit for mere declaration without consequential relief of possession, was not maintainable and is therefore

liable to be dismissed in terms of Section 34 of the Specific Relief Act, as held by the Apex Court in the case of ***Union of India vs. Ibrahimuddin (2012) 8 SCC 148***. Hence, seeks for allowing of the appeal.

14. *Per contra*, Sri Sanjeevkumar C. Patil, learned counsel appearing for the respondents/plaintiffs, justifying the judgment and decree passed by the Trial Court, submitted;

14.1. That suit schedule property was purchased in the name of husband of plaintiff No.1 and father of plaintiff Nos.2 to 6. That Nabisab Maktumsab Shiragur – propositus had no right, title and interest over the said property. As such, he had no right under law to deal with the property either to convey it by way of a partition, settlement or gift.

14.2. He submits that in the written statement defendant Nos.3 to 6 have specifically claimed the property was partitioned and shares were given by way of 'gift' in their favour, later they claimed same having being conveyed in terms of a 'settlement'. As such, the said stand is inconsistent and mutually destructive.

14.3. That none of the defendants were in possession of the suit property even as admitted by DW-1. Admittedly defendant Nos.2 and 3 were Government employees.

14.4. That the five (5) witnesses who have been examined on behalf of the plaintiffs have admitted plaintiffs to be in possession of the property. Plaintiffs are cultivating the land. Mutation entries which have been entered behind the back and without the consent of the plaintiffs do not confer any right. As such, the Trial Court and the First Appellate Court are justified in decreeing the suit as sought for.

14.5. Except defendant Nos.3 to 6, all the defendants have admitted the case of the plaintiffs and 5 witnesses have been examined on behalf of the plaintiffs who admit plaintiffs being in possession of the property. PW-3 is a third party witness. As such, the admission made cannot be binding. No right can be created based on the mutation records. Hence, seeks for dismissing the appeal.

15. This Court, vide order dated 17.04.2021, has framed the following substantial question of law:

"Whether, under the facts and circumstances involved in the case, both the courts below are justified in granting decree of declaration declaring title of the plaintiffs over the property without possession where the PW.3 in his evidence admitted that the defendant is in possession over the suit land, thus, the suit filed for mere declaration without possession is maintainable as per Section 34 of Specific Relief Act?"

16. Heard. Perused the records.

17. From the facts narrated above and the submissions of learned counsel for parties and from the records, the undisputed facts which emerge are that;

a. Suit property had been purchased in the name of Maktumsab @ Janesab Shiragur, who is the husband of plaintiff No.1 and father of plaintiff Nos.2 to 6. That the said Maktumsab @ Janesab Shiragur was the only son of Nabisab Maktumsab Shiragur from his first wife-Sharifabi.

b. Perusal of said deed of sale certified copy of which is produced at Ex.P10 indicate that the same has been executed on 01.07.1957 by one Gouse Mohammadsa and Nabisab both sons of Umarsab Denigal (who are the maternal uncles of Maktumsab @ Janesab Shiragur). Since the said Maktumsab @ Janesab Shiragur was a minor, his father Nabisab Maktumsab

Shiragur represented him as father and natural guardian. Clearly suit property was the absolute property of Maktumsab @ Janesab Shiragur and no one therefore could claim any right, title or interest over the property unless the same was conveyed in the manner known to law. The said sale deed is subsisting till date and the same has not been cancelled.

c. Revenue records at Ex.P12 reflect the name of Maktumsab @ Janesab Shiragur till the year 2003-2004. It is only in the year 2003-04 the name of defendant Nos.3 to 6 has been mutated in the said records. Maktumsab @ Janesab Shiragur passed away on 12.05.2002.

d. There is no dispute that other sons of Nabisab Maktumsab Shiragur, namely, defendant No.2 and husband of defendant No.3, born to his second wife-the defendant No.1, were the Government employees. DW-1 in her deposition has admitted to the fact that Maktumsab @ Janesab Shiragur was cultivating the land till his demise.

e. Further, PWs.2 to 5 have in their evidence deposed that the suit property was acquired in the name of Maktumsab @ Janesab Shiragur through his maternal

uncles, as the said Maktumsab @ Janesab Shiragur was not given education and was cultivating the suit land till his demise.

18. The Trial Court and the First Appellate Court having adverted to the aforesaid factual aspects of the matter, in the considered view of this Court, have come to the right conclusion that the said Maktumsab @ Janesab Shiragur was the absolute owner of the suit property.

19. The defendants No.3 to 6 in their written statement have however contended that lands bearing Sy.Nos.506/1, 214/1, 214/2, 217/1A, 217/1B+2A and 277/3 and the house properties bearing VPC Nos.488, 521 and 581 were the absolute properties of Nabisab Maktumsab Shiragur, but have not produced any documents of title to show that said Nabisab Maktumsab Shiragur was the owner of the said properties. Except the oral statement by defendant No.3, who has examined herself as DW-1, nothing is placed on record. As such, the question of Nabisab Maktumsab Shiragur conveying the property by way of gift through partition would not arise.

Assuming if said Nabisab Maktumsab Shiragur had indeed conveyed the property by way of gift through partition as contented by defendant Nos.3 to 6 in the written statement, the question is whether such a transaction was permissible under law.

20. First of all as noted there is no evidence on record to show that Nabisab Maktumsab Shiragur was the owner of the suit property. Admittedly suit property stands in the name of Maktumsab @ Janesab Shiragur in terms of sale deed dated 01.07.1957 as per Ex.P10 in which very Nabisab Makhtumsab has represented the minor as his natural guardian. Therefore, there is no way that Nabisab Maktumsab Shiragur could claim ownership over the suit property. Since he is not the owner of the suit property, there is no question of he conveying the suit property by way of gift or partition or even by way of settlement.

21. Apex Court in the case of ***Mansoor Saheb (Dead) and others vs Salima (D) by LRs and others*** in ***Civil Appeal No.4211/2009*** dealing with the concepts

of 'partition', and 'gift' under the principles of Muslim Personal Law at paragraph Nos.16 to 26 has held as under:

> **16.** Prior to looking to the above said sources, a general understanding of partition would also be instructive. Advanced Law Lexicon – (P Ramanatha Aiyar 3rd Edition Reprint 2009) defined partition as a separation between joint owners or tenants in common of their respective interests in land, and setting apart such interest, so that they may enjoy and possess the same in severalty. In SHUB KARAN BUBNA V. SITA SARAN BUBNA -((2009) 9 SCC 689) partition was defined as under:
>
> > "**5.** "Partition" is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.
> >
> > **6.** A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. "Separation of share" is a species of "partition". When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother."
> >
> > (Emphasis supplied)

17. Let us now turn to the position as it is under Mohammedan Law. The right of an heir-apparent comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor [See: Mulla Principles of Mahomedan Law, 22nd Edition, Chapter 6; ***Abdul Wahid Khan v. Mussumat Noran Bibi & Ors***. – (1885 SCC OnLine PC4). Reference may also be made to the decision of this case in ***Gulam Abbas v. Haji Kayyum Ali & Ors.*** – ((1973) 1 SCC 1) wherein a bench of three learned judges observed albeit in connection with renunciation of inheritance as under:

> "7. Sir Roland Wilson, in his "Anglo Mohamadan Law" (p. 260, para 208) states the position thus:
>
> > "For the sake of those readers who are familiar with the joint ownership of father and son according to the most widely prevelant school of Hindu Law, it is perhaps desirable to state explicitly that in Mohammedan, as in Roman and English Law, nemo est heres viventis.....a living person has no heir. An heir apparent or presumptive has no such reversionary interest as would enable him to object to any sale or gift made by the owner in possession; See Abdul Wdhid, L.P. 12 I.A., 91, and 11 Cal 597 (1885) which was followed in Hasan Ali, 11 All 456, (1889). The converse is also true: a renunciation by an exepectant heir in the lifetime of his ancestor is not valid, or enforceable against him after the vesting of the inheritance.""
>
> (Emphasis supplied)

It is also important to note that the doctrine of partial partition does not apply to Mohammedan Law as the heirs therein are tenants-in-common. Succession is to a definite fraction of the estate in question. A.N. Ray, J. as his Lordship then was wrote in ***Syed Shah Ghulam Ghouse Mohiuddin v. Syed Shah Ahmed Mohiuddin Kamisul Quadri –*** ((1971) 1 SCC 597) as follows:

> "20. … In Mohammedan law the doctrine of partial partition is not applicable because the heirs are tenants-in-common and the heirs of the deceased Muslim succeed to the definite fraction of every part of his estate. The shares of heirs under Mohammedan law are definite and known before actual partition. Therefore on partition of properties belonging to a deceased Muslim there is division by metes and bounds in accordance with the specific share of each heir being already determined by the law."

18. It is acknowledged that Islamic Law has four sources— (i) Quran (ii) Hadith (iii) Ijma and (iv) Qiyas. It is commonly accepted that all Islamic personal law has to derive from these four sources. There is a generally acknowledged division among these four sources as well. The Quran is pre-eminent and deserving of all primacy followed by the other three in that very order. The question involved in these appeals also, of inheritance and/or gift must be decided in reference thereto only. The topic of inheritance has been dealt with primarily under Chapter 4 of the Quran (https://quran.com/4), Al-Nisa.

The relevant verses are as under:

> "4:11 Allah commands you regarding your children: the share of the male will be twice that of the female. If you leave only two ˹or more˺ females, their share is two-thirds of the estate. But if there is only one female, her share will be one-half. Each parent is entitled to one-sixth if you leave offspring. But if you are childless and your parents are the only heirs, then your mother will receive one-third. But if you leave siblings, then your mother will receive one-sixth — after the fulfilment of bequests and debts. ˹Be fair to˺ your parents and children, as you do not ˹fully˺ know who is more beneficial to you. ˹This is˺ an obligation from Allah. Surely Allah is All-Knowing, AllWise.
>
> 4:12 You will inherit half of what your wives leave if they are childless. But if they have children, then ˹your share is˺ one-fourth of the estate—after the

> fulfilment of bequests and debts. And your wives will inherit one-fourth of what you leave if you are childless. But if you have children, then your wives will receive one-eighth of your estate—after the fulfilment of bequests and debts. And if a man or a woman leaves neither parents nor children but only a brother or a sister ˹from their mother's side˺, they will each inherit one-sixth, but if they are more than one, they ˹all˺ will share one-third of the estate— after the fulfilment of bequests and debts without harm ˹to the heirs˺. ˹This is˺ a commandment from Allah. And Allah is All-Knowing, Most Forbearing.
>
> 4:176 They ask you ˹for a ruling, O Prophet˺. Say, "Allah gives you a ruling regarding those who die without children or parents." If a man dies childless and leaves behind a sister, she will inherit one-half of his estate, whereas her brother will inherit all of her estate if she dies childless. If this person leaves behind two sisters, they together will inherit two-thirds of the estate. But if the deceased leaves male and female siblings, a male's share will be equal to that of two females. Allah makes ˹this˺ clear to you so you do not go astray. And Allah has ˹perfect˺ knowledge of all things."

19. Reading of the above verses reveals clearly with the use of the words 'leave', 'leaves' or 'man dies' that division of property is only possible upon the death of a person, amongst his heirs. There is no prescription as to how the partition of property may take place when a person is alive.

20. One may reasonably conclude, having referred to the primary texts and commentaries on Mohammedan Law, that partition while a person is alive between him and his heirs is impermissible. The manner in which partition is to take place after the death of the ancestor is set out in great detail in the sources of Mohammedan Law however, the same is beyond the scope of the present lis.

21. Sultan Saheb therefore during his lifetime could not have partitioned his property, giving two parts thereof to his sons. The same is not in accordance with law. The possibility of Sultan

Saheb's succeeding their father in interest of the said property, could only have arisen in 1978 when Sultan Saheb passed away. When the partition of property would have taken place upon his death in 1978, the appellants as also the respondents herein would have received shares as prescribed under Mohammedan Law. As already observed supra, the only way permissible to Sultan Saheb to have given two parts of his property to his two sons would have been through hiba, the requirements of which have been culled out further ahead in this judgment.

22. Let us now turn our attention to the next question arising for adjudication i.e., the claim of the appellants herein that their father Sultan Saheb had in fact gifted two parts of his property to them.

23. We now examine the law that deals with oral gifts and their validity under Mohammedan Law. A hiba literally means "the donation of a thing from which the donee may derive benefit". Technically, it is "an unconditional transfer of property made immediately and without any exchange or consideration, by one person to another and accepted by or on behalf of the latter." (Hedaya, 482).

24. The position of oral gift is well settled by the Courts of law. In 'Outlines of Mohammadan Law' ((2009) 6 SCC 160), A.A. Faizee described 'gift' as:

> "A man may lawfully make a gift of his property to another during his lifetime; or he may give it away to someone after his death by will. The first is called a disposition inter vivos; the second, a testamentary disposition. Muhammadan law permits both kinds of transfers; but while a disposition inter vivos is unfettered as to quantum, a testamentary disposition is limited to one-third of the net estate. Muhammadan law allows a man to give away the whole of his property during his lifetime, but only one-third of it can be bequeathed by will."
>
> Ameer Ali defines 'hiba' in the following terms:
>
> > "A hiba is a voluntary gift without consideration of property or the substance of thing by one person

> to another so as to constitute the donee the proprietor of the subject matter of the gift."

While referring to Mohammedan Law, by Syed Ameer Ali (4th ed., vol. i., p.41.), the Privy Council in ***Mohd. Abdul Ghani v. Fakhr Jahan Begam*** – (1922 SCC OnLine PC 18) observed:

> "For a valid gift inter vivos under the Mahomedan law applicable in this case, three conditions are necessary, which their Lordships consider have been correctly stated thus: "(a) manifestation of the wish to give on the part of the donor; (b) the acceptance of the donee, either impliedly or expressly; and (c) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively."
>
> (Emphasis supplied)

This Court, in ***Jamila Begum v. Shami Mohd.,*** ((2009) 2 SCC 727) reiterated the essentials of valid and complete gift as laid down in **Abdul Rahim** (supra), ((2009) 6 SCC 160):

> "23. Under the Mohammedan law, no doubt, making oral gift is permissible.
>
> …
>
> 13. The conditions to make a valid and complete gift under the Mohammadan law are as under:
>
> (a) The donor should be sane and major and must be the owner of the property which he is gifting.
>
> (b) The thing gifted should be in existence at the time of hiba.
>
> (c) If the thing gifted is divisible, it should be separated and made distinct.
>
> (d) The thing gifted should be such property to benefit from which is lawful under the Shariat. (e)

The thing gifted should not be accompanied by things not gifted i.e. should be free from things which have not been gifted.

(f) The thing gifted should come in the possession of the donee himself, or of his representative, guardian or executor."

Mulla on Mohammedan Law – (5th Edition) provides for the manner in which a gift is to be made which are:

"by a clear and unequivocal declaration of intention of making a gift made orally or in writing by the donor or his agent, and

i. accepted expressly or impliedly by the donee or his agent except in the case of a gift,

a. by a guardian to his ward; or

b. of a debt to the debtor; and

ii. Such declaration and acceptance must be followed by the delivery of possession (actually or, constructively) of the subject-matter of the gift by the donor or his agent to;

a. the donee or his agent; or

b. To the guardian, if the donee is a minor or lunatic; or

c. To the husband if the donee is a minor wife provided that the marriage has been consummated; or

d. To the trustees, if the gift is made through a trust.

iii. On the delivery of possession, a gift becomes complete, immediately."

(Emphasis supplied)

> **25**. The upshot of the above discussion is that there are three essential elements which are necessary for a valid gift deed. They are:
>
> a) The gift has to be necessarily declared by the person giving the gift, i.e., the donor;
>
> b) Such a gift has to be accepted either impliedly or explicitly by or on behalf of the donee; and
>
> c) Apart from declaration and acceptance, there is also a requirement of delivery of possession for a gift to be valid.
>
> **26.** It is a fact that the requirements for the validity of a gift deed are sequential. One must follow the other. The latter can only hold water if the first one is complied with. In other words, if (**a**) is not complied with, (**b)** and (**c**) would not be of consequence; similarly, if (**a**) and (**c**) are met without (**b**), it would still be of no consequence. In the end, all three conditions must be met.

22. The Trial Court and the First Appellate Court have rightly taken note of the contents of Ex.D-1 M.E.No.7348, which indicate a purported partition between Nabisab and his sons in respect of landed properties. The said document however do not give any reference to Nabisab being the owner of the properties and that he had conveyed the property by way of a gift through partition or he had gifted the said property by way of mutual understanding.

23. Further no details of the date of the alleged partition or gift is provided. Ex.D-1 merely refers that the same was certified based on the waradi given to the parties regarding alleged partition. Neither waradi is produced before the Court nor any revenue authority is examined.

24. Reliance placed on by the learned counsel for the appellants the judgment of the Co-ordinate Bench of this Court in the case of ***Sultan Mohiyuddin*** (supra), is of no avail in as much as the issue that fell for consideration is with regard to registered deeds of settlement executed by the owner of the property in favour of his children. Referring to the definition of term 'settlement' provided under the Stamp Act, the Co-ordinate Bench of this Court has held that such an arrangement is not prohibited under law. The subject matter of the instant case is completely different and distinct from the one which is involved in the said case.

25. As noted above in the case of ***Mansoor Saheb*** (supra), it is held that the partition and the gift can be done only in the manner provided and not otherwise.

26. Another aspect of the matter which the Trial Court and First Appellate Court have taken into consideration is defendant Nos.3 to 6 being wife and children of deceased-Muhammed Ishaq, who is the 2nd son of Nabisab through his 2nd wife, cannot acquire right, title and interest over the suit property merely on the basis of mutation entries vide M.E.No.12497 as per Ex.D3 inasmuch as Muhammed Ishaq himself had not got any right, title or interest over the said property. As such, the question of they inheriting the suit property further would not arise. In the very same judgment of ***Mansoor Saheb*** (supra) at paragraph 35, the apex Court has held as under:

> **35.** Additionally, the purpose of mutation entry, as is well settled is only limited to revenue records. They do not, in any way, translate to or confer any title in regard to the subject matter property. Some decisions reflecting this position of law are as follows:

In ***Sawarni v. Inder Kaur*** – (1996) 6 SCC 223 –

> "7. … Mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. ..."

In ***Jitendra Singh v. State of M.P. & Ors. (***2021 SCC OnLine SC 802) –

> "7. Right from 1997, the law is very clear. In the case of Balwant Singh v. Daulat Singh (D) By Lrs., reported in (1997) 7 SCC 137, this Court had an occasion to consider the effect of mutation and it is observed and held that mutation of property in revenue records neither creates nor extinguishes title to the property nor has it any presumptive value on title. Such entries are relevant only for the purpose of collecting land revenue. Similar view has been expressed in the series of decisions thereafter."

This position was recently reiterated by this Court in ***P. Kishore Kumar v. Vittal K. Patkar –*** ((2023) SCC OnLine SC 1483)"

27. Also relevant to refer the judgment of the Hon'ble Apex Cour in the case of ***Vishwa Vijay Bharati vs. Fakhrul Hassan and others*** **- (1976) 3 SCC 642**, dealing with the presumption of correctness of revenue entries, at paras 14 and 15 has held as under :-

> *"14. It is true that the entries in the revenue record ought, generally, to be accepted at their face value and courts should not embark upon an appellate inquiry in to their correctness. But the presumption of correctness can apply only to genuine, not forged or fraudulent, entries. The distinction may be fine but it is real. The distinction is that one cannot challenge the correctness of what the entry is the revenue record states but the entry is open to the attack that it was made fraudulently or surreptitiously. Fraud and forgery rob a document of all its legal effect and cannot found a claim to possessory title.*
>
> *15. In **Amba Prasad** v. **Abdul Noor Khan** – (1964) 7 SCC 800, it was held by this Court that Section 20 of the U.P. Act 1 of 1951 does not require proof of actual possession and that its purpose is to eliminate inquiries into disputed possession by acceptance of the entries in the Khasra or Khatauni of 1356 Fasli. While commenting on this decision, this Court observed in **Sonawati** v. **Sri Ram** – (1968) 1 SCR 617, 620 that the Civil Court in adjudging a claim of a person to the rights of an **adhivasi** is not called upon to make an enquiry whether the claimant was actually in possession of the land or held the right as an occupant: **cases of fraud apart**, the entry in the record alone is relevant. We have supplied the emphasis in order to show that the normal presumption of correctness attaching to entries in the revenue record, which by law constitute evidence of a legal title, is displaced by proof of fraud."*

28. That apart, defendant Nos.1, 2, 7 and 8 have specifically and categorically admitted the fact of Maktumsab @ Janesab Shiragur the husband and father of plaintiffs respectively was the absolute owner of the property and was in cultivation of the same till his demise and after his demise, the property has been in possession of the plaintiffs and defendant Nos.3 to 6 at the instigation

of certain persons with ill-intention have created violent atmosphere in the family also cannot be lost sight of.

29. The Trial Court and the First Appellate Court have also taken note of the deposition of defendant No.3 examined as DW-1, who has pleaded her ignorance as to whether there was a partition in respect of the landed property and the house property till date and she was also not aware whether oral gift was made by her father-in-law in favour of her sons and in the absence of she producing any document to support her contention, the Courts have held the claim of defendants No.3 to 6 of they being the owners in possession cannot be countenanced. When the defendant No.3-DW-1 was not aware of the mode of acquisition of the property by her family members, the question of she claiming to be the owner in possession of property also cannot be countenanced. The other witnesses examined on behalf of the defendants have pleaded ignorance about the family affairs of Nabisab. As such, the evidence of the said witnesses are of no consequences.

30. As regard to document produced by the defendants to evidence they receiving the crop insurance in respect of suit property, DW-4-Mallikarjun/Manager of Union Bank of India has been examined, who in his deposition has pleaded ignorance as to whether the crop insurance amount has been credited to the bank account of defendant No.3 or not. He has also admitted that there is no mentioning of the survey number of the land in respect of which the crop insurance was credited in the documents produced at Exs.D14 and 17. Based on the said evidence, the Trial Court and the First Appellate Court have held that the defendant Nos.3 to 6 have failed to prove their possession over the property.

31. In that view of the matter, a suit for declaration and injunction filed by the appellants cannot be held to be not maintainable and the reliance placed on by the learned counsel for the appellants on the judgment of ***Ibrahimuddin*** (supra) is of no avail.

32. Substantial question of law is answered accordingly. Consequently, the following:

ORDER

i) Appeal is ***dismissed*.**

ii) Judgment and decree dated 29.07.2011 passed in O.S.No.163/2005 on the file of the Principal Civil Judge, Vijayapura and the judgment and decree dated 27.06.2015 passed in R.A.No.34/2011 on the file of III Additional Senior Civil Judge, Vijayapura are confirmed.

Sd/-
(M.G.S.KAMAL)
JUDGE

SWK,SDU
List No.: 1 Sl No.: 20
Ct:pk