IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

911 SECOND APPEAL NO. 458 OF 2016

JOHRABI YUSUF KHAN PATHAN @
JOHRABI ABDUL MAJID

VERSUS

ABDUL KHALIK AB. HAMID
DIED LRS MAHERUNNISA AND ORS

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Mr. D.U.Mulla, Advocate for Appellant.

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CORAM : T.V.NALAWADE, J.

DATE : 21st JULY, 2016

ORDER :-

. The Appeal is filed to challenge the Judgment and Decree of R.C.S. No. 144/2000 which was pending in the Court of the Joint Civil Judge [Jr.Division], Chopda and also to challenge the Judgment and Decree of R.C.A. No. 67/2009 which was pending in the Court of the District Judge -1, Amalner, district Jalgaon. Heard learned counsel for the appellant.

2. The Suit was filed by the present appellant for

relief of declaration that she is owner of suit property bearing CTS No. 3941/2 and 3940. It is her case that defendant Nos. 1 to 3 are sons of real brother of father of the plaintiff. It is contended that in the partition between father of the plaintiff and father of defendant Nos. 1 to 3, the property bearing No. 3941/1 had come to the share of her father and this property is adjacent to the aforesaid 2 properties. It is contended that though the suit properties were allotted to the share of defendant Nos. 1 to 3, the father of the plaintiff was taking care of the defendants and his name was entered as guardian of defendants in the record.

3. It is the case of the plaintiff that when defendants became major, they shifted to other station. It is her case that on 20/07/1975, defendant Nos. 1 to 3 came to Chopda and gifted the suit properties to her orally. It is contended that as her father had taken care of defendant Nos. 1 to 3, gift was made by them. It is contended that she is paying the taxes of the property and she is in possession of the suit property. It is her case that she had kept her various articles in the suit property where there is at least dilapidated construction.

4. Defendant Nos. 4 and 5 were impleaded in the Suit as the property was sold to them by defendant Nos. 1 to 3. Defendant Nos. 1 to 3 contested the matter by filing Written Statement. They denied that they had gifted the property to the plaintiff. On the contrary, they contended that they have equal share in the property bearing house No. 3941/1. Newly added defendants also contested the matter by contending that they are bonafide purchasers. They denied that the property was gifted to the plaintiff.

5. Issues were framed on the basis of the aforesaid pleadings. Both sides gave evidence. The Courts below have held that the plaintiff failed to prove that the suit property is gifted to her by defendant Nos. 1 to 3 and she is in possession of the property. Relief of declaration was claimed on the basis of so called gift of 1975 and relief of injunction was also claimed by the plaintiff against the defendants.

6. Plaintiff examined herself and she placed reliance on some record viz. tax receipt in respect of house tax paid of the suit property. This record starts from the year 1957-58

7. For proving gift, it was necessary for the plaintiff to prove that all the defendants had offered to gift the property to her they had made such declaration on the date mentioned in the plaint and she had accepted the gift and then the possession was taken by her from the defendants. It was submitted for the appellant that the plaintiff was already taking care of the property of defendant Nos. 1 to 3 as care taker and so it can be said that possession was already with her. This proposition can not be accepted in view of the position of Muslim Law with regard to the gift. There is only oral evidence and the record of aforesaid nature. When she herself admits that she was acting as care taker, not much can be made on circumstance that she had paid taxes from the year 1958. The defendants came with the case that due to close relation, they were asking the plaintiff to pay the tax, but they were handing over the amount for the same to the plaintiff.

8. The plaintiff has relied on the report of the Commissioner appointed by the Court. The report and the submissions made show that the door of the house of the plaintiff situated in house No. 3941/1 opens to the open space, the disputed property. Some articles viz. tyres of the

plaintiff were found on the open space. There is dilapidated structure on the suit property. Even if this material is accepted as it is, it can not be said that the plaintiff was in possession of the suit property. Keeping some articles on open space does not amount to keeping possession over the open space.

9. The record of title and assessment record is in favour of defendant Nos. 1 to 3. If the property was really gifted in the year 1975, plaintiff would have taken steps to enter her name on the basis of gift. She could have at least obtained application from the defendants to the effect that they had gifted the property to the plaintiff who was their close relative. No such attempt was made. The house tax was paid subsequent to 1975 also but in the names of defendant Nos. 1 to 3. In view of the aforesaid circumstances and position of Muslim Law on gift, decree of declaration could not have been given in favour of the plaintiff. Much was argued by the learned counsel for the appellant on the circumstances that defendant Nos. 1 to 3 contended that they have right in property CTS No. 3941/1. It was submitted that in that case, the property in possession of the plaintiff and the 2 suit properties can be said to be

jointly owned by the plaintiff and defendant Nos. 1 to 3. This submission is not at all acceptable. Plaintiff had come to the Court with specific case and it was necessary for her to prove it. She failed to do so. The findings are on question of facts. This Court holds that no substantial question of law as such is involved in the matter and it is not possible to re-appreciate the material at this stage.

10. In the result, Second Appeal stands dismissed.

[T.V.NALAWADE, J.]