

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 147 OF 1991

Mohd. Umar s/o Mohd. Yakub
R/o. Chelipura, Aurangabad
District Aurangabad

...Appellant

versus

Mohd. Akbar Mohd. Yakub
(since deceased through L.Rs.)

1. Mohd. Anwar Mohd. Akbar
Age 42 years, Occ. Business,
R/o. Opp. Gate of Jannati Masjid
Manjarpura, Aurangabad
2. Mohd. Assaf Mohd. Akbar
Age 35 years, Occ. Business
R/o. Nutan Colony, Chhota Taklya
Aurangabad
3. Mohd. Yakub Mohd. Akbar
Age 32 years, Occ. Business
R/o. Sadat Nagar, Near Railway
Station, Aurangabad

...Respondents

.....
Mr. S.H. Jagiasi, advocate for the appellant
None for the respondents

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CORAM : V. K. JADHAV, J.
DATED : 3rd MAY, 2017

ORAL JUDGMENT:-

1. By this second appeal, the appellant (original plaintiff) has challenged the judgment and decree dated 17.11.1986, passed by the IIIrd Joint C.J.J.D. Aurangabad, in Regular Civil Suit No. 510 of

1984 and confirmed by the Additional District Judge, Aurangabad by judgment and order dated 11.1.1990 in Regular Civil Appeal No. 7 of 1987.

2. Brief facts giving rise to the present appeal are as follows:-

a) The appellant is claiming to be the owner of house property bearing Municipal No. 1-28-66, situated at Chelipura, Aurangabad, originally owned by his maternal grand father viz. Sardarkhan. The appellant's contention are twofold. Firstly, on or about 1340 Fasli, his maternal grand father Sardarkhan orally gifted the said house property to the appellant and secondly, in order to avoid further litigation, said Sardarkhan (maternal grand father of the appellant) on 12.8.1956 executed sale deed of the said house property in favour of the appellant. It is further case of the appellant that the defendant, who is real brother of the appellant, was in need of residential accommodation and as such at his request he was permitted to reside in three rooms as depicted in red colour in the plan enclosed with the plaint, which is subject matter and that the respondent's possession is permissive. The appellant-plaintiff was in need of said portion, however, the respondent-defendant has refused to vacate the said portion of the house. The appellant thus constrained to institute the suit for recovery of possession of the house property and

Rs.300/- towards unauthorized use of the said portion of the house alongwith the costs of the suit.

b) The respondent (defendant) has strongly resisted the suit by filing his written statement at Exh.19. It has been denied that the maternal grand father Sardarkhan gifted entire suit house and thereafter sold it to the appellant. It has been contended that the appellant, being eldest son and male issue of the daughter, grand father Sardarkhan, treated all sons of his daughter like his male issue. The suit house originally purchased by Sardarkhan, was having straw roof and thereafter it was replaced by zinc sheets. Thereafter, taxes were imposed and the property was mutated in the Municipal record, in the name of appellant being eldest and literate son in the family. The respondent has paid the taxes and also obtained water connection and paid the same. However, the appellant's name remained in the municipal record and as such all receipts were issued in his name. It has also been contended that late Sardarkhan paid the taxes etc. as long as he lived. It has also been contended that Sardarkhan did not execute the sale deed of the house in favour of the appellant and said sale deed is false, forged and fabricated document. It has also been contended that even assuming that the sale deed was executed by late Sardarkhan however he was not competent person on the day of alleged sale

deed to execute it and as such the appellant does not get title in respect of suit property on its basis. It has also been contended that late Sardarkhan during his life time made oral will deed and by way of testament, allotted two rooms to the appellant, two rooms to the respondents and kept one hall (Dalan) common between two and allotted rooms to third brother Sk. Ahmed, to live together in their allotted portions peacefully and unitedly and pay the taxes proportionately. It has been contended that the appellant with forged document and false theory of oral 'Hibba' instituted false suit to grab entire house property.

c) On the basis of rival pleadings of the respective parties, learned Judge of the trial court has framed necessary issues at Exh 20 and both the parties led their oral and documentary evidence in support of their rival contentions. Learned Illrd Joint C.J.J.D. Aurangabad, by judgment and decree dated 17.11.1986 dismissed the suit with costs. Being aggrieved by the same, the appellant has preferred Regular Civil Appeal No. 7 of 1987 before the District Court, Aurangabad and the learned Additional Sessions Judge by its judgment and order dated 11.01.1990 dismissed the appeal with costs. Hence, this second appeal.

3. Learned counsel for the appellant submits that the appellant

plaintiff has proved three essentials of the gift as provided under Section 149 of Mahomedan Law. No physical departure or formal entry is necessary in the case of gift of immovable property in which the donor and the donee both are residing at the time of the gift and in such case the gift may be completed by some overt act by the donor, indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. Learned counsel submits that in the instant case, it has been established beyond doubt that donor Sardarkhan himself mutated the house property in the name of appellant and even tax receipts and water tax receipts came to be issued in the name of appellant. Learned counsel submits that this overt act by the donor establishes the compliance with the requisite condition of delivery of possession of the property. However, both the courts below have not considered the same in its proper perspectives. In order to avoid further litigation, late Sardarkhan executed sale deed of the suit house in favour of the appellant. The courts below have recorded perverse findings in respect of the sale deed Exh.55. On the basis of oral and documentary evidence, adduced by the appellant, irresistible inference about true intention of the donor late Sardarkhan to gift the house property in favour of the appellant could be drawn. Learned counsel submits that the judgment and order passed by the courts below are thus liable to be quashed and set aside and the appellant

is entitled for decree as per his prayers in the suit.

Learned counsel for the appellant, in order to substantiate his submissions, placed reliance on the judgment in the case of ***Des Raj Nagpal vs. Income Tax Officer, reported in 1985 13 ITD 800 Delhi.***

4. Though the respondents are duly served, none appears for them.

5. There are three essentials to the validity of gift, (1) a 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 in pursuance thereto. It is also essential for the validity of the gift under Mahomedan Law that the donor should divest himself completely of all ownership and domain over the subject of the gift. So far as the delivery of property, which is subject matter of the gift is concerned, no physical departure or formal entry is necessary in the case of gift of immovable property in which the donor and the donee both are residing at the time of the gift and in such case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the

gift. The Mahomedan Law does not dispense with the necessity or acceptance of the gift even in case where donees are minors.

6. In the instant case, the appellant's theory of 'Hibba' or gift fails on two counts. Firstly, even though the father of the appellant was alive and has not been deprived his rights and powers as guardian, the possession of the property (subject matter of gift) was not delivered to the father. Admittedly, the appellant was minor at the time of alleged delivery of house property by way of Hibba/gift and as such, right to take possession on behalf of him, belongs to his father/guardian. The appellant has only deposed that late Sardarkhan had grown him up and educated him and also taken his care up to his marriage. The appellant has however, nowhere contends that his own father/natural guardian has been deprived of his rights and powers as guardian. There should have been a delivery of possession by grand father late Sardarkhan to the father of the appellant as guardian as his minor son and as such, gift is not complete. The mere fact that the appellant has been brought up and maintained by late Sardarkhan, will not constitute late Sardarkhan as guardian of their property so as to dispense with delivery of possession.

7. Secondly, it further appears from the evidence adduced by the

appellant that late Sardarkhan had not divested himself completely from ownership and domain over the subject of the gift. It is true that no departure or formal entry is necessary in the case of gift of immovable property, in which the donor and the donee both are residing at the time of the gift and in such case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. Learned counsel for the appellant vehemently submitted that overt act on the part of late Sardarkhan is fully established by the appellant in the form of documents, such as tax receipts of the house property issued by the Municipality and also water tax receipts.

8. On careful perusal of documents at Exh. 31 and 32, it appears that there is a reference of receipt of certain amount by the water supply department of Aurangabad city from the appellant. However, the important columns like house number, ward number etc. are kept blank. Thus, it is not clear whether the water supply department of Aurangabad city had received the said amount in respect of suit house. The document at Exh.33 pertains to works of private pipeline connection, issued in the name of the appellant. On perusal of the same, it appears that no house number is mentioned in said document Exh.33 and only receipt is issued in the name of the

appellant, even without referring his status in respect of said work of private pipeline connection. The receipts at Exh. 34 to 43 are in respect of water tax for the period from January 1974 to 1983. Exh.44 is a notice dated 25.11.1976 issued by Municipal Council, Aurangabad to the appellant and further Exh.45 is also a tax receipt dated 31.3.1981 issued by Municipal Council, Aurangabad. Documents Exh. 34 to 43 and Exh. 44 and 45 are not helpful for the appellant since the appellant has also raised the contention about execution of sale deed in his favour by late Sardarkhan in respect of suit house property in the year 1956. So far as the claim of the appellant about gift of suit property is concerned, the appellant has also failed to prove the overt act on the part of late Sardarkhan indicating clear intention on his part to transfer possession of suit house and to divert himself of all control over the suit house. Thus, the courts below have rightly come to the conclusion that oral gift is not proved by the appellant.

9. So far as the sale deed Exh. 52 is concerned, it is pertinent to note that there is no reference in the sale deed of alleged oral gift in favour of the appellant in respect of suit house. Further, both the courts below have expressed their doubts about authenticity of unregistered sale deed Exh.52. Learned Judge of the lower appellate court has observed that the stamp paper used for preparing

sale deed Exh.52 is of Maharashtra State though the transaction is dated 12.8.1956.

10. As per the provisions of Section 54 of the Transfer of Property Act, in case of transfer of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. The sale of such property would be complete as soon as delivery of possession is proved either on the basis of unregistered instrument of sale or otherwise. In the instant case, though there is recital in the sale deed about delivery of possession of the suit property, it further appears from the admission given by the appellant during the course of his cross examination that the said recital came to be inserted in the sale deed Exh.52 without any attempt at fulfillment. The appellant has stated in his cross examination that he was put in possession long back by way of oral gift by late Sardarkhan prior to execution of sale deed. As discussed in the foregoing paras, the appellant has failed to prove the theory of oral gift in respect of house property and as such, the sale of house property in the year 1956 under unregistered sale deed Exh.52 would be incomplete in absence of delivery of possession at the time of execution of such sale deed. Both the courts below have therefore, rightly observed that the appellant failed on both the counts.

11. In view of above discussion, I find that no substantial question of law is involved in this appeal. There is no reason to interfere in the concurrent finding of facts recorded by the courts below. There is no substance in the appeal and the appeal is thus liable to be dismissed. The appeal is therefore, hereby dismissed. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

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