

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

**SECOND APPEAL NO.871/2018
WITH CIVIL APPLICATION NO.13569/2018**

Ajay s/o Tulsidas Mote. ...Appellant / Applicant

VERSUS

Sushilabai w/o Satwajirao Jagtap. ...Respondent..

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Shri R.N. Dhorde, Senior Counsel i/b Shri V.R. Dhorde,
for the appellant / applicant.

Shiri V.D. Sapkal, Advocate for respondent.

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CORAM: V.L. ACHLIYA, J.

DATE: 19.06.2019

PER COURT :

1] Being aggrieved by the judgment and decree dated 30.11.2007 passed in Special Civil Suit No.233/2006 by learned Civil Judge, Senior Division, Aurangabad, and confirmed in appeal preferred before the District Judge, Aurangabad, vide Regular Civil Appeal No.24/2016 decided on 24.9.2018, the appellant – original defendant, has

preferred this second appeal.

2] Heard learned Senior Counsel for the appellant – defendant and the learned counsel for the respondent – original plaintiff. Perused the record and proceedings.

3] The respondent – plaintiff had filed Special Civil Suit No.233/2006 seeking following relief:-

“The suit of the plaintiff may be decreed with costs. Plaintiff may be declared owner of the suit property. The Gift Deed dated 14.07.2004 may be declared as void, being without free consent and being actuated by fraud and deception and the same may be ordered to be delivered up and cancelled.”

4] The plaintiff had filed suit claiming above quoted relief with contention that the registered gift-deed dated 14.7.2004 was got executed by practising fraud upon her, under the pretext of signing the General of Power Attorney in favour of the defendant. The defendant resisted the suit claim by denying the case as put forth by the plaintiff. It is specifically pleaded that the gift-deed executed in his favour was voluntary. The plaintiff got prepared two gift-deeds, one in favour of

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the defendant and another in favour of Dhananjay, son of her sister. Both the gift-deeds were prepared by Shri Arora, a family Advocate of the plaintiff as per her instructions. Before execution and registration of gift-deeds, the drafts of both the gift-deeds prepared by Advocate Shri Arora were seen and approved by the plaintiff. The stamp duty and the registration charges to the tune of more than rupees five lakhs were paid by the plaintiff by drawing demand drafts from her account. The plaintiff personally appeared in the office of Registrar of Registration alongwith attesting witness Anandgiri Maharaj, who is son of her sister. After fully knowing the contents of the gift-deeds voluntarily executed two gift-deeds before two different Sub-Registrars of Registration.

5] The trial Court has framed the issues and recorded the findings as under :-

Sr.No.	Issues	Findings
1]	Does plaintiff prove that the defendant got executed Gift Deed bearing 2797 dated 14.7.2004 by playing fraud and deception and misrepresentation ?	In affirmative

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2]	Does plaintiff prove her ownership over the suit property ?	In affirmative.
3]	Whether the plaintiff is entitled for the declaration as prayed ?	In affirmative.
4]	What order ?	Suit decreed with costs.

In order to prove her case, the plaintiff has examined herself and further examined Anand Ramkrishna Avhad @ Anandgiri Maharaj (PW2), the attesting witness to the gift-deed (Exhibit 24). The defendant has examined himself in support of his case. The trial Court has decreed the suit by holding that the plaintiff has proved that the defendant has got executed the deed in question by playing fraud, deception and misrepresentation. It is further held that the plaintiff proved her ownership over the suit property and entitled for the declaration and injunction. The decision of the trial Court appears to be mainly based upon the view formed by the trial Court that in spite of execution of gift deed in favour of the defendant, the possession of the property remained with the plaintiff and in absence of possession being delivered, no valid gift of the suit property has taken

place.

6] In an appeal preferred against the judgment and decree passed by the trial Court, the appellate Court has framed the points for determination and recorded the findings as under:-

Sr.No.	Points	Findings
1]	Does plaintiff (respondent) prove that defendant got executed alleged gift deed by playing fraud and misrepresentation ?	In the negative.
2]	Does defendant (appellant) prove that gift deed dated 14.7.2004 executed by plaintiff in his favour is legal and valid in the eyes of law ?	In the negative.
3]	Does defendant (appellant) entitle to produce additional evidence under Order XLI Rule 27 of C.P.C. and to remand the matter ?	In the negative.
4]	What order and decree ?	As per final order.

Though the appellate Court has recorded the finding to point no.1 in the negative and thereby

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disagreed with the finding recorded to issue no.1 by the trial Court, the appellate Court has dismissed the appeal and confirmed the decree passed by the trial Court by holding that the gift-deed dated 14.7.2004 executed by the plaintiff in favour of the defendant is not legal and valid. The decision of the appellate Court dismissing the suit appears to be mainly based upon its conclusion that the defendant has failed to prove the execution of gift-deed as contemplated u/s 68 of the Indian Evidence Act.

7] Shri R.N. Dhorde, learned Senior Counsel appearing on behalf of the appellant assailed the reasons and findings recorded by the Courts below with contention that the judgments and orders passed by the Courts below are *per-se* perverse and not sustainable in law. It is submitted that the trial Court has framed the issues and cast entire burden upon the plaintiff to prove her case. No issue was framed to cast any burden upon the defendant. So also no specific issue was framed casting the burden upon the defendant to prove the execution of gift-deed as contemplated u/s 68 of the Indian Evidence Act. It is submitted that in absence of any issue being

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framed and burden being cast upon the appellant-defendant, the Courts below erred in passing the impugned judgments. By referring the decision of this Court in the case of *Ajit Gaitonde & another v. Smt.Ezilda Emiliana Cristina Pinto* (2009 (3) ALL MR 838), the learned Senior Counsel submits that this Court has held that non-framing of an issue is a defect in the trial and adversely affects the rights of the parties to the suit. It is further pointed out that the decision rendered by the Courts below holding that delivery of possession of gifted property is a condition precedent to hold the gift-deed as valid, is *per-se* contrary to Section 123 of the Transfer of Property Act as well as the legal position set at rest by the three Judges Bench decision of the Apex Court in the case of *Renikuntla Rajamma v. K. Sarwanamma* (2014) 9 SCC 445). By referring the decision in said case, the learned Senior Counsel submits that in a reference made on account of conflict of two earlier decisions of the Apex Court on the issue, the Apex Court has decided the reference and held that delivery of possession to donee is not an essential condition of the gift. The condition recorded in gift-deed to receive

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rents of the property by donor during the life time does not make the gift invalid. By placing reliance upon the said decision, the learned Senior Counsel submits that the decisions rendered by the Courts below are contrary to the law settled by the Apex Court in the said case.

8] It is further submitted that the Courts below erred in holding that the defendant was under obligation to prove the execution of gift-deed by examining the attesting witness. In this context, the learned Senior Counsel submits that execution of gift-deed (Exhibit 24) was never disputed by the plaintiff. She has herself tendered the gift-deed (Exhibit 24) in evidence and also examined the attesting witness. It is further submitted that the admission of gift-deed (Exhibit 24) in evidence was not objected from either side. On the contrary, the gift-deed was admitted and read in evidence while deciding the case by the trial Court as well as the appellate Court. It is further submitted that the requirement of examination of attesting witness arose only in the event the document is not registered and/or execution of the document has been denied by the executant. Since the document in question being

registered document and execution of the document being not in dispute, the reasons and findings recorded by the Courts below are perverse and unsustainable in law. It is further submitted that the Courts below also erred in refusing to entertain the application moved for adducing additional evidence. In support of the submissions advanced, the learned Senior Counsel has referred and relied upon following rulings :-

1] *Uttaradi Mutt v. Raghavendra Swamy Mutt* (2018) 10 SCC 484

2] *Y.P. Sudhanva Reddy & others v. Chairman and Managing Director, Karnataka Milk Federation & others* (2018) 6 SCC 574

3] *Bachahan Devi & another v. Nagar Nigam, Gorakhpur & another* (2008) 12 SCC 372

4] *North Eastern Railway Administration, Gorakhpur v. Bhagwan Das* (2008) 8 SCC 511

5] *Ramesh Radkabhai Vartha v. Babubhai Mahadubhai Raut* (2015 (4) ALL MR 860)

6] *Jairam P. Kamat v. State Bank of India & others* (1997 (3) ALL MR 339)

9] Learned Senior Counsel for the appellant submits that the appeal raises following substantial questions of law:-

1] Whether the appellate Court committed error

by confirming the decree passed by the trial Court when the fraud alleged by plaintiff in execution of gift deed is held to be not proved and the suit ought to have been dismissed on failure of plaintiff to prove fraud in execution of gift deed Exhibit 24 ?

2] Whether the appellate Court has ignored the important judgments of the Apex Court cited before it which is reported in 2014 (9) SCC 445 wherein it has been held that the donor can retain the possession during the lifetime and donate the property to the donee ?

3] Whether both the Courts below misread and misconstrued the registered gift deed Exhibit 24 wherein it has been specifically stated that possession has been handed over to the donee ?

4] Whether both the Courts have ignored the provisions of Section 68 of the Evidence Act read with Sections 122 and 123 of the Transfer of Property Act and thereby arrived at erroneous conclusion by holding that gift deed is not legal and valid ?

5] Whether the appellate Court has erroneously dismissed the appeal by rejecting the application Exhibits 14 and 40 seeking leave to lead additional evidence without any reasons ?

6] Whether the trial Court has grossly erred by not framing issue as to whether the gift deed is properly proved or not by the defendant and without giving opportunity to defendant to

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prove the execution of gift deed has mechanically decreed the suit ?

10] On the other hand, the learned counsel for the respondent opposed admission of the appeal with contention that the appeal raises no substantial questions of law and urged to dismiss the appeal. By referring to overall facts of the case, the learned counsel submits that in view of denial of execution of gift-deed by the plaintiff, the defendant ought to have proved the execution of gift as contemplated u/s 68 of the Indian Evidence Act. It is submitted that examination of the attesting witness is a mandatory requirement of law. Failure to examine the attesting witness, the defendant has failed to prove the execution of gift deed by the plaintiff in favour of the defendant. It is submitted that as the plaintiff as well as the defendant have stepped into the witness box and adduced evidence, the burden of proof loses its significance. So also non-framing of issue resting burden upon the defendant to prove execution of gift-deed cannot be raised after a period of 15 years of filing of suit, that too at the stage of hearing of second appeal. In support

of the submission that the examination of attesting witness is a mandatory requirement of law, the learned counsel has referred and relied upon decisions of the Apex Court as well as this Court in the following cases :-

1] *Dattatray Narayan Aher v. Bhaskar Narayan Aher* (2010 (6) ALL MR 31)

2] *Krishna Mohan Kul alias Nani Charan Kul & another v. Pratima Maity & others* (AIR 2003 SC 435)

3] *Joseph John Peter Sandy v. Veronica Thomas Rajkumar & another* (2013 DGLS (SC) 192

11] It is further submitted that the reasons and findings recorded by the first appellate Court to reject the application to adduce the additional evidence suffers from no illegality and same is in consonance with the law settled by the Apex Court. It is submitted that in order to lead the additional evidence, the party must bring its case within the ambit of one of the pre-requisite conditions laid down in Order 41 Rule 27 of the Code of Civil Procedure. The additional evidence cannot be permitted to fill up the lacuna and lapses on the part of party seeking permission to lead additional evidence. It is further submitted that to prove the execution of gift

as contemplated u/s 68 of the Indian Evidence Act being the requirement of law, the defendant cannot claim that due to non-framing of issues and burden of proof placed upon him, he could not examine attesting witness. In support of the submissions advanced, the learned counsel has referred and relied upon the decisions of the Apex Court in the case of *Union of India v. Ibrahim Uddin & another* (2012) 8 SCC 148) and *Om Prakash v. Shanti Devi* (2015 DGLS (SC 2)).

12] I have carefully considered the submissions advanced in the light of rival pleadings, the evidence adduced in the case, the issues framed by the trial Court, the reasons and findings recorded by the trial Court as well as the first appellate Court. On due consideration of the submissions advanced, I am of the view that a case has been made out to entertain and admit the second appeal.

13] The appeal raises following substantial questions of law :-

1] Whether the decisions rendered by the Courts below are contrary to legal position set at rest by the Apex Court in the case of

Renikuntla Rajamma v. K. Sarwanamma reported in **(2014) 9 SCC 445) ?**

2] Whether the Courts below have erred in interpreting and applying the provisions of Sections 122 and 123 of the Transfer of Property Act ?

3] Whether the Courts below committed error in law in interpreting the provisions of Section 68 of the Indian Evidence Act and holding that the defendant has failed to prove the execution of gift-deed (Exhibit 24) ?

4] In absence of any specific plea and issue being framed and decided by the trial Court resting the burden of proof upon the defendant to prove the execution of gift-deed, whether the first appellate Court was justified to hold that the defendant has failed to prove the execution of gift-deed (Exhibit 24) ?

5] Whether the first appellate Court committed error in law in confirming the decree passed by the trial Court and dismissing the appeal by acting contrary to its own finding that the

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plaintiff has failed to prove that the gift deed in question was got executed by the defendant by playing fraud and misrepresentation ?

6] When the gift-deed (Exhibit 24) tendered in evidence by the plaintiff, admitted in evidence without any objection and also read in evidence, whether the first appellate Court was justified in holding that execution of gift-deed was not proved by the defendant as contemplated u/s 68 of the Indian Evidence Act ?

7] Whether in the facts and circumstances of the case and examination of one of the attesting witness by the plaintiff, the defendant was required to prove the execution of gift-deed by calling another attesting witness to gift-deed (Exhibit 24) ?

8] If the Donor and Donee are alive and have examined themselves in the case, is the examination of attesting witness necessary to prove the execution of gift deed u/s 68 of the

Indian Evidence Act ?

9] Whether the first appellate Court erred in rejecting the applications filed by the appellant seeking leave to lead additional evidence ?

10] Whether the trial Court erred in framing proper issue to prove the execution of gift deed ?

11] Whether the decisions rendered by the Courts below are perverse and liable to be set aside ?

14] In view of above, I am inclined to admit the appeal and further allow the Civil Application No.13569/2018 filed for interim relief. Accordingly, the following order is passed :-

O R D E R

A] Admit.

B] Call R & P.

C] Issue notice to respondent.

D] Shri V.D. Sapkal, learned counsel waives notice for the respondent.

E] Preparation of paper book is dispensed

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with.

F] In view of old age of the plaintiff, hearing of the appeal is expedited.

G] List the appeal for final hearing on 22.7.2019.

H] Pending disposal of second appeal, there shall be interim relief in terms of prayer clause (A) of Civil Application No.13569/2018.

I] Civil Application No.13569/2018 stands disposed of.

(V.L. ACHLIYA, J.)