

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.2801 of 2019(O&M)
Date of Decision:03.09.2019

Mohd. NazirAPPELLANT

Vs.

Mohd. JamilRESPONDENT

CORAM: HON'BLE MR. JUSTICE DR. RAVI RANJAN

Present: Mr.Satish Chaudhary, Advocate for the appellant.

DR. RAVI RANJAN, J.(Oral Judgement)

This appeal has been preferred by the appellant-Mohd. Nazir against the Judgment and Decree dated 23.01.2019 passed by the Addl. District Judge, Sangrur in C.A. No.37 of 2017, by which, he has affirmed the Judgment and Decree dated 07.04.2017 passed by the Ld. Civil Judge, (Jr. Divn.), Malerkotla in Suit No.1153 of 2012.

1. Short fact which would be necessary for consideration of the *lis* stands enumerated as under:-

The plaintiff(respondent herein) filed a suit for declaration and permanent injunction taking a ground that he is the owner in possession of the suit property, which is in nature of the house measuring 91 square yards as detailed in the plaint, in view of the same having been acquired by him by way of oral gift from his father, namely, Atta Mohd. in the month of January, 2001. It is stated that the parties were born in the house in dispute. The defendant is working in the Arab country and he often comes to India to meet his family. Atta Mohd., father of the plaintiff, was residing with the plaintiff and was being looked after by the plaintiff as the defendant is permanently settled in Saudi

Arabia for the last more than 15 years. In January, 2001, Atta Mohd., father of

the plaintiff, out of love and affection, had voluntarily made an oral gift regarding the disputed house in favour of the plaintiff-respondent in the presence of Mohd. Sultan and Mohd. Salim, residents of Mohalla Khatikan Malerkotla and other respectables and relatives. The gift was accepted by the plaintiff in the presence of aforesaid persons. The actual physical possession was handed over to the plaintiff on the spot which was received by him in the presence of the aforesaid persons and since then, he is continuously living in the house whereas the defendant is residing in the house as his licensee. It is further stated that, at the time of oral gift, nothing in writing was executed between the parties. However, despite accepting the oral gift, the plaintiff could not get his name recorded in the Municipal Record being an illiterate person. The electric meter and sewerage connection in the house in dispute is still continuing in the name of Atta Mohd. but the plaintiff is regularly paying the bills thereof. It is also contended that the Gas connection is also in the name of the wife of plaintiff on the address of the house in dispute. The water connection is in the name of Fazal Mohd., elder brother of the plaintiff. The father of the plaintiff, Atta Mohd. died on 01.11.2012 at Malerkotla. It emanates from the impugned Judgment that the defendant and his family members were previously living in the house in dispute being son of Atta Mohd, however, after the oral gift, the defendant asked the plaintiff to give one room, kitchen and bathroom to his family to live in the said house as licensee. The defendant was allowed to do so by the plaintiff. Thus, it has been urged that there is relationship of owner and licensee between the plaintiff and defendant qua one room, kitchen and bathroom out of the aforesaid house but the defendant does not have any right, title or interest in the disputed house. Since the defendant has started claiming himself to be the owner of the house in dispute on the basis of some forged and

fabricated documents and started threatening to dispossess the plaintiff from the house in dispute, the declaratory suit was filed in which a relief for seeking permanent injunction restraining the defendant from interfering into the peaceful possession of the disputed house was also sought.

2. The defendant appeared and contested the suit by filing written statement by stating that, Atta Mohd., father of the parties to the suit, resided with the family of the defendant in the suit house who used to send money in the name of the plaintiff from Saudi Arabia but the plaintiff has misappropriated the money sent by him and the plaintiff is now seized of and wants to usurp the house under the garb of the present suit. He has denied the execution of the oral gift in the month of January, 2001 by Atta Mohd., father of the parties to the suit, in favour of the plaintiff. Rather, the case of the defendant is that Atta Mohd. orally gifted away the suit property in his favour in the month of August, 2007 in the presence of Mohd. Jamil, Mohd. Younas and other respectable persons of the locality and relatives of the parties and actual physical possession was also delivered in his favour. The defendant also accepted the deed of gift in the presence of the aforesaid persons and, thus, defendant became sole owner in possession of the suit house. Thereafter, on 13.02.2008, a memorandum of oral gift was prepared reducing the same into writing between the defendant and his father-Atta Mohd. Accordingly, the name of the defendant was entered in the municipal records.

3. The Trial Court, on the basis of the rival pleadings of the parties, framed following issues:-

- “1. Whether plaintiff is entitled for declaration as prayed for? OPP
2. Whether plaintiff is entitled for permanent prohibitory injunction as prayed for ? OPP
3. Whether the deceased Atta Mohd. in August 2007 orally gifted away the suit house in favour of defendant and execute

memorandum of oral gift dated 13.02.2008 in favour of defendant? OPD

4. Whether the present suit is not maintainable? OPD

5. Whether the plaintiff is not come to the Court with clean hands and suppressed the material facts from the Court? OPD

6. Whether the plaintiff has no cause of action or locus standi to file the present suit? OPD

7. Relief.”

4. The plaintiff, in order to prove his case, examined himself as PW-1 and also one Mohd. Salim has been examined as PW-2. Thereafter, plaintiff closed his evidence.

5. On behalf of the defendant, marginal witness to the memorandum of oral gift, v.i.z., Mohd. Jamil has been examined as DW-1, Nirbhai Singh, as DW-2, Mohd. Sagir as DW-3, Rashidan as DW-4, Mohd. Parvej as DW-5 and defendant Mohd. Nazir has examined himself as DW-6. Thereafter, the defendant closed his evidence after tendering into evidence several documents.

The Trial Court has come to the conclusion that oral gift is valid under *Muslim* Law provided it is coupled with the delivery of the possession. However, the present case is one in which the oral gift, as alleged by the plaintiff and the defendant, are pitted against one and another. It is admitted fact that the oral gift in favour of the plaintiff, being of the 2001, is prior to the gift in favour of the defendant which was executed in the year 2007. The Trial Court has come to the conclusion that the plaintiff has been able to prove the oral gift in his favour by his father by producing the witnesses and case of the plaintiff is that the physical possession of the property was handed over to him on the same day after he accepted gift.

The Trial Court has noticed that the plaintiff has stated in his cross-examination that on the day on which the oral gift was made by his father in his

favour, his mother and brothers were also present at the spot. Identical

statement was made by Mohd. Salim (PW-2) in his cross-examination by saying that it is correct that at the time when oral gift was made, the mother of the plaintiff was also present at the spot.

However, regarding the gift in favour of the defendant, the marginal witness who has been examined as DW-1, has stated in his cross-examination that he does not know that the memorandum of oral gift (Ex.D1) was hand written, typed or printed through computer. He has also stated in his cross-examination that he does not know if the memorandum was drawn on stamp paper or plain paper or petition paper. He has further stated that that when he arrived at the place, the memorandum was already drawn and he simply put his signatures. He has also stated that Nazir had gone to Arabian country about 20 years back. DW-2 Nirbhai Singh has proved Ex.D2, i.e., the entry in his Notary Register with respect of attestation of memorandum. It bears the signatures of DW-1. DW-2 has made disclosure that, in connection with preparation of memorandum of Hiba, no other proceeding was conducted in his presence except his signing the same. In his presence, neither any person entered writing in any register nor did anyone get his signature in any register regarding the Hiba. He also does not know with whom or in which office the document got registered.

However, the clinching issue was the fact that the mother of the parties, namely, Rashidan, who has been examined as DW-4, has accepted in his cross-examination that when Atta Mohd.(her husband) made an oral gift in favour of the plaintiff, she and her other sons were also present there. In that way, she has accepted the case of the plaintiff that oral deed was executed by his father in his favour in the presence of his close relatives. Acceptance of that fact by the mother gives a fatal blow to the case of the defendant as the validity

of the first oral gift stands established. Once the oral gift is held valid, the father of the plaintiff and the defendant would not have any authority, right or power to again alienate the same property which has already been dispensed with. Accordingly, the trial Court decreed the suit.

The Judgment of the Trial Court was put to challenge by the appellant before the First Appellate Court but the First Appellate Court has also affirmed the findings recorded by the Trial Court and has dismissed the appeal. Hence, this Regular Second Appeal has been preferred by the defendant-appellant.

7. In the aforesaid background of the factual matrix, I have heard learned counsel for the appellant.

Learned counsel for the appellant has vehemently argued that there is no evidence of delivery of possession in favour of the plaintiff. Though, the plaintiff has stated that Electric Meter and Sewerage Connection were still existing in the name of his father and Gas Connection were installed in the name of the plaintiff or his wife whereas there is proof of delivery of possession in favour of the defendant as his name got mutated in the municipal records.

The plaintiff has proved the copy of the Passport, Voter Card, Ration Card, Bank Account and Aadhar Card to demonstrate that in all such documents, he has shown the suit property as his address but at the same time, he has stated that, being an illiterate person, he could not get the property mutated in his favour.

Article 149 of Principles of the *Mohomendan Law* by Mulla (22nd Edition) lays down three essentials of a gift. First is declaration of the gift by donor. Second is acceptance of the gift express or implied and the third is delivery of possession of the subject of the gift by the donor to the donee.

Much emphasis has been given by learned counsel for the appellant that the delivery of possession of the gifted property in favour of plaintiff is doubtful but it has to be kept in mind that the donor and the donee, i.e., father and the son were living in same house and the moment the property was gifted by father in favour of the son, the father's status merely become as licensee after alienating the property but it does not mean that after the oral gift, he would have to be thrown out from the house by the son being the donee.

A Division Bench of the Calcutta High Court rendered in **Abdul Sattar Ostagar and another Vs. Abu Bakkar Ostagar and others, 1977 AIR (Calcutta) 132**, has held that in case both the donor and donee were residing in the same house which was the subject matter of deed of gift, it cannot be said that it was necessary for father to vacate the said dwelling house after execution of the deed.

Apart from the above, in his testimony, the mother of the plaintiff and the defendant, who has been examined by the defendant as DW-4, has accepted that there was oral gift by her husband in favour of her son (plaintiff). She could have further gone to say that even though such oral gift was executed but no delivery of possession was made in favour of sons. However, she has not stated like that.

8. In above view of matter, in my considered view, since the earlier gift, i.e., gift in favour of the plaintiff stands proved in view of disclosure by the mother, who has been examined as defendant's witness (DW-4), the father of the parties, Atta Mohd., having already alienated the property, was not competent to execute another gift after few years in favour of his second son.

10. Having held so, this Court is of the opinion that no good ground or substantial question of law could be raised by learned counsel appearing for the

appellant warranting any interference of this Court in the Judgments and Decrees passed by the Courts below.

In the result, this appeal, being devoid of any merit, is dismissed.

(DR. RAVI RANJAN)
JUDGE

03.09.2019
Anjal

Whether speaking/reasoned?	Yes/No
Whether reportable?	Yes/No