IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11960 OF 2019

Laxman Waghuji Zurale .. Petitioner

Vs.

Subhash Damodar Kharde & Ors. .. Respondents

…

Mr. Sanket S. Kulkarni for the petitioner.

Mr. Rahul R. Karpe for respondent No1.

…

CORAM : MRS. BHARATI DANGRE, J.

RESERVED ON : 03RD FEBRUARY, 2022.

PRONOUNCED ON : 03RD MARCH, 2022.

ORDER:-

1. Heard Shri Sanket Kulkarni, the learned counsel for the petitioner and Shri Rahul Karpe, learned counsel for the respondent No.1.

2. Since the parties have advanced their submissions towards final disposal of the writ petition, issue Rule. Rule made returnable forthwith. By consent of the parties, heard finally.

3. The land involved in the present writ petition is Gat No.426, Old Survey No.397 admeasuring 21 Acres and 22 Gunthas situated at Village Undirgaon, Taluka Shrirampur, District Ahmedngar (for short, **“the said property”**).

The Petitioner and the respondent claim their respective interest in the aforesaid property in distinct capacities; the petitioner claims his interest through his father Waghuji Zurale, in whose favour the property was gifted by one Manjulabai. Defendant No.1 is claiming his interest as legal heir of Manjulabai.

4. The petitioner claims that the subject property was owned by Maruti Kharde and after his demise, the said property was inherited by his widow Manjulabai and it was mutated in her name. The petitioner claims that Manjulabai transferred the said property in favour of the petitioner’s father Waghuji Zurale vide a registered gift deed dated 21/12/1960, pursuant to which, the name of his father was mutated in the record of rights vide Mutation Entry No.579. On his death, on 4/12/1996, the names of the petitioner and his mother came to be recorded as against the said property vide Mutation Entry No.5739. The petitioner states that the mother of the petitioner expired on 02/08/2010 and, since then, the petitioner became the sole owner of the said property.

5. The petitioner pleads that the registered gift deed executed in favour of his father was subject matter of RCS Suit No.87 of 1961, instituted by the father of respondent No.1, Damu @ Damodar Kharde, before the Civil Judge, Junior Division, Srirampur, where he raised a challenge to the gift deed, on the ground that the said property is the family property and defendant No.1 i.e. the widow of Maruti Kharde, Manjulabai got the said property transferred in her name, which earlier stood in the name of Maruti Kharde, who is the brother of Laxman Kharde as karta of the family. It was pleaded that defendant No.1 Waghuji Zurale pressurized Manjulabai to execute a gift deed, which is void, since it involve the family property. It was also pleaded that on the strength of the gift deed, defendant No.2 is trying to take rent of the land from the tenant and, therefore, an injunction was sought.

6. The plaint was, however, returned by the learned Judge on 21/04/1962, on the ground of pecuniary jurisdiction, but the plaint was never presented to the appropriate court, the petitioner contend that the gift deed in favour of his father remained unchallenged, though the respondent had full and complete knowledge of the transfer of said property by Manjulabai.

The petitioner also claims that his father was held entitled for the lease rent and, by seeking information from the Maharashtra State Farming Corporation (for short, **"MSFC"**), the petitioner sought information under the RTI Act, which divulge that the father of the petitioner was paid the lease rent from the year 1974 to the year 1981 by the Corporation, to whom the land was leased by Manjulabai.

The petitioner, therefore, claims that pursuant to the gift deed executed in favour of his father, his father had been attorned the rights, since the property was leased out by Manjulabai in favour of MSFC and the gift deed makes a reference to the possession of the said property being with the MSFC.

7. Per contra, the learned counsel Mr. Karpe would submit that Manjulabai could not have executed the gift deed on 21/12/1960 since the said property was leased out to MSFC and he would submit that during the life time of Manjulabai, the said property was never put in possession of the transferee and, therefore, the gift deed is void. Submitting that Manjulabai and Maruti Kharde had no children of their own, the children of his Brother, Domadar claimed as the legal heirs of Maruti Kharde/Manjulabai and they filed an application before the Civil Judge, Senior Division, Shrirampur, vide Heirship Enquiry Application No.34 of 2012, seeking a declaration of their heirship of deceased Manjulabai in respect of the said property and the learned Civil Judge on 20/12/2012 granted the said application declaring that applicant Nos.1 to 9 in the application as legal heirs of deceased Manjulabai. However, at the instance of the petitioner, the execution and operation of the Succession

Certificate granted in the application came to be suspended/kept in abeyance initially, but finally, the application filed by the petitioner, on 19/06/2014, was declined by the Civil Judge, Senior Division, Shrirampur and since the objection was raised by a person, who was not having any blood relation with the claimants and, by recording that the heirship was conferred in favour of the legal heirs of Damodar and assuming for a moment that there exists a gift deed in favour of the petitioner, by recording that he is not the legal heir of Manjulabai and, therefore, not entitled to object to the heirship, is the finding recorded in the order dated 19/06/2014.

8. Being aggrieved, the petitioner filed a first appeal, which was numbered as First Appeal No.2382 of 2014 and during the course of its hearing, a statement came to be made on behalf of the respondents, which was recorded in the order to the following effect.

> *"3] During hearing, Mr. Karpe, learned counsel for the respondents, states that the only certificate regarding the relation of the deceased with the respondents is issued and present respondents would not claim any right, title or interest in the property i.e. Gat No.426 of Village Undirgaon."*

The first appeal came to be disposed of with the aforesaid statement.

9. A subsequent development occurred in pursuace to the policy of the Government as contained in it's Circular dated 04/05/2012 by which, the Revenue & Forest Department, State of Maharashtra decided to release the land, which was leased out to MSFC, in favour of the original lessor or his/her legal heirs. The Sub-Divisional Officer, Shrirampur by his order dated 01/02/2017, processed a proposal to release the said property in favour of Laxman Waghuji Zurale i.e. the petitioner since the name of the petitioner was mutated against the said property, but this was objected to, by the respondents by seeking release of the land in favour of the legal heirs of Manjulabai.

In furtherance of the objection raised, the Collector, Ahmednagar conducted a hearing on 15/04/2017 in Enquiry Proceeding No.1 of 2017. After referring to the rival contentions between the parties and by specifically making a reference to the registered gift deed dated 21/12/1960 in favour of Waghuji Zurale, it was recorded that the proceedings filed by Damu Kharde to challenge the said Will remained undecided, since the plaint was returned. The said property which was handed over to MSFC on lease, has been demised in favour of Waghuji Zurale vide the registered gift deed. Further, recording that the lease amount has been disbursed in faovur of Waghuji Zurale, the application preferred by the respondents to release the land in their favour, in the capacity as legal heirs of deceased Manjulabai came to be rejected.

10. This order of the Collector dated 24/05/2017, was subject matter of challenge before the Divisional Commissioner in form of revision being preferred under Section 257 of the Maharashtra Land Revenue Code, who by his order dated 29/10/2018 reversed the finding rendered by the Additional Collector and the matter was remitted for re-enquiry before the Collector.

The revision filed by the respondents came to be granted and the order passed by the Collector on 24/05/2017 in Enquiry No.01 of 2017 was set aside.

Against the aforesaid order, a revision came to be preferred before the Additional Divisional Commissioner, Nasik by the present petitioner, which came to be rejected by upholding the order passed by the Additional Collector on 29/10/2018 and the appeal came to be dismissed.

11. In the sequence of the aforesaid events, the issue that arise for consideration is, about the sustainability of the finding rendered by the Additional Collector on 29/10/2018, which was been upheld by the Additional Divisional Commissioner on 15/07/2019 in an appeal.

It is not in dispute that the said property was made over to the MSFC by Manjulabai, the widow of Maruti, who claims that she inherited the self acquired property of her husband on his death and leased out the same to MSFC from 01/04/1953, for thirty years, by executing a lease deed.

During the pendency of the leasehold rights created in favour of the MSFC, she executed a gift deed on 21/12/1960 in favour of the petitioner, which recite that her husband had expired 20 years back, but she was looked after by Waghuji Zurale and she had developed love and affection for him as her own son. The gift deed further record that the Donor had no issue of her own and had no close relative and, therefore, on account of the affection towards her sister's son, Waghuji, she is gifting the said property belonging to her husband, which he had acquired out of his own income and, which she has inherited, in favour of the Donee.

The gift deed gives the details of the said property, located at Gat No.426, Village Undirgaon, Shrirampur, and it was valued at Rs.16,800/-. The said property is clearly identified in the gift deed by setting out it's boundaries.

12. The Additional Collector, after referring to the sequence of events and noticing the existence of a registered gift deed, referred to the definition of 'gift' contained in Section 122 of the Transfer of Property Act, 1882 (for short, **"T.P. Act"**) and, in the wake of the concept of 'gift', analyzed the factual position placed before him. He records that the erstwhile lessee Manjulabai, widow of Maruti Kharde had leased out the property admeasuring 21 Acres and 22 Gunthas in Survey No.397 for a period of 30 years in favour of Belapur Sugar Mills, Haregaon. In the wake of the decision of the Government to release the said

land, the question arose for determination whether it should go to the petitioner, who has a registered gift deed in his favour or it shall go to her legal heirs, who are so declared in heirship application No.34 of 2012 by the Civil Judge, Senior Division, Shrirampur.

13. By referring to the concept of 'gift', the Additional Collector holds that, it is necessary for the Donee to accept the gift during the life time of the Donor and if it is not so accepted, the gift deed becomes void. By applying the aforesaid principles flowing from Sections 122 and 123 of the T.P. Act, in the impugned order, the Additional Collector derived a conclusion that on perusal of the document, it is apparent that Manjulabai is no longer alive and the land leased out by her is in possession of MSFC. In the wake of Section 122 of the T.P. Act, the possession of the said property ought to have been made over to Waghuji Zurale or his legal heirs during her life time and they should have accepted the gift during her life time, but this does not happen and this appears to be the factual position. Accordingly, on the death of the Donor, Manjulabai, the 'gift' has become void.

This finding is affirmed by the Additional Commissioner on the same principle that during the life time of Manjulabai the possession of the property was not accepted by Waghuji Zurale or his legal heirs i.e. the petitioner and, therefore, the gift has become void.

14. Correctness of the aforesaid concurrent finding in the two orders, is questioned by the learned counsel Mr. Kulkarni.

‘Transfer of property’ is defined in the T.P. Act as an act by which a living person conveys property, in present or in future, to one or more living persons; or to himself, and one or more other living persons; and ‘to transfer of property’ is to perform such act.

The term ‘property’ is used in the T.P. Act in its widest and most generic legal sense and the property is not only the thing which is the subject matter of ownership, but it also includes *dominium* or the right of ownership or partial ownership, and the term would convey every possible interest, which the parties can have. As th ownership consists of a bundle of rights, the various rights and interests may be vested in different persons, for example, a mortgagor and a mortgagee, a lessor and a lessee, or a tenant for life and a remainderman. Absolute ownership is an aggregate of component rights such as the right of possession, the right of enjoying the usufruct of the land and so on. These subordinate rights, the aggregate of which make up absolute ownership, are referred to in the T.P. Act as ‘interest’ in property.

A transfer of property is either a transfer of absolute ownership, or a transfer of one or more of these subordinate rights.

The use of the word ‘convey’ is also used in a wider sense. To convey, the Transferor must have an interest in the property and he cannot sever himself from it and yet convey it. A transfer of property or creation of an interest may be accompanied by conditions, covenants or restraints unless there is some provision of law, which annuls or invalidates such conditions, restraint or limitation. Ultimately, whether the property is conveyed or intended to be conveyed will have to be gathered from the intention expressed in the document, by which it is alleged to be transferred. Section 6 in the Act is an indication of the widest use of the term 'property' since it specifies that the property of any kind may be transferred, except as otherwise provided by the Act or by any other law for the time being in force.

15. Gift, which is one mode of transfer of property is defined in Section 122 of the T.P. Act, as under:

> *"122. "Gift" defined - "Gift" is the transfer of certain existing moveable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.*
>
> *Acceptance when to be made – Such acceptance must be made during the lifetime of the donor and while he is still capable fo giving.*
>
> *If the donee dies before acceptance, the gift is void."*

The manner in which the transfer will be effected is set out in Section 123, which reads thus:

> *"For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.*
>
> *For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.*
>
> *Such delivery may be made in the same way as goods sold may be delivered."*

16. The reliable test for determining whether a document constitutes a Will or Gift is to find out as to what exactly is the disposition which the document has made, whether it has transferred any interest in *praesenti* in favour of the Donee or it intented to transfer interest in favour of the Donee only on the death of the Donor.

As a necessary ingredient of Section of Section 123 and in order to complete the transfer of property, by way of gift, the acceptance by or on behalf of the Donee of the moveable or immoveable property is necessary. Section 122 contemplates that such an acceptance must be made during the lifetime of the Donor and while he is still capable of giving and if the Donee dies before acceptance, the gift is void. It is this principle which is relied upon by the Additional Collector and the Additional Commissioner, while it passed the impugned orders.

17. I may once again turn to the facts and particularly, the gift deed executed by Manjulabai in favour of the petitioner. Worth it to mention that the gift deed has not been challenged by the respondents, when the earlier attempt on the part of the predecessor of the respondents challenging the gift deed failed on account of want of jurisdiction by the court in which the proceedings were instituted.

The gift deed dated 21/12/1960 at Exhibit-A to the List of Dates contains a specific recital to the effect that the property which is being gifted is inherited by her from her husband is his self acquired property. It also states that her husband expired 20 years' back and she has no legal heirs as there are no children born out of the wedlock and she has no close relatives. Out of love and affection for the Donee, she has gifted the property described in the deed and the recital states that the said property has been given in possession of the Donee and thereupon he shall be entitled for its enjoyment by paying Government Revenue and Gram Panchayat Tax. The deed also stipulates that if anyone objects to the gift, the said document would form the basis of redressal of the objections.

Another recital in the gift deed, specifies that the said property is given on lease to Belapur Sugar Mills Limited and for obtaining the actual possession, she will take steps herself and accordingly she had issued a notice to the company.

Another recital in the gift deed is that the property is offered without consideration and it is accepted by the Donee.

The gift deed declare that it has been executed by her own will and in her full conscious, free of any pressure/influence.

18. Perusal of the gift deed would divulge that it contains a specific recital to the effect that the property is put in possession and it is accepted by the Donee. The property was leased out to the Sugar Mills is mentioned in the deed and one of the recitals in the deed specifically record that the gift is accepted by the Donee.

In order to constitute a valid gift, the pivotal requirement is the acceptance thereof. No particular mode of acceptance is contemplated, but the necessary requirement is in order to complete the transaction of gift, it must be accepted by the Donee during the lifetime of the Donor. The factum of acceptance can be established by different circumstances, such as Donee taking the property physically or being in possession of deed of gift alone. If the document of gift after it’s execution and registration in faovur of the Donee is handed over to him by the Donor, if he accepts it, it amounts to valid acceptance of gift. The specific recital in the deed that the possession is given raises a presumption of acceptance. Unless the contrary is proved, in the wake of the recital of delivery of possession by the Donor and its acceptance by the Donee, clinching evidence is required to be brought on record to establish that the Donor still retain possession and the document was not acted upon.

19. The acceptance of the property by way of gift need not be express. The gift can be accepted by physical mode or in a constructive manner. The acceptance may thus be inferred and proved by the Donee's possession of the property, actual or constructive, or by the Donee's possession of the deed of gift. Oral evidence will have to be led to challenge the finding that the gift deed has not been acted upon. Delivery of possession of the gift of property can be proved by assent of the Donor but mere assent to the gift deed cannot prove delivery of possession of the property, but wherever there is a specific recital that the property has been handed over to the Donoee, a presumption arises that the possession has been handed over to the Donee. Acceptance has been inferred from the acceptance of the right to collect rents in the case of tenanted property or from the mutation in the Register. An attornment in favour of the Donee, in case where the property is leased out, would be an indication that the gift has been accepted and acted upon.

20. In the present case, the gift deed is in possession of the petitioner and it contains a recital of the Donee being put in possession and it's acceptance by him i.e. Waghuji Zurale.

Surrounding circumstances indicate that the gift deed has been acted upon and accepted by the Donee and this all happened during the lifetime of Manjulabai. Manjulabai expired on 27/09/1972 and the 7/12 extracts of the said property would reveal that the name of the Donee came to be recorded in the 7/12 extract by effecting mutation entries and the entries recorded the name of the land owner i.e. Manjulabai Maruti Karade, who has gifted the property to Waghuji Zorale. Necessary changes were made in the record of rights, on death of Waghuji Zorale and his wife Dropatibai Zorale when the name of the petitioner came to be mutated along with the recording of MSFC. The record of rights, which are placed on record, refer to the various entries and during the lifetime of Manjulabai, the name of Waghuji Zorale is recorded in respect of Gat No.426 by Mutation Entry No.2575 approved on 30/08/1962. This aforesaid entry in the record of rights goes to show that the said property, which was leased out to MSFC, was gifted to Waghuji Zorale.

Another important aspect of the matter is that a Special Civil Suit No.87 of 1961 came to be instituted by the father of the respondent Damodar Laxman Kharde against Manjulabai and Waghuji Zorale i.e. the father of the petitioner, for declaration and seeking an injunction restraining defendant No.2 Waghuji Zorale from accepting the rentals of the land from Haregaon Sugar Mills, who was impleaded as defendant No.3. The said suit sought a declaration about the gift deed being void, because it was alleged that the suit property as a family property, and Waghuji Zorale was a stranger. The plaint of the suit was returned for its presentation to the proper court, having pecuniary jurisdiction and though the remedy was available, was not adopted and the gift deed attained finality as there is no challenge to the gift deed till date.

21. Another document, which evidence the factum of the father of the petitioner being recognized as a lessor by the lessee i.e. MSFC is the information obtained by the petitioner under the RTI Act from MSFC, which reveals that the Donee Waghuji Zorale was in receipt of lease rents from 1974 to 1981 in respect of Gat No.426 of Village Undirgaon. Since MSFC has paid the rent to the father of the petitioner/Donee, even the attronment is established.

The document for renewal of lease in respect of the said property is placed on record and if the same is perused, which had renewed the lease from 01/04/1953 for a further period of 30 years, it is seen that, Clause No.8 stipulates that it would be open for the MSFC i.e. the lessee to permit user of the said land or its portion by someone else and similarly, liberty was also conferred upon the lessor to sell the said property or dispose of the same in favour of third person. The only restriction imposed was that the sale/disposal would be subject to stipulation and condition of the lease deed.

The above condition in the lease deed executed by Manjulabai in favour of MFSC, in any case, do not impose any restriction upon her to demise the said property in favour of the father of the petitioner, while the lease is in force.

22. The aforesaid facts being construed in the light of Section 122 of the T.P. Act, which clearly conveys that the recitals in the gift deed that possession has been handed over to the Donee and he has accepted the possession, a presumption arises that there is acceptance. Merely because the land was in possession of the MSFC on lease through Manjulabai, cannot presuppose that the gift deed was not acted upon and the Donee was not put in possession of the said property. In wake of the constructive possession to the Donee and the further fact that even the MSFC has acted upon the gift deed and made over the lease rent for some period of time in favour of the Donee i.e the father of the petitioner, unequivocally give rise to a presumption that the gift deed was acted upon during the lifetime of Waghuji.

23. Since the gift deed is valid and is compliant with the stipulation of its acceptance as contemplated under Section 122 of the T.P. Act, coupled with the fact that it is a registered gift deed, which is not challenged, though executed on 21/12/1960, the finding rendered by the Additional Collector and the Additional Commissioner that the Donee Waghuji Zorale was not put in possession of the said property is not a correct finding and cannot sustain in law as well as on facts.

24. Learned counsel for the respondent Mr. Karpe has relied

upon the decision of the Apex Court in ***S. Sarojini Amma v. Velayudhan Pillai Sreekumar reported in (2019) 11 SCC 391*** and on reading of the said decision of the Apex Court, it can be seen that the Apex Court has categorically recorded that the gift can be effected without transfer of possession and the following observations of the Apex Court in paragraphs 14 to 16, in fact support the case of the petitioner.

> *"14. In Reninkuntla Rajamma v. K. Sarwanamma (2014) 9 SCC 445 a Hindu woman executed a registered gift deed of immovable property reserving to herself the right to retain possession and to receive rent of the property during her lifetime. The gift was accepted by the donee but later revoked.*
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> *15. In Reninkuntla Rajamma (supra), this Court held that the fact that the donor had reserved the right to enjoy the property during her lifetime did not affect the validity of the deed. The Court held that a gift made by registered instrument duly executed by or on behalf of the donor and attested by at least two witnesses is valid, if the same is accepted by or on behalf of the donee. Such acceptance must, however, be made during the lifetime of the donor and while he is still capable of making an acceptance.*
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> *16. We are in agreement with the decision of this Court in Reninkuntla Rajamma (supra) that there is no provision in law that ownership in property cannot be gifted without transfer of possession of such*

> *property. However, the conditions precedent of a gift as defined in Section 122 of the Transfer of Property Act must be satisfied. A gift is transfer of property without consideration. Moreover, a conditional gift only becomes complete on compliance of the conditions in the deed."*

25. Further reliance in the case of ***Baby Ammal v. Rajan Asari reported in (1997) 2 SCC 636*** is also not in any support to the learned counsel, since it is an accepted position flowing from Section 122 that the delivery and acceptance of possession of the gifted property must be established, so as to constitute a valid gift. In the said case, the plaintiff retained both the title and the possession with her and, therefore, the Apex Court held that it does not constitute gift.

26. Both the impugned orders i.e. order dated 29/10/2018 passed by the Additional Collector Ahmednagar and the order dated 15/07/2019 passed by the Additional Commissioner, Nasik are liable to be quashed and set aside since they render a finding that there is no compliance of Section 122 of the T.P. Act and the gift deed was not acted upon. In the light of the above, the impugned orders are quashed and set aside and the order passed by the Additional Collector on 24/05/2017, rejecting the objections raised by the respondents about the release of the said property in favour of the petitioner is restored.

Necessary steps shall be taken by the Additional Collector, Ahmednagar, to release the said property in favour of the petitioner in terms of the policy of the Government as contained in Circular dated 04/05/2012.

[SMT. BHARATI DANGRE, J.]

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