

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. : 278 OF 1995

Sharifabee w/o Shaikh Walisaheb
Age : 60 yrs. Occu. : Household
Resident of Bharni, Taluka Ahmedpur
(New Chakur),
District : Latur

... APPELLANT

VERSUS

1. Narayan s/o Ramchandra Kote,
Age : 58 yrs. Occu : Agril.
2. Shaikh Walisaheb s/o Shaikh,
Yasinsaheb, 62 yrs, Occu : Labourer,
Both residents of village
Gharni, taluka Ahmednagar
(Now Chakur)
Dist. Latur

....RESPONDENTS

...

Advocate for the Appellant :- Mr. R. R.Suryawanshi and
Mr. D. R. Bhadekar

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CORAM : ARUN R. PEDNEKER, J.

RESERVED ON : 26.06.2023

PRONOUNCED ON : 04.07.2023

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ORAL JUDGMENT :

1. By the present Second Appeal, the appellant is challenging the orders dated 31.12.1992 and 04.10.1994 passed by the Regular Civil Judge J.D., Ahmedpur in Regular

Civil Suit No.76 of 1986, and the First Appellate Court in Regular Civil Appeal No.30 of 1993 dismissing the suit filed by the appellant-plaintiff for declaration of ownership and possession of house bearing Gram Panchayat No. 163 situated at village Gharani belongs the appellant by virtue of the oral gift which was later transcribed on a stamp paper.

2. The present Second Appeal is admitted on the substantial question of law No. XV as under :-

“ XV) The compliance of gift under Mohomedan law”, u/s. 152(3) may be by some “overt Act” between husband and wife is not mandatory condition when oral gift u/s 147 of the above law is also supported by a writing on a stamp paper.”

3. The facts giving rise to the present Second Appeal in brief are as under :

The appellant and respondent No. 2 are wife and husband respectively and governed by the Mohammedan Law.

4. The appellant and defendant No.2 were residing in their ancestral house at Gram Panchayat No.163 situated at

village Gharni, Tq. Ahmedpur. It is the case of the plaintiff that on 26.11.1974 defendant No. 2 orally gifted the suit house to the plaintiff in presence of panchas of Gram Panchayat and she accepted the gift. On 01.12.1972 defendant No. 2 transcribed the gift deed on stamp paper in presence of witnesses. She was delivered possession of the suit house accordingly. Being the family members, they continued to reside in the house. It is the contention of the plaintiff that she became the owner of the house by virtue of the gift-deed.

5. The plaintiff further contended that defendant No. 1, by keeping defendant No. 2 under the influence of liquor, obtained execution of false sale deed in his favour without any consideration and that defendant No. 1 has forcibly obtained possession of her house on 12.04.1985 and thus the suit is filed for declaration of ownership and possession.

6. The appellant submits that the gift deed being in writing no overt act is required as contemplated under Section 152 of the Mohammedan Law. There is no requirement of written gift deed under the Mohammedan

Law in terms of Section 147. The present gift deed having been transcribed on the stamp paper further overt act is unnecessary.

7. The case was contested by defendant No.1. He denied the execution of the gift deed in favour of the plaintiff by the defendant No.2. He further submits that the registered sale deed in his favour was executed on sum of Rs.1500/- as consideration and since then he is in possession of the house as an owner and there is no question of forcible possession on 12.04.1985. The Trial Court after consideration of pleadings formulated following issues as under :

Sr. No.	ISSUES	FINDING
1	Does plaintiff prove that she is a owner of suit house no. 163/1 admeasuring east-west 27 cubits and south north 12 curbits situated at village Gharni ?	No.
2	Is the entitle for declaration sought ?	Does not survive.
3	Is she entitle for possession of suit house property from the defendant no.1 ?	Does not survive.
4	Does the deft.No.1 prove that he purchased suit house property from the deft. No.2 for the consideration of Rs. 2500/-	Yes.

of registered sale deed dt. 25-6-1975 & since then he is owner & possessor of suit house property ?

- | | | |
|---|---|---------------------|
| 5 | Does he entitle for compensatory costs of Rs. 1000/- from the Plaintiff ? | Yes.
Rs. 300/- |
| 6 | What order & decree ? | As per final order. |

8. The Trial Court held that there is no valid gift to the plaintiff by defendant No.2. The document transcribed is also possibly back dated document as the same has been purchased by Mr. Narayan Ramchandra Kote and the same is suspicious. It also held that the dispossession is alleged as of 12.04.1985, but there is no complaint in any form over the dispossession. The appellant thereafter challenged the order passed by the trial Court before the appellate Court. The appellate Court formulated the following points as under :

Sr.No.	POINTS	FINDING
1	Whether the learned Judge of the Lower court has committed any Error in appreciating the evidence ?	No.
2	Whether any additional issue as suggested by the appellant was necessary for the lower court to decide the controversy ?	No.
3	Whether any	No.

interference is necessary
in respect of the
impugned judgment ?

4 What order ?

Appeal
dismissed.

9. The appellate Court after examination of the evidence and grampanchayat record held that the appellant did not adduce evidence of the doner and donee. Secondly, there is no explanation as to why in the case of the oral gift deed, the name of appellant was not entered in the revenue records and that there were no steps were taken on the date of dispossession to recover the possession. The appellate Court has taken a view that the appellant and defendant No.2 has colluded to defeat the interest of the defendant No.1 (purchaser of the suit property). And as such, dismissed the appeal filed by the appellant.

10. It is the contention of the appellant that under the Mohammedan Law, an oral gift is permissible and once a oral gift is made, under Section 152 (3) of the Mohammedan Law, if the gift is between husband and wife living in his same house, the overt act is not mandatory condition for a valid gift and in the instant case since the oral gift is also

transcribed by writing on a stamp paper, the intention of the parties is clear, and there is a valid gift in favour of the plaintiff.

11. However, the findings of both the courts below is that there is no oral gift at all, therefore, this contention of the appellant does not arise for consideration. The contention that any overt act is necessary for ascertaining whether there was a valid gift does not arise in the instant case. The appellate Court has held that the oral gift deed is set up so as to defeat the right of the defendant No.1. That, the doner and donee has not entered into the witness box. Thus, the courts below have completely disbelieved the case that there was at all a oral gift by the husband and wife. The appellate Court has not relied upon the condition of any overt act as prescribed under Section 152(3) of the Mohammedan Act to disbelieve the gift deed. The gift deed is not disbelieved on the ground that there is no overt act of removing the doner from the property gifted. The question of law so raised does not arise for consideration in this case as the courts below have not held that the overt act is necessary at the instance of the doner to prove the gift deed. Rather the courts below

have come to conclusion that there was no gift at all and the gift deed is set up only to defeat the right of the defendant No.1 (purchaser of the suit property).

12. In view of the above, the examination of the question of law raised for consideration does not arise and accordingly Second Appeal is dismissed.

(ARUN R. PEDNEKER)
JUDGE

shp/-