

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO. 153/2021

Mohammad Habibur Rahman s/o Abdul Rahman (Dead) thr. LRs. Moinur Rahman
Shaikh .vs. Misbahur Rahman s/o Late Sayeedur Rahman

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. O. W. Gupta, Advocate for appellant.
Mr. S. Khan, Advocate instructed by Mr. M. Shareef and
Mr. A. J. Mirza, Advocate for respondent nos. 1 to 5.

CORAM : ANIL L. PANSARE, J.

ARGUMENTS WERE HEARD ON :- 19.07.2023

ORDER PRONOUNCED ON :- 21.07.2023

The appellant-original plaintiff (since deceased) now represented by his LRs (hereinafter referred to as "Plaintiff"), have filed the present appeal against the respondents-original defendants (hereinafter referred to as "Defendants"), being aggrieved by judgment and decree dated 06.03.2019 passed by learned District Judge-2, Bhandara in Regular Civil Appeal No.44/2012 (Old First Appeal No. 708/2012), dismissing the appeal filed by the plaintiff, against the judgment and order dated 26.07.2002, passed by Jt. Civil Judge Senior Division, Bhandara, partly decreeing the suit thereby restraining the defendants permanently from alienating the suit property until partition by metes and bounds. The claim of the plaintiff in respect of the declaration of exclusive ownership of the suit property however was dismissed. The first appellate court, by the impugned

judgment, has dismissed the appeal, thus maintaining the judgment and decree passed by the trial Court.

2. I have heard Mr. Gupta, learned counsel for plaintiff and Mr. Khan and Mr. Mirza, learned counsel for defendants.

3. The foundation of the suit is oral gift made by the father of the plaintiff in his favour on 02.09.1979 in the nature of Marj-ul-maut. The father's name is Abdul Rahman. He had two sons namely; plaintiff – Habibur Rahman, Saidur Rahman and four daughters. According to the plaintiff, in presence of near relatives which includes the plaintiff's brother, the father Abdur Rahman has bequeathed the suit property by oral gift, 15 minutes prior to his death on 02.09.1978. The suit property comprises of one house bearing house no. 58 constructed on plot no.69 and two other plots bearing nos.70 and 54 situated at Bhandara.

4. Both the Courts below held that the plaintiff failed to prove the oral gift as alleged.

5. Amongst various grounds for rejection of claim, the most crucial is the principles of Mohammedan Law that govern the gift under question. The first appellate court referred to Section 135 of Chapter X of the Mulla's

Principles Of Mohammedan Law. It deals with the gifts made during Marj-Ul-Maut, which reads thus:

“A gift made by a Mohammedan during marz-ul-maut or death-illness cannot take effect beyond a third of his estate after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, to the excess taking effect; nor can such a gift take effect if made in favour of an heir unless the other heirs consent thereto after the donor’s death.”

(Emphasis now)

6. Thus, one of the ingredients of a valid gift is that it takes effect when other heirs consent to the gift after the donor’s death.

7. The Courts below have held that this consent is absent. Rather, the Courts below have noted that the plaintiff has not made sisters as party-respondent and that therefore the suit itself is bad for non joinder of necessary party and accordingly dismissed the suit.

8. In the light of the above, a specific query was made to the learned counsel for the appellant as to whether the legal heirs of Abdur Rahman have consented to the gift in favour of the plaintiff, he fairly states that such a consent has not been obtained. In the circumstances, despite the efforts made by learned counsel for the appellant to convince the Court that the

Courts below have committed error, I do not find any substance in the case put forth by the appellant, inasmuch as the findings rendered by both the Courts below on the invalidation of the gift for want of consent of legal heirs is, admittedly, in tune with the provisions of Mohammedan Law.

9. Thus, there arises no question of law, muchless substantial question of law. The appeal is, therefore, dismissed.

(Anil L. Pansare, J.)

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