



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

**SECOND APPEAL NO.262 OF 1995
WITH
CIVIL APPLICATION NO.4026 OF 1995**

Kasim @ Babumiya s/o Abdul Wahed,
Age : Major, Occu.: Business,
R/o.: Mukhed, T. Mukhed, Dist. Nanded **APPELLANT**
(Orig. Defendant)

VERSUS

Abdul Majid s/o Mahboob,
(Minor) U/G of his father-
Mahboobsab s/o Ismailsab,
Age : 41 years, Occu.: Business,
R/o.: Mukhed, T. Mukhed,
District : Nanded **RESPONDENT**
(Orig. Plaintiff)

.....
Ms. Vishakha Patil h/f Mr. S. B. Talekar, Advocate for the Appellant
Mr. M. D. Narwadkar h/f Mr. M. V. Deshpande, Advocate for the
Respondent.

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CORAM : SANDIPKUMAR C. MORE, J.

RESERVED ON : 26/06/2024
PRONOUNCED ON : 20/07/2024.

JUDGMENT :

1. The appellant herein, who is the original defendant, has challenged the concurrent findings of both the courts below namely the learned trial court i.e. Civil Judge (Junior Division), Mukhed, in Regular Civil Suit No.17 of 1985 and the learned first appellate

court i.e. Additional District Judge, Biloli in Regular Civil Appeal No.63 of 1993 (Old Regular Civil Appeal No.230 of 1987).

2. The respondent / original plaintiff filed Regular Civil Suit No.17 of 1985 for declaring himself as a owner of the suit property i.e. House No.146/1 in Ward No.5 at Mukhed, District : Nanded and also for restraining the appellant / defendant from obstructing his possession. However, during pendency, it is claimed by the plaintiff that he lost possession of the suit house due to wrongful act of the appellant / defendant and therefore, he sought possession of the suit house. It was the contention of the plaintiff that one Wahedbee Mohammad Ashraf was the owner of the suit house and she sold the same to him for a consideration of Rs.6,000/- and also executed a registered sale deed dated 09/03/1984 in his favour by delivering the possession of the suit house. According to him, the defendant has no concern with the suit property but in order to grab his property, the defendant firstly obstructed him and lastly dispossessed him from the suit house on 17/07/1985. Thus, he was constrained to file the aforesaid suit.

3. On the contrary, the appellant / defendant resisted the suit under his written statement Exhibit-16 and came with the case

that Wahedbee, the earstwhile owner of the suit house, had in fact executed a gift deed dated 04/02/1984 in favour of himself and his wife and also delivered the possession of the suit house to them and therefore, on the basis of said gift-deed, they are possessing the suit house. As such, the appellant / defendant had prayed for dismissal of the suit.

4. The learned trial court after conducting the trial, declared the respondent / plaintiff as a owner of the suit house on the basis of sale deed dated 09/03/1984 and discarded the gift-deed dated 04/02/1984 allegedly executed by Wahedbee in favour of the defendant. Feeling aggrieved with the judgment and decree dated 30/09/1987 of the learned trial court in Regular Civil Suit No.17 of 1985, the present appellant / defendant had preferred Regular Civil Appeal No.63 of 1993 but the same was dismissed by the learned first appellate court under judgment and order dated 04/02/1995.

5. The learned counsel for the appellant / defendant vehemently argued that both the learned courts below have failed to consider the concept of gift deed under Mohammedan Law and wrongly held that it was required to be registered. According to her, only three aspects namely offer, acceptance and possession are to be

established in case of a valid gift under Muslim Law. She pointed out that the learned trial court did not frame any issue regarding the aforesaid ingredients. Further, according to her, the respondent / plaintiff had also not examined Wahedbee, who had executed the *Will* and merely produced on record her affidavit sworn before the court wherein she had refused the fact of executing *Will* in favour of the present appellant / defendant. She submitted that unless Wahedbee was subjected to cross-examination in respect of contents of her affidavit, it was not admissible in evidence. She also contended that the respondent / plaintiff did not discharge the burden to prove that the *Will* was not validly executed. She also relied on following judgments.

- A) *Hafeeza Bibi and others vs. Shaikh Farid (dead) by LRS. And others, (2011) 5 SCC 654;***
- B) *Rasheeda Khatoon (dead) through Legal Representatives vs. Ashiq Ali s/o Lieutenant Abu Mohd. (dead) through legal representatives, (2014) 10 SCC 459;***
- C) *Union of India and others vs. Vasavi Cooperative Housing Society Limited and others, (2014) 2 SCC 269;***
- D) *Subhra Mukherjee and another vs. Bharat Coking Coal Ltd., and others, (2000) 3 SCC 312 and***

E) Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra and others, (2013) 4 SCC 465.

6. On the contrary, the learned counsel for the respondent / plaintiff strongly opposed the submissions made on behalf of the appellant / defendant. According to him, the claim of respondent / plaintiff is based on the registered sale deed, which is proved by him on the basis of evidence of attesting witnesses and concerned Sub-Registrar. He pointed out that the burden of disproving the *Will* was never on the respondent / plaintiff but it was on the appellant / defendant to prove that the *Will* was validly executed by Wahedbee in his favour. According to him, the appellant / defendant should have examined Wahedbee to prove the contents of the *Will* but he withheld the important evidence for the reason best known to him.

7. Heard rival submissions. Also perused documents on record alongwith the record and proceedings and impugned judgments. Also perused citations relied upon by the appellant's counsel.

8. It is significant to note that the respondent / plaintiff is claiming that Wahedbee had sold the suit property to him by way of

a registered sale deed dated 09/03/1984 for a consideration of Rs.6,000/-. He has also examined the concerned Sub-Registrar and the attesting witnesses who have proved the execution of the said sale deed. The learned counsel for the appellant tried to argue that the attesting witnesses and the Registrar admitted that no consideration was paid before them. However, the recitals of said sale deed dated 09/03/1984 at Exhibit-59 itself indicate that the consideration amount of Rs.6,000/- was already paid to Wahedbee before execution of the sale deed. As such, such admission on behalf of them does not have any force. It is extremely important to note that the only substantial question of law involved in this matter is that whether both the learned courts below, have failed to consider the concept of gift-deed under Muslim Law.

9. According to the learned counsel for the appellant the learned first appellate court has wrongly observed that the *Will* executed by Wahedbee was required to be registered. She heavily relied on observation of the Hon'ble Apex Court in the case of ***Rasheeda Khatoon (dead) through Legal Representatives*** (*supra*), wherein it is observed that a gift under Mohammedan Law can be an oral gift and need not to be registered. Further, for a valid gift under Mohammedan Law there are only three essential features namely i)

declaration of the gift by the doner, ii) acceptance of the gift by the donee expressly or impliedly and iii) delivery of possession either actually or constructively to the donee. If all these ingredients are satisfied then said gift is treated to be a valid one and does not warrant registration under Section 17 of the Registration Act.

10. Admittedly, the learned first appellate court has opined that the gift deed at Exhibit-63 was required registration but he has discussed the aforesaid ingredients and discarded the same only because it is not a case of oral gift. Admittedly, no concept of such oral gift is involved in this matter, but it is a case of written gift-deed and claim of the defendant is based on the said gift-deed. Even if it is presumed that the aforesaid ingredients are to be established for proving the valid gift under Muslim Law, but here Wahedbee, who allegedly executed the said gift deed, is not examined by the appellant / defendant to establish that there was a valid offer by her. It is extremely important to note that Wahedbee was very much alive when the evidence was led by the appellant / defendant before the learned trial court. Therefore, to establish the fact that Wahedbee validly executed the gift deed in favour of the appellant / defendant, the appellant / defendant was under obligation to prove the same. Moreover, the learned first

appellate court has not discarded the *Will* only for want of registration but it is also observed that the gift deed was surrounded with suspicious circumstances in respect of writing on the said gift-deed Exhibit-63. Thus, it appears that the appellant / defendant has withheld the most important evidence i.e. the testimony of Wahedbee for the reason best known to him only. Therefore, considering the clouding circumstances in respect of the said gift deed, the evidence of Wahedbee would have established the necessary three ingredients of gift deed under Muslim Law.

11. The learned counsel for the appellant / defendant vehemently argued that the respondent / plaintiff has not in fact discharged the burden of disproving the gift-deed Exhibit-63. However, it is significant to note that the burden of proving the contents of documents is on the person who asserts it. Here in this case, the claim of the respondent is based on sale deed executed by Wahedbee in his favour and he has succeeded in proving the contents of said sale deed in the light of cogent and satisfactory evidence. He has never claimed that Wahedbee had not executed any gift deed in favour of the appellant / defendant and his wife. As such, the burden of disproving the *Will* was never upon him. There are concurrent findings of both the learned courts below in

favour of the respondent / plaintiff and therefore, inability of the appellant / defendant to establish the execution of the *Will* on the basis of three ingredients as discussed above, has definitely frustrated his claim to that effect. Therefore, no substantial question of law as mentioned above appears to be involved in this matter. As such, the present second appeal has no substance at all and it stands dismissed alongwith pending Civil Application No.4026 of 1995.

(SANDIPKUMAR C. MORE, J.)