



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

**SECOND APPEAL NO.145/2007**

Kusumbai w/o Subhash Shinde,  
aged about 40 years, Occ. Household,  
r/o Colwadi, Tah. Mangrulpir,  
Dist. Washim.

**.....APPELLANT**

**...V E R S U S...**

1. Sukhdeo Ukandaji Ghule,  
aged 40 years, Occ. Cultivator  
r/o Mangrulpir (Mangaldham),  
Dist. Washim,

2. Subhash Namdeo Shinde,  
aged 50 years, Occ. Cultivator,  
r/o Colwadi, Tq. Mangrulpir,  
District Washim.

**...RESPONDENTS**

-----  
Ms A. M. Telange, Advocate instructed by Mr. A. P. Tathod,  
Advocate for appellant.  
None for the respondents.  
-----

**CORAM:- ANIL L. PANSARE, J.**

**DATE OF RESERVING THE JUDGMENT : 15.01.2024**

**DATE OF PRONOUNCING THE JUDGMENT: 17.01.2024**

**JUDGMENT**

Heard.

2. The appeal has been admitted on the following  
substantial question of law:

*“Whether the first appellate court fell in error in  
rejecting the secondary evidence when a certified  
copy was filed and there was an evidence that the  
original was torn?”*

3. The appellant is original plaintiff and respondents are  
original defendants. The parties will be hereinafter referred to by

their original nomenclature. The plaintiff filed a suit bearing Regular Civil Suit No.87/1995, for possession of agricultural land at village Golwadi, District Akola bearing Gat No. 117 (New) admeasuring 2.11 HR. The plaintiff is legally wedded wife of defendant no.1.

4. It is/was the case of the plaintiff that on 24.01.1984, the defendant no.1 executed registered gift deed of the suit field in favour of Anil, who was minor. The possession, therefore, was handed over to plaintiff as Anil's legal guardian. The defendant no.1 failed to take care and maintain the plaintiff and, therefore, she along with her son left village Golwadi and started residing at her parent's house from the year 1989.

5. According to the plaintiff, her son Anil expired on 14.05.1990. After his death, the defendant no.1, taking undue advantage of absence of plaintiff from village Golwadi, in collusion with the defendant no.2, the then Talathi, got mutated his name in the record of right as legal heir of the deceased Anil. The defendant no.1 was alcoholic. Defendant no.2 purchased 1.11 HR land out of 2.11 HR. The plaintiff, therefore, challenged the sale deed as also possession of defendant no.2 over the suit property.

6. The trial court, by judgment dated 15.02.2000, decreed the suit and directed the defendant no.2 to hand over the suit field admeasuring 1.11 HR, to the plaintiff.

7. The first appellate court, in Regular Civil Appeal No.48/2000 vide judgment dated 24.08.2005, has reversed the finding of the trial court by holding that the trial court committed an error by relying upon the secondary evidence (Certified copy of gift deed). According to the first appellate court, the party relying upon the document is duty-bound to place on record the primary evidence and if it is not in his/her custody, such a party is under an obligation to seek permission to lead the secondary evidence. The first appellate court was of the view that the certified copy of the gift deed, though was marked as an exhibit, would not discharge the burden to prove due execution of original gift deed.

8. Learned counsel for the appellant has invited my attention to the evidence and the findings of the trial court in this regard. The trial court noted that the plaintiff could not file original gift deed but has made out a case for leading the secondary evidence. She has deposed in cross-examination that her husband (defendant no.1) had torn the original gift deed. The trial court has noted in para 9 of its judgment, that with

prior permission of the court she has led the secondary evidence in this regard. Exh.-46 is certified copy of gift deed obtained from the Sub Registrar, Mangrulpir, which was executed on 24.01.1984 and is a duly registered gift deed. The trial court further noted that donee has accepted the gift and got his name mutated. Accordingly, it held that the plaintiff has proved that the defendant no.1 executed the registered gift deed of the suit field in favour of the deceased Anil.

9. I find substance in the contention of the plaintiff. There is no reason to disbelieve her theory that the defendant no.1 has torn the original gift deed. The trial court granted permission to the plaintiff to lead the secondary evidence, upon which certified copy of gift deed was produced and marked as Exh.-46. The plaintiff has then proved the gift deed by examining the attesting witness PW2 – Parashram Wankhede, who has categorically stated that the gift deed was prepared in his presence and he signed below it as an attesting witness.

10. The suit field, therefore, was gifted to Anil who accepted the same and is reflected in the revenue entries. Despite aforesaid facts, the first appellate court has taken an erroneous view that plaintiff has to seek permission to prove execution of the gift deed and simply because the document is

marked exhibit, would not be sufficient to discharge the burden. This finding, being contrary to the facts and evidence and the prevalent law, is required to be set aside. Accordingly, the substantial question of law is answered in the affirmative, meaning thereby that the first appellate court fell in error in rejecting the secondary evidence when a certified copy of the gift deed was filed and that the original was torn.

11. The net result of the above is that deceased Anil was the owner of the suit field and after his death, the suit field will devolve upon the plaintiff in terms of Section 8 of the Hindu Succession Act, 1956. The father being class-II heir, will not be entitled to succeed in the lifetime of mother – the plaintiff. Consequently, defendant no.1 could not have sold the part of the suit field to the defendant no.2. The first appellate court has, thus, committed an error in reversing the well reasoned finding of the trial court.

12. Having answered the substantial question of law in the manner above, the appellant-plaintiff succeeds in the second appeal. Hence, the following order.

### **ORDER**

- (i) The appeal is allowed with costs.

(ii) Judgment and order dated 24.08.2005 passed by Ad Hoc Additional District Judge, Washim in Regular Civil Appeal No.48/2000 is set aside. Judgment and decree dated 15.02.2000 passed by Joint Civil Judge (Junior Division), Mangrulpur in Regular Civil Suit No.87/1995, is restored.

**(Anil L. Pansare, J.)**

kahale