



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

SECOND APPEAL NO. 394 OF 2022

APPELLANTS :

(Appellants/Defendants)
On R.A.)

1. Sheikh Ibrahim S/o Mohammad Sheikh,
Aged about 65 years, Occu : Private,
2. Rashida Begum W/o Sheikh Ibrahim,
Aged about 55 years, Occu : Nil,
3. Sheikh Tahir S/o Sheikh Ibrahim,
Aged about 35 years, Occu: Private,
4. Sheikh Javed S/o Sheikh Ibrahim,
Aged about 34 years, Occu: Private,
5. Sheikh Imran S/o Sheikh Ibrahim,
Aged about 32 years, Occu : Private,
6. Sheikh Salman S/o Sheikh Ibrahim,
Aged about 30 years, Occu: Private,

All 1 to 6 R/o 38/2, Somwari Quarter,
Somwaripeth, Nagpur.

V E R S U S

RESPONDENT :

(Respondent/Plaintiff)
On RA)

Sheikh Rehman S/o Mohammad Sheikh,
Aged 66 Years, Occ.: Retired,
R/o 178/B, Koradi Road, Ganesh Nagri,
Bokhara, Nagpur.

Shri M. R. Johrapurkar, Advocate for appellants.
Shri Nitin Vyawahare, Advocate for respondent-sole.

CORAM: ROHIT W. JOSHI, J.

DATED : 16/04/2025.

ORAL JUDGMENT :

1. This appeal is preferred by the original defendant Nos.1 to 6 who has suffered a decree of possession in the suit filed by the respondent-sole. The plaintiff claims his ownership over the suit property on the basis of Hiba in his favour by his father on 11/06/2005.

Thereafter, oral gift dated 11/06/2005 is reduced into writing on 12/06/2005. The father is arrayed as defendant in the suit. The father has supported the case of the plaintiff in his written statement. It is not the contention of defendant Nos.1 to 6, that the written statement was filed by his father under the influence of plaintiff. The learned Trial Court has accepted the case of oral gift i.e. Hiba by father defendant No.7 in favour of the plaintiff and has accordingly passed a decree for possession in favour of the plaintiff. The defendant Nos.1 to 6 challenged the said decree by filing first appeal bearing Regular Civil Appeal No.262/2019 which is also dismissed vide Judgment and Decree dated 28/03/2022. The present second appeal is preferred against these concurrent Judgments and Decrees.

2. Shri M.R. Joharapurkar, learned counsel for the appellants has contended that the evidence on record is insufficient to establish the case for transfer of property by the father defendant No.7 in favour of the plaintiff. The said contention is liable to be rejected. In view of the fact that the father is party to the suit and has supported the case of the plaintiff by filing his written statement. As stated above, it is not even the case of appellants i.e. defendant Nos.1 to 6 that the father has filed written statement not on his own accord or free will, but under the influence of the plaintiff.

3. In that view of the matter, the fact that the gift by father - defendant No.7 in favour of son, the plaintiff cannot be doubted.

4. I have also perused the findings recorded by the learned Courts with the able assistance of learned advocates appearing in the matter and find that the Courts have correctly appreciated the evidence on record including the evidence of sister of the parties. He supports the case of the plaintiff with respect to the oral deed / Hiba. The contention with respect to the father transferring the property to the plaintiff by Hiba is, therefore, liable to be rejected.

5. The other contention raised by Mr.M.R.Joharapurkar, learned counsel for the appellants is that in order to constitute transfer of property by way of Hiba, the possession of property should be essentially transferred. He contends that the evidence on record would suggest that the father did not transfer possession of the suit property to his son i.e. the plaintiff and therefore, the transaction cannot be said to be Hiba. He has placed reliance on the Judgment of the Hon'ble Supreme Court in the matter of Hafeeza Bibi and others Vrs. Shaikh Farid (dead) by LRs and others, reported in AIR 2011 SC 1695 to advance his contention. The controversy in the said Judgment was as to whether in cases where Hiba is made orally and subsequently, the terms are reduced into writing, registration of the document will be compulsory or not. It is held that when the Hiba is made orally and the same is thereafter reduced in writing, registration of the deed is not compulsory. In this context, the Hon'ble Supreme Court has referred three essential ingredients of valid gift under Muslim law namely; a]

Declaration of gift by donor, b] Acceptance of gift by donee and c] Delivery of possession. It is however, not held that delivery of possession should be actual physical possession.

6. As regards, the transfer of possession by doner in favour of donee under Hiba, it is not necessary that delivery of possession should be actual physical possession. It can also be constructive possession. In the facts of the present case, the property which is given by way of Hiba is house property. At the relevant time, the father i.e. the doner was residing in the residential house along with his son - the plaintiff. The actual physical possession was of all the family members who were occupying the property. However, as per Hiba the donor has delivered constructive possession to the donee. This in my considered opinion is sufficient to satisfy the requirement of delivery of possession in order to complete the transaction. When the donor and donee, who are father and son, are residing together in residential house owned by the father, it is not expected that after gifting the property by way of Hiba, the father would leave the residence.

7. The Hon'ble Supreme Court has in the matter of **Abdul Raim and others Vrs. Sk. Abdul Zabbar and others**, reported in **AIR 2010 SC 211** held that for completion of Hiba / gift, it is not necessary that actual physical possession should be delivered by the donor to the donee and that delivery of constructive possession will also satisfy the requirement. In Paragraph No.15 of the said Judgment, it is held that when the donor had himself applied for mutation of the name of donee

in the revenue record, it must be construed that the donor had placed the donee in constructive possession of the demised property.

8. It will also be profitable to refer to a Privy Council Judgment in the matter of Mohammad Abdul Ghani Khan and another Vrs. Mt. Fakhr Jahan Begam and others, reported in AIR 1922 Privy Council 281.

In the said case, one Munni Bibi had made a gift in favour of one Niamat Ullah Khan. The issue was as to whether the document was a Gift or Will. It was held that the transfer was intended to operate immediately and irrevocably upon execution of the document. While considering as to whether possession was delivered by the donor to the donee, it is observed that although the donor had reserved the right to receive usufruct of the demised property to herself, during her life time, nonetheless, the donee had got his name mutated in the revenue record on the basis of the document immediately upon execution of the document. In such circumstances, it is held that the document was indeed a gift and not a Will. While dealing with aspect of delivery of possession, it is held that for the purpose of a valid gift / Hiba, although delivery of possession of the property is necessary, possession need not be delivered actually or physically and even delivery of possession constructively will be sufficient to complete the transaction of gift. In that view of the matter, it was held that although the donor enjoyed the proceeds of the demised property, during her lifetime, the document under which the property was given by her to the donee was indeed a gift and the gift was valid in view of delivery of constructive possession.

9. In the present case, although the father – donor continued to reside with the defendant - donee who is his son, it is duly established on record that applications were made for mutation of the name of plaintiff on the basis of gift in the records of Nagpur Municipal Corporation (NMC) and Maharashtra Housing and Area Development Authority (MHADA).

10. In the light of the aforesaid Judgments of the Hon'ble Supreme Court and the Privy Council, there cannot be a shred of doubt that constructive possession was delivered by the donor to the donee and as such, the transaction of gift / Hiba was completed validly and legally.

11. In that view of the matter, the second contention raised by Shri Joharapurkar is also liable to be rejected. In view of the reasons recorded above, no substantial question arises for consideration in the present second appeal.

12. The second appeal is, therefore, dismissed with no order as to costs.

13. Since the second appeal is dismissed, pending civil applications, if any, are disposed of.

[ROHIT W. JOSHI, J.]