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

SECOND APPEAL NO.385/2022

Prabhakar Narayan Thorve
...Versus...
Uddhav s/o Narayan Thorve

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

Mr. S.G. Wadalkar, Mr. D.R. Khapre & Mr. P.A. Deshpande, Advocates for appellant
Mr. V.B. Bhise, Advocate for respondent

CORAM : ROHIT W. JOSHI, J.

Date of reserving the order : 15/09/2025
Date of pronouncing the order: 24/09/2025

1. Notice in the present second appeal is issued vide order dated 09/07/2024 on the following substantial question of law :-

> *"Whether the learned trial Court and the first appellant Court were justified in holding that the plaintiff alone has absolute right in the suit property and those Courts failed to appreciate the evidence legally ?"*

2. The appellant is the original defendant. The respondent who is original plaintiff is stepbrother of the appellant (The parties will hereinafter referred to as "plaintiff and defendant"). The plaintiff had filed the suit for possession against the defendant being Regular Civil Suit No.61/2010 claiming ownership over the suit property which comprises of a residential house bearing House Nos.246 and 247 situated at Warud Jaulka Tq. Akot and District Akola. The plaintiff claimed ownership over the suit property on the basis of a registered gift deed dated 31/05/1955 executed in his favour

by his father late Narayan.

3. The case of the plaintiff is that his mother had expired on 28/08/1967 and thereafter his father started residing with mother of the defendant. The plaintiff alleges that defendant is illegitimate child of his father. The plaintiff has alleged that he had allowed defendant to reside in the suit property as a gratuitous licensee. He alleges that the defendant tried to make construction over the suit property and the plaintiff restrained him from dong so. The plaintiff states that in view of the said act on the part of the defendant the licence came to be terminated vide notice dated 12/05/2010.

4. On being served with the suit summons, defendant appeared in the matter and filed written statement opposing the suit. The defendant has denied gift deed dated 31/05/1955 and has stated in the alternate that the alleged gift was never acted upon. The defendant also contended that the suit property was ancestral property and he was in occupation of the same as a coparcener. Based on oral pleadings, the learned trial Court framed issues in the matter. Both the parties have led evidence in support of their respective cases.

5. Apart from the substantial question of law which is farmed, during the course of hearing, the learned Advocate for the appellant/defendant argued that gift deed was not duly proved. The learned Advocate contended that as per Section 123 of the Transfer of Property Act, 1882 a gift deed of immovable property of valued more than Rs.100/- can be created by only registered document signed by the doner and attested by at least two witnesses. The learned Advocate

argued that it was necessary for the plaintiff to examine at least one attesting witness in order to prove the gift in view of Section 68 of the Indian Evidence Act, 1872. The learned Advocate urged to frame additional substantial question of law in this regard.

6. Learned Advocate for the respondent/plaintiff opposed the submission stating that the gift deed is a document which is duly registered and therefore, there is statutory presumption with respect to due execution and attestation of said document in view of Section 90 of the Indian Evidence Act. Learned Advocate further contends that objection with respect to need to examine attesting witnesses was not raised while the document was marked exhibit during the course of evidence of plaintiff.

7. I have perused the gift deed. It is a registered document. It is attested by two witnesses. Gift deed is executed in accordance with Section 123 of the Transfer of Property Act. I have also perused examination-in-chief of the plaintiff. Perusal of the examination-in-chief will demonstrate that defendant did not raise any objection to mark the gift deed as exhibit on the ground that attesting witness was not examined. In this regard, it will be appropriate to refer to Section 68 of the Indian Evidence Act, 1872, which reads as under :-

> *"**68. Proof of execution of document required by law to be attested.**- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence :*

> *Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”*

8. The provision contemplates that a document which is required by law to be attested shall not be used in evidence unless one attesting witness is examined for proving due execution. The proviso to Section 68 states that it is not necessary to call any attesting witness to prove execution of a document requiring attestation if the document is duly registered and execution thereof is not denied by the executant.

9. The executant of the gift deed is the father. It is nobody’s case that the father had disputed the gift during his lift time. Therefore, in view of proviso to Section 68 of the Indian Evidence Act in the considered opinion of this Court it was not necessary for the plaintiff to examine any attesting witness to prove the gift. It must be stated that since the gift is a document more than 30 years old there is a statutory presumption with respect to due execution and attestation of gift as is rightly pointed out by the learned Advocate for the plaintiff. This Court is also in agreement with the learned Advocate for the plaintiff that the objection to exhibition of gift on the ground that attesting witness was required to be examined was not raised by the defendant during the course of evidence of the plaintiff when the document was marked as exhibit. If such objection was raised,

the plaintiff could have contemplated taking appropriate steps for proving due attestation of the witness. Such objection also does not appear to have been raised before the trial Court during the course of final argument.

10. In view of the above, in the considered opinion of this Court, no substantial question of law arises on the ground that attesting witness to the gift or other evidence regarding due attestation of witness was not led by the plaintiff.

11. As regards the substantial question of law (supra) the learned Advocate for the defendant has referred to cross-examination of the plaintiff where he has stated that the gift was executed in his favour by his father in order to prevent wastage of the properties by the father who was addicted to vices.

12. In view of the above, the contention of the learned Advocate for the defendant is that gift was not executed in order to transfer the property to the plaintiff but only in order to safeguard the same. Although it is the case of the defendant that the gift was not acted upon, this is not a circumstance pleaded in the written statement to contend that the gift was not to be acted upon. Perusal of written statement will demonstrate that the defendant has not contended that the gift deed was executed in order to protect the property without any intention to transfer the property to the plaintiff. In the absence of any pleading in this regard the said evidence cannot be considered to arrive at a conclusion that the gift was not to be acted upon. It is well settled legal principle that parties have to lead the evidence in accordance with the pleadings and evidence beyond the pleading is of no avail.

13. It will also be pertinent to mention that the gift deed is dated 31/05/1955. The mother of the plaintiff expired on 28/08/1967. Marriage of the mother of the defendant was solemnized with Narayan father of the parties thereafter. The defendant is born after 28/08/1967. The defendant therefore cannot have any knowledge in this regard. It will be pertinent to state that the defendant has also not stated in his examination-in-chief that the gift was not acted upon. Only because the gift is executed to protect the property, it cannot be said that the gift executed by the father in favour of his son was sham document not intended to be acted upon. It is equally possible that in order to safeguard the property the same was actually transferred by executing gift deed in question. Both views were possible. In that view of the matter, in the considered opinion of this Court the statement in the cross-examination of the plaintiff that the gift was got executed from the father of the grandmother of the plaintiff in his favour in order to safeguard the suit property cannot be said that the gift was not acted upon.

14. The second circumstance on the basis of which it is sought to be contended that the gift was not acted upon is that the property bearing Survey No.42 was sold by mother of the defendant by registered sale-deed and that the plaintiff and defendant have signed the said sale-deed as attesting witnesses. The learned Advocate for the defendant contends that this property was also a part of the gift and yet the same is sold by the mother of defendant which is coupled with the fact that the plaintiff and defendant have signed the same as attesting witnesses which establishes that the gift was not to

be acted upon.

15. Perusal of the written statement will demonstrate that although it is pleaded that the property bearing No.452 was sold by mother of defendant, the plaintiff and defendant have signed the same as attesting witnesses, it is not pleaded that the said property forms subject matter of the gift.

16. I have perused the gift deed and the sale-deed with the able assistance of the learned Advocates. Perusal of the gift deed does not indicate that property No.452 forms a subject matter of the same. It needs to be mentioned that the plaintiff has stated that the gift was pertaining the suit property and another agricultural land bearing Survey No.126/2. The gift, however, makes a reference to three properties. However, on perusal of the gift deed and the sale-deed with respect to property No.452, it cannot be said with certainty that third property in the gift deed is the said property No.452. It needs to be reemphasized that it is not even pleaded by the defendant that this property No.452 is also subject matter of suit. Therefore, this circumstance also cannot lead to an inference that the gift was not acted upon.

17. Other than this, the contention of the defendant is that the suit property was ancestral property of the parties and he is in occupation of the same as a coparcener. However, the defendant has not pleaded the relevant facts to demonstrate as to how the suit property can be said to be an ancestral property. The evidence of the defendant in this regard is also silent.

18. The plaintiff has duly proved the gift and as such his title over the suit property. The defendant has failed to

prove better title and also that the gift was not acted upon. Both the learned Courts have recorded concurrent findings of facts in favour of the plaintiff. These findings of facts are recorded on appreciation of evidence on record which is discussed above. The findings cannot be said to be perverse.

19. In that view of the matter, in the considered opinion of this Court, the substantial question of law deserves to be answered against the appellant/defendant and in favour of the respondent/plaintiff. The second appeal, therefore, stands dismissed. No order as to costs.

(ROHIT W. JOSHI, J.)

Wadkar