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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Judgment Reserved on : 12.06.2023

Judgement Delivered on: 17.08.2023

CORAM

THE HONOURABLE MRS.JUSTICE N.MALA

A.S.(MD).Nos.262 of 2009, 142 of 2014 & 5 of 2011
and M.P(MD).No.2 of 2013, CMP.No.10130 of 2017 and
C.R.P.(MD).No.2022 of 2017

A.S.(MD)No.262 of 2009

S.K.Mohammed Kasim
S/o Late S.Khader Ibrahim Rowther

1. Aysammal
2. S.K.M.Zakir Hussain
3. S.K.M.Syed Kader Saleem
4. S.K.M.Sabeer Salik
(Appellants 1 to 4 are the Legal Representatives
of the deceased 1st defendant/appellant)

... Appellants

Vs.

1. S.K.Amirunisha (died)
W/o M.M.Jalaludeen
2. S.K.Sherfudin
S/o Late S.Kadher Ibrahim Rowther
3. S.K.Shabharoon,
W/o Jabbarullah
4. Zahira Syed
W/o Syed Mohammed
5. J.M.Akbar Kalifullah



S/o Late Haji Jamal Mohammed

6. J.M.Jawahar Kalifullah

S/o Late Haji Jamal Mohammed

7. J.M.Raja Kalifullah

S/o Late Haji Jamal Mohammed

8. Jalaludeen,

S/o Dawood Batcha

9. Shathaj,

W/o Sulthan Ibrahim

10. Dilshad Begum

W/o Raj Mohammed

11.Kaleel Rahman,

S/o Jalaludeen

12. Bahar Jan,

W/o Mohammed Mukthar

13. Shameem,

W/o Shaukath Ali

Respondents 8 to 13 are brought on record
as LR's of the deceased 1st respondent vide
court order dated 21.09.2022 made in
CMP(MD)No.8507 of 2022 in
A.S.(MD)No.262 of 2009

... Respondents

First Appeal filed under Section 96 read with Order XLI Rule I of CPC
against the judgement and decree dated 10.09.2008 in O.S.No.4 of 2004 on the file
of Additional District Court (Fast Track Court-II) Tiruchirapalli.

For Appellants : Mr.K.Prabhakar

For Respondents : R-1 Died

Mr.M.Palani for R-2



RR 3 to 7 No appearance
Mr.J.Anand Kumar for RR 8 to 13

A.S.(MD)No.142 of 2009

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1. S.K.Ameerunnissa (died)
W/o S.M.M.D.Jalaludeen

2. Jalaludeen
S/o Dawood Batcha

3. Shathaj,
W/o Sulthan Ibrahim

4. H.Dilshad Begum,
W/o Raj Mohammed

5. Kaleel Rahman,
S/o Jalaludeen

6. Bahar Jan,
W/o Mohammed Mukthar

7. Shameem
W/o Shaukath Ali

Appellants 2 to 7 are brought on record as
LRs of the deceased sole appellant vide Court
Order dated 21.09.2002 made in
CMP.(MD).No.8503 of 2022 in
A.S.(MD).No.142 of 2014

... Appellants

Vs.

S.K.Mohammed Kasim (died)

1. S.K.Sherfudin
S/o Late S.Kadher Irahim Rowther

S.K.Noorjahan @ Kannammal (died)



S/o Jabbarullah

Haji P.K.Jamal Mohammed (died)

3. Zhira Syed

W/o Syed Mohammed

4. J.M.Akbar Kalifullah

S/o Late Haji Jamal Mohammed

5. M.J.Jawahar Kalifullah,

S/o Late Haji Jamal Mohammed

6. J.M.Raja Kalifullah,

S/o Late Haji Jamal Mohammed

...Respondents 1 to 6/

Defendants 2,4,

6 to 9

7. Aysammal,

W/o S.K.Mohammed Kasim

8. S.K.M.Zahir Hussain,

S/o S.K.Mohammed Kasim

9. S.K.M.Syed Kader Saleem,

S/o S.K.Mohammed Kasim

10. S.K.M.Sabeer Salia,

S/o S.K.Mohammed Kasim

... Respondents/LRs of

1st defendant

First Appeal filed under Section 96 of C.P.C. to modify the judgment and decree passed in O.S.No.4 of 2004 dated 10.09.2008 on the file of the Additional District Court/ Fast Track court No.II, Tiruchirappalli.

For Appellants : Mr.J.S.Anand Kumar

For Respondents : Mr.M.Palani for R-1

RR 2 to 6 - No appearance

R-7 died



Mr.K.Prabhakar for RR 8 to 10

A.S.(MD)No.5 of 2011

S.K.Sharfudin

Defendant

... Appellant/2nd

Vs.

1. S.K.Ameerunnisa (died)
W/o S.M.M.Jalaludeen

2. S.K.Sabiroon
Wo Jafarulla

3. Shahira Syed
W/o Syed Mohammed

4. J.M.Akbar Kalifullah
S/o Late Hajee P.K.Jamal Mohamed

5. J.Jawahar Kalifullah
S/o Late Hajee P.K.Jamal Mohamed

6. J.Raja Kalifulla,
S/o Late Hajee P.K.Jamal Mohamed

... Respondents/
Defendants 4 & 6 to 9

7. Aisma ammal
W/o Late Mohamed Kasim

8. Zakir Hussain
S/o Late Mohamed Kasim

9. Syed Kadar Saleem
S/o Late Mohamed Kasim

10. Sabir Salik,
S/o Late Mohamed Kasim

... Respondents/ LRs of
1st defendant



11. Jalaludeen,
S/o Dawood Batcha

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12. Shathaj,
W/o Sulthan Ibrahim

13. Dhilshad Begum
W/o Raj Mohammed

14. Kaleel Rahman
S/o Jalaludeen

15. Bahar Jan
W/o Mohammed Mukthar

16. Shameem,
W/o Shaukath Ali

Respondents 11 to 16 are brought on record
as LR's of the deceased 1st respondent vide
Court Order dated 10.10.2022 made in
CMP(MD).No.9388/2022 in
A.S.(MD)No.5 of 2011

... Respondents

First Appeal filed under Section 96 of C.P.C. against the Judgment and
decree passed in O.S.No.4 of 2004 dated 10.09.2008 on the file of the Additional
District Court/ Fast Track Court No.II, Tiruchirappalli.

For Appellants : Mr.M.Palani

For Respondents : Mr.K.Prabhakar for R8 to R10
Mr.J.Anandkumar for R11 to R16
R2 to R6 - No appearance
R1 Died

C.R.P.(MD)No.2022 of 2017

<https://www.mhc.tn.gov.in/judis>



1. S.K.Sherfuddin
S/o Kadar Ibrahim Rawther
2. M.A.M. Service,
represented by its Partner,
S.K.Sherfuddin
S/o Kadar Ibrahim Rawther,
No.39, Sathyamurthy Road,
Trichirapalli.
3. S.K.Roadways,
represented by its Partner,
S.K.Sherfuddin,
S/o Kadar Ibrahim Rawther,
No.91, Heber Road,
Tiruchirappalli.

... Petitioners

Vs.

1. Ayesha Amma,
W/o Late S.K.Mohamed Kasim
2. Zakir Hussain,
S/o Late S.K.Mohamed Kasim
3. Syed Kadar Saleem,
S/o Late.S.K.Mohamed Kasim
4. Sabir Salik,
S/o Late S.K.Mohamed Kasim
5. Hafiz motor Transports
No.39, Sathyamurthy road,
Tiruchirappalli.
6. Al Hafiz Motor Transports,
No.39, Sathyamurthy road,
Tiruchirappalli.
7. S.K.Ameerunisha(died),
W/o S.M.M.Jaladdin



8. Jalaludeen,
S/o Dawood Batcha

9. Shathaj,
W/o Sulthan Ibrahim

10. Dhilshad Begum,
W/o Raj Mohammed

11. Kaleel Rahman
S/o Jalaludeen

12. Bahar Jan,
W/o Mohammed Mukthar

13. Shameem,
W/o Shaukath Ali

Respondents 8 to 13 are brought on record
as LR's of the deceased 7th respondent
vide court Order dated 10.10.2022
made in C.M.P(MD)No.9401 of 2022
in CRP(MD)No.2022 of 2017

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decreetal order dated 13.07.2017 made in I.A.No.11 of 2017 in O.S.No.116 of 2012 on the file of the Sessions Judge, Mahila Court, Tiruchirappali.

For Petitioners : Mr.A.Arumugam
for Ajmal Associates

For Respondents : Mr.K.Prabhakar for RR 1 to 4
RR 5 and 6 - No appearance
Mr.J.AnandKumar for RR 8 to 13

R7- Died

* * * *

COMMON JUDGMENT



The plaintiff has filed the appeal in A.S.MD.No.142 of 2014, challenging the Judgment and Decree of the Trial Court declining the relief of partition, as regards some of the suit schedule properties.

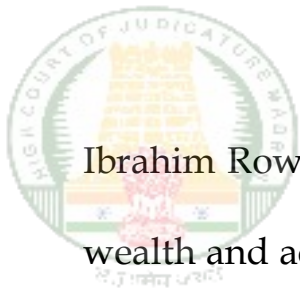
2.The first defendant in the suit has filed the above A.S.M.D.No.262 of 2009 against the Judgment and decree of the trial Court decreeing the suit in favour of the plaintiff in respect of some of the suit schedule properties and accounting by the first defendant for the properties in his possession. The second defendant has filed the appeal in A.S.M.D.No.5 of 2011 challenging the Judgment and Decree as regards some items of suit schedule properties standing in the name of the first defendant which were held to be his self acquisitions.

3.All the three appeals arise out of one and the same Judgment in O.S.No.4 of 2004 dated 10.09.2008, hence the same are disposed of by this common Judgment.

4.This Court vide order dated 30.07.2022 tagged the CRP along with the above appeals, hence the CRP is taken up along with the appeals.

5.The facts in brief giving rise to the above appeals are as follows:

The plaintiff in the suit and the defendants 1 to 4 and one Avabi are the



Ibrahim Rowther was a renowned business man in Trichy, who earned immense wealth and acquired various properties scheduled to the plaintiff. The said Kadher Ibrahim Rowther died intestate on 10.03.1967 and his wife Saliba Bibi also died intestate on 06.05.1968. One of the sisters of the plaintiff by name Avabi filed a suit in O.S.No.777 of 1971 on the file of the Sub Court, Tiruchirappalli for partition of her 1/8th share in the suit properties against the plaintiff and the defendants 1 to 4.

6.It is stated by the plaintiff that on the intervention of the mediators and the well-wishers of the family a compromise was arrived at and the properties described in Schedule L to this plaint were allotted to Avabi. The said Avabi executed a release deed dated 10.12.1974 in favour of the plaintiff and the defendants 1 to 4 in respect of the remaining properties. It is further stated that the Schedule L properties were allotted to Avabi only in recognition of her distinct right in the properties of their father Kadher Ibrahim Rowther.

7.The plaintiff in view of the release executed by Avabi filed the suit for partition of her 1/7th share in the suit schedule properties as her requests to the first defendant to divide the suit properties did not bear fruit. Though initially the suit was filed containing Schedules A to L, after the written statement was filed by the third and fourth defendants, the other properties (i.e.) Schedules M to



X were added vide IA.No.511 of 1991 dated 13.08.2002. The third defendant died on 17.07.1999 and the defendants 5 to 9 were impleaded as her legal heirs vide order in I.A.No.799 of 1999 dated 11.07.2003.

8.The gist of the first defendant and the second defendant's case on the other hand was that the property in Item 1 of A schedule consisting of 44 shops were the absolute properties of their mother Salia Bibi, she having received the same under a settlement from her husband Khader Ibrahim Rowther in 1958. It was stated that Salia Bibi in turn orally gifted the properties to the defendants 1 and 2 as early in 1965. The properties were delivered to the defendants and they were in possession and enjoyment of the same ever since the oral gift in their favour. It was further stated that the item No.3 of A schedule was also gifted by their father to their mother who in turn orally gifted the same to the defendants 1 and 2. As regards the other properties, the first defendant claimed exclusive right on a plea of ouster and self acquisition. The second defendant claimed exclusive right to certain items of properties (i.e.) schedules M to Q. M schedule was claimed to be exclusive property of the second defendant with third parties as partners. N schedule was claimed to be the property of the partnership firm of his wife with third parties. O schedule property was stated to be the separate property of his wife, P schedule was claimed to belong equally to himself and his wife and Q schedule property was stated to belong exclusively to his wife.



9.The defendants 3 to 4 sailed with the plaintiff and stated that they were entitled to 1/7th share in the entire suit schedule properties.

10.Before the Trial Court, the plaintiff examined herself as PW1, defendants 1 and 2 examined themselves as DW1 and DW2. The plaintiff marked Ex.A1 to Ex.A16 and the defendants marked Ex.B1 to Ex.B76.

11.The Trial Court on the basis of the pleadings and on the evidence placed on record framed the following issues:

1.தாவா சொத்துக்கள் இறந்து போன காதர் இப்ராகிம் சாகிப்புக்கு பாத்தியப்பட்டதா?

2.1,2 பிரதிவாதிகள் எதிரிடை அனுபவத்தினால் வரையறுக்கப்பட்ட உரிமை பெற்றுள்ளார்களா?

3.வாதிக்கு ரூ.40,000/அவரது கோரிக்கையைப் பொறுத்து செட்டில்மென்ட் படி செலுத்த வேண்டுமா?

4.1ஆம் பிரதிவாதி கணக்கு காட்ட கடமைப்பட்டவரா?

5.வாதி பெறக் கூடிய பாகம் ஏதேனும் உண்டா?

6.வேறு என்ன பரிகாரம்?

12.The trial Court on an assessment of the oral and documentary evidence on record and on the basis of Ex.A6 and the confirmation deed, decreed the plaintiff's 1/7th share in respect of 1st and 3rd items in A Schedule, 1st and 3rd items



1st to 6th items in R schedule and 4th Item in V Schedule. The Trial Court further directed the second defendant to render accounts from 10.03.1967 with respect to 2nd and 3rd items of B schedule properties and 6th item of R schedule properties and also directed the first defendant to render accounts for the remaining properties from 10.03.1967. The mesne profits were left to be determined as per Order 20 Rule 12 of C.P.C. Aggrieved by the judgment and decree of the trial Court, the plaintiff and the defendants 1 and 2 have preferred the above appeals.

13.At the time of arguments it was conceded by all the learned counsels appearing for the parties in the appeals that the main challenge in the appeals was to the interpretation of Ex.A6, a registered release deed executed by Avabi in favour of the plaintiff and the defendants 1 to 4 and the unregistered confirmation deed. All the appellants have questioned Ex.A6 in one manner or the other and therefore the consensus is that the interpretation of Ex.A6 will settle the rights of the parties in the appeal. But as the appellant's referred to certain other matters also in the written arguments they are also considered.

14.I have heard the learned counsels and I have perused the records. The point for determination in the appeal is as follows:

1.Whether the trial Court was right in relying solely on Ex.A6



2. Whether the HIBA set up by the defendants 1 and 2 is proved or not?

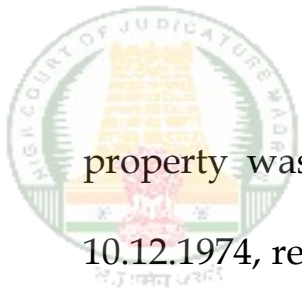
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3. Whether the exclusive title to the suit properties claimed by the first defendant on the plea of ouster is sustainable?

4. Whether oral partition set up by the second defendant is proved or not?

15. The plaintiff and the defendants 1 to 4 and one Avabi are the children of S.Khader Ibrahim Rowther and Salia Bibi. Khader Ibrahim Rowther was a reknowned business man at Tiruchirappalli. He was doing several businesses and earned a lot of wealth. According to the plaintiff the suit schedule properties were acquired by Khader Ibrahim Rowther from his own earnings. Khader Ibrahim Rowther died intestate on 10.03.1967 and his wife Salia Bibi died intestate on 06.05.1968. The first defendant as the eldest male member of the family was in management of all the properties of Khader Ibrahim Rowther. While so one of the sisters of the plaintiff viz., Avabi filed a suit in O.S.No.777 of 1971 for partition of her 1/8th share in the properties of her parents viz., Khader Ibrahim Rowther and Salia Bibi against the plaintiff and the defendants in this suit.

16. According to the plaintiff, a compromise was arrived at on the intervention of mediators and well-wishers of the family and the suit L Schedule



property was allotted to Avabi, who in turn executed the release deed dated 10.12.1974, releasing her rights in respect of the other items of properties in favour of the other co-sharers viz., the plaintiff and the defendants 1 to 4. It is the plaintiff's case that the L Schedule properties were allotted to Avabi only in recognition of her distinct right in the properties of Khader Ibrahim Rowther.

17.It is the case of the defendants 1 and 2 that the 1st item of A schedule properties consisting of 44 shops were the absolute properties of their mother Salia Bibi under the settlement deed of Khader Ibrahim Rowther. According to the defendants 1 and 2 their mother Salia Bibi orally gifted item No.1 of A schedule to them and ever since the gift they were in absolute possession and enjoyment of the same in exclusion of the other co-sharers. The defendants 1 and 2 further stated that item No.2 of the A schedule was gifted by their father to their mother Salia Bibi and she in turn orally gifted the same to the defendants and ever since the said oral gift they had been in absolute possession and enjoyment of the same. As regards the other items of the properties, the first defendant pleaded that he had purchased some of the suit properties out of his own earning and for the remaining properties he claimed exclusive title by ouster.

18.The second defendant claimed that suit schedules M, N, O to Q were the exclusive properties of himself and his wife. As regards properties standing in



the name of the first defendant the second defendant claimed a share stating that they belonged to the family as they were purchased in the name of the first defendant who was managing the family properties. The defendants 3 & 4 sailed with the plaintiff and they also claimed their 1/7th share in the entire suit properties.

POINT NO.1:

19.The Trial Court solely relied on Ex.A6 to decree the plaintiff's suit for partition with respect to some of the suit scheduled properties. The appellants therefore now question Ex.A6 in their own way. In the suit the plaintiff relied on Ex.A6 to support her case that Ex.A6 was executed recognising the distinct rights of one of the daughters to the suit properties and therefore the defendants 1 and 2 could not deny the plaintiff her 1/7th share in the suit properties. In other words the plaintiff relied on Ex.A6 to establish that the plaintiff as well as the defendants 3 and 4 were entitled to a share in the suit properties.

20.In the appeal the plaintiff assails Ex.A6. According to the plaintiff the recitals in Ex.A6 do not bind the other co-sharers as they were not signatories to Ex.A6. The plaintiff's further contention is that the recitals in the release deed would bind only the releasor and therefore the trial Court ought not to have made



items of the suit properties. The plaintiff's further case is that the confirmation document attached to Ex.A6 is a mere acknowledgment of giving the 'L' Schedule property and the amount referred to therein to the sister viz. Avabi.

21.The first defendant in his written statement stated that Ex.A6 was not executed in recognition of the distinct right of the daughters. Now the first defendant states that Ex.A6 coupled with the confirmation deed is binding on all the parties. The recitals in Ex.A6 along with the Confirmation Deed, according to the first defendant are binding on all the parties to the Release Deed and Confirmation Deed. The first defendant further states that the recitals in Ex.A6 support his contention that items 1 and 3 of 'A' schedule were orally gifted to the defendants 1 and 2 by their mother, Salia Bibi. The first defendant further relies on Ex.A6 to contend that it was admitted by all parties that the properties standing in the name of the individuals belonged to them. In substance, first defendant relies on Ex.A6 and the Confirmation Deed and states that the other co-sharers are bound by it and are estopped from assailing it.

22.The second defendant assails Ex.A6 stating that the parties did not derive title to the property under Ex.A6 and that the trial Court erred in relying on Ex.A6 to decree the suit. The second defendant in the written arguments confined the challenge to the trial Court judgment and decree to the properties decreed in



favour of the first defendant as his self acquisitions on the basis of Ex.A6.

23.The above being the stand of the appellants, it is to be seen if the trial Court erred in making Ex.A6, the basis of the judgment. Before dealing with Ex.A6 and the Confirmation Deed, the relevant portions of the Release Deed are extracted hereunder for better appreciation.

"நம் மாதாபிதா காலத்திற்கு முன்னும், முன்னும் எனக்குண்டான சட்டரீதியான பாக உரிமையில் அநேக சவுகரியங்களை நான் அடைந்திருக்கிறேன். இருப்பினும் பிற்பகுதியில் சில காலமாக நமக்குள் ஒற்றுமை குறைவும், கருத்து வேறுபாடுகளும் ஏற்பட்டு நம் குடும்பத்தில் அக்கரை உள்ளவர்கள் எல்லோருடைய பாத்தியா பாதியங்களையும் எல்லா சொத்துக்களின் நிலைமையையும் பரிபாவிக்கும் வசதிகளை கவனித்தும் தீவிர ஆலோசனையின் பின் செய்த மத்தியஸ்தின் படி,,,,,,

நாம் எல்லோரும் மனோராசியாகவும் சமாதானமாகவும் ஒருவருக்கொருவர் கலந்து யாருடைய தூண்டுதலும் நிர்பந்தமும் இல்லாமல் முடிவு செய்து என் முழு சம்மதத்தின் பேரிலும், இஷ்டத்தின் பேரிலும் என் சுயபுத்தியுடன் இதனடியில் கண்ட வாசகப்படி நான் என் மனப்பூர்வமான பூரண விருதலை எழுதிக் கொடுக்க முன் வந்ததை 1 முதல் 5 லெக்கமிட்ட தாங்கள் யாவரும் ஏற்றுக் கொண்டிருக்கிறீர்கள்.

நம் மாதாபிதாக்களுக்கு பாத்தியப்பட்ட ஐவேஜுகளில் இருந்தும் எனக்கு சட்டப்படி கிடைக்க வேண்டிய பூரா பாகத்திற்கும் திருச்சி சப்-ஜெயில் ரோட்டிலுள்ள கடையும், திருச்சி தாலுக்கா, புங்கலூர் ரீ கிராமத்திலுள்ள அயன் நடுத்தை சர்வே நிலமும், சொத்தாகவும் இவைகள் அன்னியில்



ரூ.52,000/- (ரூபாய் ஐம்பத்திரண்டு ஆயிரம்) ரொக்கமாகவும், இதனடியில் ஏ ஷெடியூல் சொத்து விபரத்தில் கண்டுள்ள சொத்துக்களை நான் பெற்றுக்கொண்டு பாக்கி ஐவேஜுக்கள் பூராவையும் அதாவது இதனடியில் கண்ட பி ஷெடியூல் சொத்துக்களை 1 முதல் 5 லெக்கமிட்ட உங்கள் எல்லோருக்கும் இந்த விடுதலை சாசன மூலம் எனக்குள்ள எல்லா பாக பாத்யதையும் விடுதலை release and relinquishment செய்து கொடுத்து விட்டபடியால் இதனடியில் விவரிக்கப்பட்டுள்ள ஏ ஷெடியூலில் கண்ட சொத்துக்களை நீக்கி மற்ற சொத்துக்களுக்கும், மற்றமுள்ள பாங்க அக்கவுண்ட்ஸ், டிபாசிட்ஸ், கும்பெனி ஷேர்ஸ், கடன் பத்திரங்கள், பாண்டுகள் வர வேண்டிய நிலுவைகள் மற்றும் நம் மாதாபிதாக்களுக்குப் பாத்தியப்பட்ட சகல அசையும் சொத்துக்களுக்கும், ஆசையா சொத்துக்களுக்கும் நீங்கள் ஐவரும் மட்டும் சட்டப்படி பரிபூரண பாத்தியத்தை உடையவர்களென்று உறுதி செய்து இதன்மூலம் எழுதிக் கொடுத்துவிட்டேன். நம் மாதாபிதாவின் சொத்துக்களில் விடுதல் இல்லை என்றாலும் வேறு ஏதேனும் இதில் காண விட்டுப் போய் பின்னர் தெரிய வந்தால் அவைகளும் 1 முதல் 5 லெக்கமிட்ட தங்கள் யாவருக்கும் பரிபூரண பாத்தியமென்றும் அவற்றில் எனக்கும், ஏன் வாரிசுகளுக்கும் எவ்வித பாத்தியங்கள் இல்லையென்றும் உறுதி கூறுகிறேன்.

..... மேலும் உங்களில் தனிப்பட்டவர் பெயரிலும் கூட்டுப் பெயரிலும் தஸ்தாவேஜுகள் மூலம் ஏற்பட்டுள்ள சொத்துக்களுக்கு மேற்படி தஸ்தாவேஜுப்படி உரிய உரிமையாளர்களே சகல பாத்யதையுடையவர்களென்றும், மேற்படி சொத்துக்களில் எனக்கும், ஏன் வாரிசுகளுக்கும் எவ்வித பாத்தியமும், முன்தொடர்ச்சியுமில்லை என்றும் இந்த சாசனம் மூலம் உறுதி கூறுகிறேன்.



பி ஜெடியூலில் விவரிக்கப்பட்ட முதலாவது அயிட்டி
சொத்தாகிய பேட்டை கட்டடங்கள் புராதானமாகவும், மிகப்
பழைமை வாய்ந்தவைகளாகவும் இருப்பதனால்
அவைகளை இடித்து மறுபடி புழு மாதிரியாக்கி கட்டவும்,
பழுது பார்க்கவும், அதிக சிலவாகும். தவிர நகர
வாசத்தில் இருக்கும் குடியிருப்பாளர்களின்
அனுபவத்தில் இருப்பதாலும் அவர்களை காலி செய்ய
முடியாததாலும் மறுபடியும் மராமத்து செய்து நல்ல
முன்னனியில் கட்டட வசதிகள் செய்தலல்லாது அதில்
வாடகை கிடைக்காதாகையாலும் இறந்தவரும் அவருடைய
சொத்துக்களை அவருடைய ஆண் பிள்ளைகள்
அனுபவிப்பதை பெண் வாரிசுகள் தடுக்காமல் இருக்க
வேண்டுமென்ற அவாவுடன் இருந்தமையாலுமம் தற்கால
சட்டங்கள் வரி வசூல்கள் நிபந்தனைகள் யாவும்
சொத்துக்களுக்கு லாபம் கொடுக்கக்கூடியதாக இல்லாததாலும்
சொத்துக்களைப்,,,,,

24.The recitals in Ex.A6 bring out that after elaborate discussions and deliberations in the presence of mediators all the parties agreed voluntarily to the release. Therefore, the release deed was executed in recognition of the rights of the parties as heirs of Khader Ibrahim Rowther. The plaintiff relies on Ex.A6 to support her plea that the brothers in recognition of the distinct right of the daughters got the Release Deed from Avabi. The plaintiff states that though the release deed is valid, the recitals therein do not bind her. The plaintiff further states that as Avabi was the executor of the document, the recitals bind her only



and not the plaintiff. The plaintiff by filing the suit for partition for 1/7th share leaving Avabi has acted upon the Release Deed and the Confirmation Deed. Once the Release Deed is accepted for determining the share's, the plaintiff cannot be heard to say that the recitals therein are not binding on her. As a beneficiary under the Release Deed and having acted upon the same, the plaintiff is estopped from stating that the recitals are not binding on her. The plaintiff can either accept the whole document or reject the same totally but she cannot be permitted to pick and choose those aspects of the document that suit her and reject the others. In my view the plaintiff cannot approbate and reprobate.

25. Useful reference is made to the Judgments of the Hon'ble Supreme Court in the case of the *Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd., and another* reported in *AIR 2013 SC 1241*. The Hon'ble Supreme Court in the said Judgment held that “a party cannot be permitted to “blow hot and cold”, “fast and loose” or “approbate and reprobate”. Where one party knowingly accepts the benefits of a contract or conveyance or an order, it is estopped to deny the validity or binding effect on him of such contract or conveyance or order”. The Hon'ble Supreme Court in the case of *Bhagwat Sharan Vs. Purushottam and others* reported in *2020 (6) SCC 387*, held that “the doctrine of election is a facet of



party which takes advantage of any instrument must accept all that is mentioned in the said document". Therefore, in my view, the document cannot be dissected as per the whims and fancy of the plaintiff.

26.In this regard the evidence of the plaintiff on Ex.A6 is pertinent. The plaintiff in her cross-examination states as follows:

"அவ்வாறு விடுதலைப் பத்திரம் எழுதிக் கொடுத்தவர்/அவ்வாறே. அந்த விடுதலைப் பத்திரத்தை குறித்து எனக்கு ஓரளவு நேரடியாகத் தெரியும். அது குடும்ப ஏற்பாடாக செய்யப்பட்ட ஆவணம் என்பதால் அதனை சகோதர, சகோதரிகள் அனைவரும் ஏற்றுக் கொண்டோம். அந்தப் பத்திரத்தின் நகல் தான் வா.சா.ஆ.6. வா.சா.ஆ.6ல் ஏற்பட்ட உடன்பாடுகளின் விபரங்கள் எனக்குத் தெரியாது. வா.சா.ஆ.6 பத்திரம் ஏற்பட்ட போது என் கணவர் என்னுடன் தான் இருந்தார். வா.சா.ஆ.6ல் சொல்லப்பட்ட விபரங்கள் சரிதான்."

27.The plaintiff admits that all the brothers and sisters accepted the Release as a family arrangement and that the recitals are also correct. The plaintiff as a beneficiary of the document cannot be heard to say that the recitals are not binding on her. The plaintiff in my view is therefore estopped from contending that the recitals are not binding on her.



28.The further contention of the plaintiff that the Confirmation Deed dated 07.04.1975 is only an acknowledgment of giving the property and the amount mentioned therein is also untenable. The Confirmation Deed is as follows:

"மேற்படி பத்திர ஷரப்படி சம்மதித்துச் கொண்டோம்.
மேற்படி பாகஉரிமை விடுதலை சாசனப் பத்திரமானது நாளது
07.04.1976-ம் தேதியில் திருச்சி சப்ரிஜிஸ்டிரார் 3-ல் நெ: 923
ஆப் 1975 தஸ்தாவேஜாக பதிவாகியுள்ளதையும் நாம்
எல்லாரும் ஏகமனதாக ஒப்புக்கொண்டோம்."

29.The document acknowledges the payment of Rs.52,000/- as also the allotment of 'A' Schedule property to Avabi. But the further recital "மேற்படி பத்திர ஷரப்படி சம்மதித்துக் கொண்டோம்" shows that there is an acknowledgement of the recitals also and not just the payment and allotment. The objection of the plaintiff that the Confirmation Deed is unstamped and unregistered hence not admissible in evidence is liable to be rejected on the short ground that the said Deed by itself does not create any right, title or interest in the property as it is only an acknowledgement of the Release executed on 01.04.1975 and registered later on 07.04.1975. It is settled law that a document which itself does not create or extinguish rights to immovable property above Rs.100/- need not be stamped and registered. Reference in this regard is made to the Judgments in the case of *Kale Vs. Deputy Director of Consolidation* reported in AIR 1976 SC



reported in AIR 2001 Madras 135 and *Korukonda Chalapathi Rao & Another Vs. Korukonda Annapurna Sampath Kumar* in Civil Appeal No(s).6141 of 2021.

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30.The second defendant's contention that trial Court ought not to have relied on Ex.A6 is answered by my finding against the plaintiff on the same issue. It is relevant to note here that the second defendant admitted the release deed in his written statement filed on 20.10.1989 and also prayed for passing of preliminary decree declaring the rights of the parties. Further DW2 in his cross examination by the first defenant stated as follows:

"என்னுடைய சகோதரி உறவாபீ 1, 4, 75ல் ஏ6 என்ற பாக விடுதலை சாசனம் எழுதி பொருத்த விவரம் எனக்கு தெரியும். ஏ6 சாசனத்தில் கண்டுள்ள விவரங்கள் சரியானவையா என்று முழுமையாக தெரியாது. ஓ.எஸ்.2667/04ல் என்னை விசாரித்தார்கள். அந்த நீதிமன்றத்தில் என்னுடைய சாட்சியத்தில் 1975ல் என் சகோதரி உறவாபீ எழுதி கொடுத்த விடுதலை பத்திரத்தில் சொன்ன சங்கதிகள் சரிதான் என்று கூறியிருக்கிறேன். ஏ6ல் என் தகப்பனார் என்ன எண்ணத்துடன் இருந்தார் என்ற விவரத்தை என் சகோதரி சொல்லியுள்ளார் என்ற விவரம் எனக்கு தெரியாது. ஏ6 மூலம் எனக்கும் அதில் பாத்தியதை உண்டு."

<https://www.mhc.tn.gov.in/> மா.சா.ஆ.6 மூலம் கூடுதலாக சொத்துக்கள்



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கொடுப்பதற்கு இவ்வழக்கின் தரப்பினர்களாகிய நாங்கள்
ஒப்புக்கொண்டோம். வா.சா.ஆ,6 உருவான காலத்தில்
மத்தியஸ்தர் செய்த பரிந்துரையை எல்லோரும்
ஏற்றுக்கொண்டோம்."

31.In the light of the said discussion the contention of the plaintiff that recitals in Ex.A6 are not binding on the plaintiff and therefore the trial Court erred in relying on the same to non-suit the plaintiff for some items of suit properties is rejected. So also in the light of the categorical admission of the second defendant that all the sharers accepted the release, the contentions now raised contra to the above cannot be sustained. Point No.1 is answered against the plaintiff and the second defendant.

POINT NO.2:

32.The first defendant's contention that the recitals in Ex.A6 support his case that his father was desirous of giving the properties to the male heirs and it further fortifies his plea of oral gift in his and second defendant's favour, in my view, is misconceived. The relevant recitals are as follows:

"இறந்தவரும் அவருடைய சொத்துக்களை அவருடைய ஆண்
பிள்ளைகள் அனுபவிப்பதை பெண் வாரிசுகள்
தடுக்காமல் இருக்க வேண்டுமென்ற



அவாவுடன் இருந்தமையாலும்"

WEB C 33. The above recitals convey only a desire of the father to give the properties to the sons. In the absence of any particulars in the pleadings regarding the date, time, witnesses and the place etc., of the hiba the aforesaid recitals per se cannot amount to proof of Hiba. It is trite that in Mohammedan Law, the gift can be oral. But oral Hiba has to be pleaded and proved in a manner known to law. The pleadings are absolutely bereft of particulars regarding the three essentials of a valid Hiba like declaration, acceptance and delivery of possession. Useful reference can be made to the Judgments of the Hon'ble Supreme Court in the case of *Rasheeda Khatoon Vs. Ashiq Ali* reported in 2014 (10) SCC 459, wherein it was held as follows:

"17. From the aforesaid discussion of the propositions of law it is discernible that a gift under the Muhammadan Law can be oral gift and need not be registered; that a written instrument does not, under all circumstances acquire registration; that to be a valid gift under the Muhammadan law three essential features, namely (i) declaration of the gift by the donor, (ii) acceptance of the gift by the donee expressly or impliedly, and (iii) delivery of possession either actually or constructively to the donee, are to be satisfied; that solely because the writing is contemporaneous of the making of the gift



deed, it does not warrant registration under Section 17 of the Registration Act."

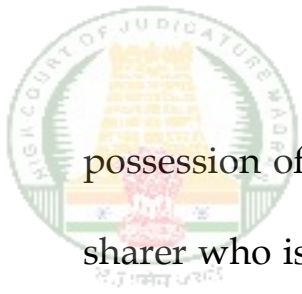
It is not necessary to elaborately deal with this issue as I am of the opinion that in the absence of basic pleadings, necessary for sustaining the plea of Hiba, the same deserves to be rejected. It is further pertinent to note that the second defendant sailed with the first defendant on suit items 1, 2 and 3 of A Schedule properties. He supported Hiba set up by the first defendant . As I have rejected the plea of Hiba set up by the first defendant, for the same reasons, the Hiba set up by the second defendant is also rejected. Hence, point No.2 is decided against the defendant Nos.1 and 2.

POINT No.3:

34.The contention of the first defendant that he has derived exclusive title to the properties by ouster is concerned, here again, I am of the view that there is neither any pleading nor any evidence to support the same. It is settled law that ouster has to be pleaded and proved. Assuming that the defendant has been in long and uninterrupted possession ouster cannot be inferred in the absence of proof of animus to hold hostile title.

35.Reference in this regard is made to the Judgments in the case of *Karbali*

Bequm Vs. Mohd. Sayeed (AIR 1981 SC 77). It was held that "a co-sharer in



possession of the property would be a constructive trustee on behalf of other co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustee co-sharer". The Hon'ble Supreme Court in the case of *Mohd. Zain-ul-Abdin Vs. Syed Ahmad Mohiudding (AIR 1990 SC 507)*, held that "'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus (ii) long and uninterrupted possession of the person pleading ouster and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner". In the case of *Vidya Devi @ Vidya Vati Vs. Prem Prakash and others* reported in *1995 SCC (4) 496*, the Hon'ble Supreme Court held that "what, however, emerges from a perusal of the pleadings contained in the written statement filed on behalf of the respondent is that the plea of adverse possession had not been specifically raised by setting out all the requisite ingredients which had necessarily to be pleaded in order to constitute the case of acquisition of title by adverse possession. Unless, the pleadings are complete and all the necessary ingredients to constitute ouster by adverse possession are set out in the written statement, the plea relating to the title of the property in question cannot be said to have been raised". Absolutely there is no



is without merit. Point No.3 is answered against the first defendant.

POINT No.4:

36.It is noteworthy that till the plaint was amended and schedules M to V were added, the second defendant did not seriously object to the plaintiff's suit for partition, rather he also prayed for a preliminary decree to declare the parties rights. It was only after schedules M to V were added that the second defendant hotly contested the suit praying for dismissal of the suit in his additional written statement. It is also to be noted that even in the appeal in the written arguments of the second defendant he has categorically stated that the appeal is targeted against the decree declaring the first defendant's exclusive right to certain items of properties as his self acquisition. It is surprising that in his written statement the second defendant did not whisper about the oral partition, it was only in the additional written statement that the oral partition was pleaded.

37.The oral partition set up by the second defendant in his additional written statement has not been proved by evidence and hence the same is rejected. It is pertinent to note that in O.S.No.2637 of 2004 the very said contention was rejected and confirmed by the Hon'ble Supreme Court in SLP.No.



businesses in schedules D, E, M, N did not belong to Khader Ibrahim Rowther and hence they were matters to be settled inter se between D1 and D2.

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38.CRP was filed challenging the interim order rejecting the I.A.No.11 of 2017 for stay of the proceedings in O.S.No.116 of 2012 till the disposal of the appeals. The CRP is dismissed as infructuous as the appeal is itself now disposed of.

39.It is seen that the trial Court has given cogent reasons and meticulously considered all the issues and therefore I see no reason to interfere with the trial Court's Judgment and decree dated 10.09.2008 in O.S.No.4 of 2004 on the file of Additional District Court (Fast Track Court-II) Tiruchirapalli, and hence the same is confirmed. The appeals are hence dismissed. There shall be no order as to costs. Consequently the connected miscellaneous petitions are closed.

17.08.2023

Index: Yes / No

Internet : Yes / No

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To

1.The Additional District Court
(Fast Track Court-II),

<https://www.mhc.tn.gov.in/judis>
Tiruchirapalli.



A.S.(MD).Nos.262 of 2009, 142 of 2014 &



2.The Sessions Judge,
Mahila Court,
Tiruchirappali.

3.The Section Officer,
V.R. Section,
High Court,
Madras.

N.MALA, J.

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A.S.(MD).Nos.262 of 2009,
142 of 2014 & 5 of 2011
and
C.R.P.(MD).No.2022 of 2017



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A.S.(MD).Nos.262 of 2009, 142 of 2014 &



17.08.2023