



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

ORDER RESERVED ON : 03.03.2023
ORDER PRONOUNCED ON: 01.06.2023
CORAM

HON'BLE MRS.JUSTICE N.MALA

A.S.(MD).No.24 of 2010

and

M.P(MD)No.2 of 2010

- 1.Noorjehan Beevi (Died)
- 2.Mehaboob Beevi
- 3.Ibrahim Fathima (Died)
- 4.Pathamuthu Beevi
- 5.Anneis Fathima (Died)
- 6.Syed Meera
- 7.M.Abdul Rehman
- 8.Taj Nisha Begum
- 9.M.Mansoor Ahmed Sait
- 10.Avva Beevi
- 11.Sabura Beevi
- 12.Shakkela Banu
- 13.Mohamad Sheik Sikkander
- 14.P.K.M.Abdul Razak
- 15.Shajahan
- 16.Habib Rehman
- 17.Mohamad Ithrees
- 18.Sarath Jailani
- 19.M.Aiyisha Sithika
- 20.Kanima
- 21.Inoon Jaria
- 22.H.Fathima Kani

.. Appellants

Appellants 18 to 22 are brought on record as legal heirs of the deceased first appellant
vide Court order dated 12.08.2022 made in CMP(MD).No.7147 of 2022 in AS(MD)No.24
of 2010

Vs.

- 1.Tajudeen
- 2.S.Abdul Hameed
- 3.H.Samsudeen (Died)
- 4.Alima Beevi (Died)
- 5.S.Kaja Mohideen
- 6.Naina Mohamad
- 7.Mohamad Hussain



- 8.Kaja Bahrudeen
- 9.Sirajudeen
- 10.Rahmath Beagum
- 11.Sithika Beagum
- 12.Mehraj Beagum
- 13.Dr.Vasantha Kumari Bose
- 14.Haji.A.E.S.Raja Hasper Ali
- 15.Mubarak
- 16.T.Ahamed Jalaludeen
- 17.T.Kadar Hussain
- 18.Seyadu Fathima
- 19.Hameeda Beevi
- 20.Zainabu
- 21.Haja Nazimudeen
- 22.Kamela Begum
- 23.Ahmed Kabbar
- 24.Jaffar Ali

.. Respondents

Respondents 16 to 18 are brought on record as legal heirs of the deceased first respondent *vide* Court order dated 27.06.2022 made in CMP(MD)Nos.8262, 8263, 8265 and 8266 of 2018 in AS(MD)No.24 of 2010.

Respondents 19 to 24 are brought on record as legal heirs of the deceased third respondent *vide* Court order dated 27.06.2022 made in CMP(MD)No.8262, 8263, 8265 and 8266 of 2018 in AS(MD)No.24 of 2010.

Prayer: Appeal Suit filed under Section 96 of the Civil Procedure Code, against the judgment and decree dated 21.04.2008 passed in O.S.No.563 of 2004 on the file of the Additional District Court (Fast Track Court No.2), Madurai.

For Appellants : Mr.S.Ramesh @ Ramiah
For RR13 : Mr.V.Nagendran
For RR19 to 24 : Mr.R.Subramanian
For RR 2 to 12 : No Appearance
For RR 14 to 18 : No Appearance



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A.S.(MD).No.

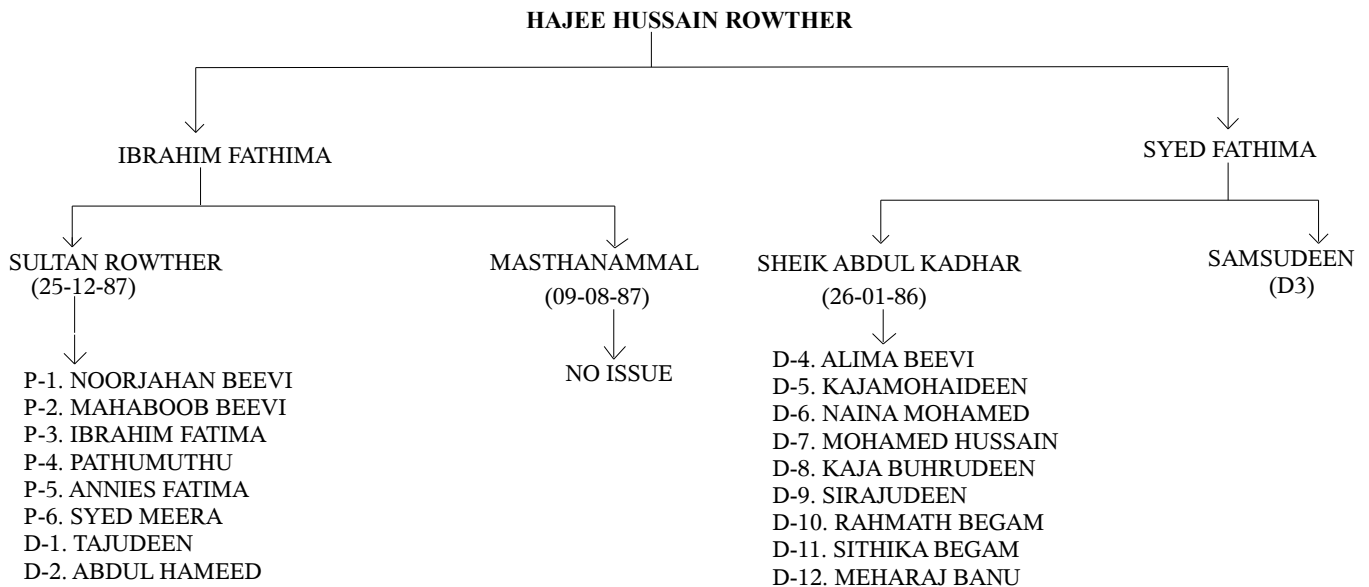


JUDGMENT

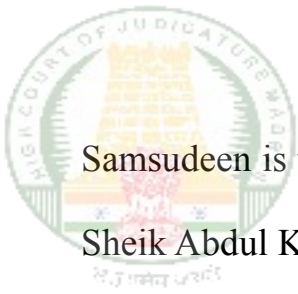
The unsuccessful plaintiffs are the appellants in this appeal.

2. The summary of facts leading to the above appeal are as follows:

The genealogy is as follows:



3. From the above genealogy, it is seen that Hajee Hussain Rowther had two wives, Ibrahim Fathima (W-1) and Syed Fathima (W-2). Ibrahim Fathima had two children viz. Sultan Rowther and Masthanammal. The defendants 1 and 2 and the plaintiffs 1 to 6 are the sons and daughters of Sultan Rowther through Ibrahim Fathima, first wife of Hajee Hussain Rowther. Masthanammal died issueless. Through the second wife Syed Fathima, Hajee Hussain Rowther had two sons viz. Sheik Abdul Kadhar and Samsudeen.



Samsudeen is the third defendant in the suit. The defendants 4 to 12 are the legal heirs of Sheik Abdul Kadhar. The defendants 13 to 15 are the tenants in the suit property.

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4. It is the case of the plaintiffs that the suit property, which consists of four items, belongs to Masthanammal. The said Masthanammal is the paternal aunt of the plaintiffs. Masthanammal purchased the suit item one along with the second wife of Hajee Hussain Rowther on 21.11.1960. The suit item 2 was gifted to Masthanammal by her father Hajee Hussain Rowther under a registered deed dated 17.06.1954. The third and fourth items of the suit property were purchased by Masthanammal *vide* documents dated 14.12.1961, 02.07.1960 and 05.04.1970. The plaintiffs therefore claim that they are entitled to 6/20 share in suit item 1 and 6/10 share in suit items 2 to 4. It is the further case of the plaintiffs that earlier the first plaintiff filed a suit against the defendants 1 and 2 and her sisters in O.S.No.476 of 1995 for partition of suit item 1 and other suit properties, so also the sixth plaintiff filed a suit in O.S.No.621 of 1995 against the defendants 1 and 2 and other sisters (plaintiffs) in respect of items 2 to 4 of the suit property among other properties. The above suits were compromised, with the parties, agreeing to file a separate suit in respect of items 2 to 4 of the present suit, which were items 6, 7 and 20 in the earlier suit.

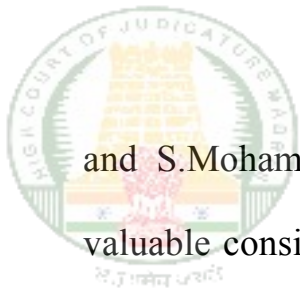
5. The plaintiffs submitted that they were in joint possession and enjoyment of the suit properties along with the other co-sharers and as misunderstandings developed between them, the plaintiffs were constrained to file the present suit for partition. The



defendants 4 to 13, remained *ex parte* before the Court below.

6. The first defendant filed a written statement claiming exclusive right by inheritance as residuary, being the son of full brother of Masthanammal. According to the first defendant, the plaintiffs were neither the sharers nor residuaries. The first defendant claimed 1/4 share in item 1 of the suit property and 1/2 share in items 2 to 4 of the suit property.

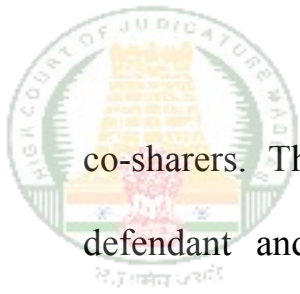
7. The third defendant was the main contesting defendant in the suit and he filed a written statement, setting a 'hiba' in his favour for the suit items 1 and 4. According to the third defendant, the said Masthanammal had gifted her 1/2 share in the suit item 1 and 4 orally in the presence of S.K.A.Kamarus Zaman and Samba Narayanan, Seeni Pethammal and Kamal Batcha. The said Masthanammal also gifted him 1/2 share in the suit item 1 and the entire 4th item. It was the third defendant's further case that Masthanammal had executed a 'hiba nama' dated 10.02.1986 confirming the gift effected in favour of the third defendant and the third defendant accepted the gift and took delivery of the possession of the gifted properties. According to the third defendant, ever since the gift in his favour by Masthanammal, he had been in the absolute possession and enjoyment of the same as exclusive owner thereof. According to the third defendant, as regards item 2 of the suit property, Masthanammal was given the said item by her father *vide* registered settlement deed dated 17.06.1954. Further according to the third defendant, even during the life time of Masthanammal, she sold suit item 2 to one S.Kaja Najumudeen, S.Ahmed Abdul Gaffer



and S.Mohammed Jaffar Ali *vide* three registered sale deeds dated 23.11.1983 for a valuable consideration. It was therefore the third defendant's contention that suit item 2 was not available for partition in view of the alienation as stated above. According to the third defendant the suit was bad for nonjoinder of necessary parties. As regards item 3 in the suit property, it was the stand of the third defendant that the said property was gifted by Masthanammal to Hameetha Beevi for starting a trust from the income realized from the suit item 3 and therefore, the suit items 2 and 3 were enjoyed exclusively by the aforesaid persons and further, the plaintiffs, who were very well aware of the said facts, suppressed the same before the Court. The third defendant further pleaded that the suit was bad for partial partition and for under valuation and improper payment of court fees.

8. The thirteenth defendant, who was a tenant in suit item 1, filed a written statement pleading that her husband was only a tenant and therefore, she was not concerned with the interse title dispute between the co-sharers. According to the thirteenth defendant, she was not a tenant of the suit, but, it was her husband who was tenant. The said property was leased out by the third defendant Samsudeen to whom her husband was paying the rent. The 13th defendant further referred to certain rent control proceedings between the plaintiffs and the thirteenth defendant.

9. The fourteenth defendant filed a written statement in the suit, wherein, it has been stated that fourteenth defendant was interested in item 2 of the suit property, as a tenant and he also submitted that he was not interested in the claim of title between the



co-sharers. The fourteenth defendant submitted that the rent was paid by him to the third defendant and that rent control proceedings between himself and third defendant regarding the payment of rent were pending.

10. In the Trial Court, the plaintiffs examined one witness i.e. the sixth plaintiffs' husband Raja Mohammed (P.W.1) and marked two exhibits. On the side of the defendants, the third defendant was examined by a Commissioner and marked thirty seven exhibits.

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

1. Whether the plaintiffs are entitled to get preliminary decree for partition as prayed for in the plaint?
2. Whether the suit is bad for misjoinder of parties?
3. To what other relief are the plaintiffs entitled?

12. The Trial Court dismissed the suit by holding that, the plaintiffs did not file a reply statement to the specific defence taken by the third defendant that Masthanammal executed a 'hiba nama' in his favour and so there was admission of Hiba by the plaintiffs. That apart the plaintiffs failed to appear before the Court and give evidence, claiming to be gosha women. The failure to give evidence would establish that the plaintiffs did not have any legal evidence in support of their case. The Trial Court further held that the suit



was bad for nonjoinder of necessary parties, as the plaintiffs failed to implead the purchasers of suit item 2. The Trial Court relied on Ex.B.21, the pleadings filed in W.O.S.No.621 of 1995 and held that as the first defendant herein admitted the gift and the 'hiba nama' in the written statement, the same would bind the plaintiff also. On the basis that admission made by one of the defendants would be binding on all parties to the suit. It further held that the gift was not disputed. The Trial Court therefore dismissed the suit also on the ground that the suit was bad for nonjoinder of necessary parties as in spite of specific plea having been raised in the written statement, the plaintiff had failed to take steps to implead the purchasers under Ex.B.32. Aggrieved by the said judgment of the Trial Court, the plaintiffs have filed the above appeal.

13. The learned counsel for the plaintiff's submitted that the finding of the trial Court that non-filing of reply statement denying the "Hiba" set up by the defendant in the written statement amounted to admission of the gift is erroneous. The learned counsel submitted that the reliance placed by the trial Court on Ex.B.21 for its finding that the "HIBA" and "HIBA NAMA" were admitted is erroneous. The learned counsel submitted that the validity of the HIBA could not be decided on the basis of a presumed admission and the burden lies on the person who sets up the HIBA to prove the same, as the HIBA **interfires** with natural line of succession.

14. The learned counsel for the respondents/defendants on the other hand submitted that the Judgment and Decree of the Trial Court was fair and justified as it was based on



the evidence and pleadings of the parties. The learned counsel further submitted that material evidence was available in proof of the oral gift. According to the learned counsel, the contentions of the plaintiffs that 'hiba nama' was not proved by examining witnesses and further that there was no reference to the 'hiba' in the 'Hiba Nama' is unsustainable, because, it is not mandatory under the Mohammedan law that a gift should be in writing. The learned counsel further submitted that Section 129 of the Transfer of Property Act is not applicable to Mohammedan gifts. According to the learned counsel, the requirement of Section 69 of the Evidence Act rises only when a dispute regarding the execution of document arises. The learned counsel therefore stated that in the absence of a denial of the hiba, the Trial Court was right in finding that the hiba was valid. On these grounds, the learned counsel prayed that the appeal was bereft of merits and the same deserved to be dismissed.

15. I have heard both the learned counsel for the plaintiffs and learned counsel for the defendants and have perused the materials placed on record.

16. The points that rise for determination in this appeal are as under:

- i. Whether the plaintiffs are entitled to the relief of partition of their 6/20 share in item 1 of the suit property and 6/10 share in items 2 to 4 of the suit properties.*
- ii. Whether the suit is bad for nonjoinder of necessary parties.*
- iii. Whether the oral gift/hiba was proved by the defendants on the facts of the case.*



iv. To what other relief are the plaintiffs entitled for?

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17. The undisputed facts of the case are that the suit properties items 1 to 4 belonged to Masthanammal, the paternal aunt of the plaintiffs and the step sister of third defendant and step aunt of the defendants 4 to 12. It is further undisputed that in suit item 1, Masthanammal had 1/2 share, vide sale Deed dated 21.11.1960. It is also undisputed that suit item 2 was the exclusive property of Masthanammal, she having got the same under the gift deed dated 17.06.1954 executed by her father in her favour. The other 2 items of the property *i.e.* items 3 and 4 were purchased by Masthanammal *vide* the sale deeds dated 11.12.1961, 02.07.1960 and 05.04.1970.

18. It is a case of the defendants that eventhough a plea was raised as regards the hiba and hiba nama dated 10.02.1986 in the written statement, the plaintiffs by not filing any reply statement challenging the said plea are deemed to have admitted the HIBA and hence proof of the HIBA was not necessary. The objection is a very technical objection and it is to be seen whether the filing of the reply statement to the written statement is mandatory in law. Order 6 of the C.P.C. deals with pleadings generally. The plaint and written statement together are called the pleadings. Order 7 deals with plaint and Order 8 deals with written statement. Under Rule 3 of order 8, the defendant is enjoined to deny such of the allegations of facts which he does not admit as true. Rule 5 of Order 8 states that every allegation of the fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant shall be taken to be admitted. The provisions of the Civil Procedure Code do not require the filing of



rejoinder/ replication/ reply statement. It is seen from a reading of Order 8 of C.P.C that except in case of a counter claim raised by the defendant, the plaintiff is not neccessitated to file reply and once the pleadings are closed the reply can be filed only with the leave of the Court. It is therefore clear that it is not necessary that the plaintiff should file a reply in every case.

19. It will be relevant to not here the consequences of failure to deny specifically the plaint averment, the failure to file the written statement and failure to file reply statement to the written statement. Under Rule 5 of Order 8 if a defendant chooses to file general and evasive replies to the plaint allegations which need to be specifically denied, then he is deemed to have admitted the same. Even failure to file a written statement does not preclude the Court from pronouncing Judgment against the defaulting defendant. But the plaintiff in this regard, stands on a different footing. He is not treated similarly by the code, in the sense that every material averment made in the written statement is presumed to be denied and the plaintiff is not ordained to file reply statement for the purpose of denial. It is seen that it is not necessary for the plaintiff to file a reply statement if the plaintiff would be satisfied by merely joining issue on a defence set up by the defendant. As already discussed, every material averment made in the written statement is presumed to be denied by the plaintiff and therefore, by not filing the reply, the plaintiff automatically joins the issue. In this regard the judgment of the Hon'ble Supreme Court in *K.Laxmanan v. Thekkayil Padmini and others* reported in 2009 (1) SCC 354 can be gainfully referred In para 29 it is held as follows:



“29. Pleadings as we understand under the Code of Civil Procedure (for short “the Code”) and as is defined under the provision of Rule 1, Order 6 of the Code consist only of a plaint and a written statement. The respondent-plaintiff could have filed a replication in respect to the plea raised in the written statement, which if allowed by the court would have become the part of the pleadings, but mere non-filing of the replication does not and could not mean that there has been admission of the facts pleaded in the written statement.....”

A Judgment of the Patna High Court in the case of *Bank of Behar Ltd vs. Madhusudan Lal and Anr.* is referred to herein in para 4 as follows:

“4. I have listened to an extraordinary argument to the effect that as the defendant alleged it and as the plaintiff did not deny, it must be taken to be proved. What holds good as regards the allegations in the plaint does not hold good as regards the averments in the written statement, and indeed as I have already pointed out, the defendant made no attempt to prove any inducement....”

20. From the above discussions, it is clear that the Trial Court fell into error in its finding that the non filing of reply statement refuting the claim of the third defendant is fatal to the claim of the plaintiffs. In my view, because of this basic fallacy in appreciating the law, the Trial Court thinking that the HIBA is deemed to be admitted failed to frame an issue on the validity of hiba. This Court would normally have remanded the matter to the Trial Court to frame an issue on the validity of hiba and consider the suit afresh. But considering the fact that the suit is of the year 2004 and as almost two decades have lapsed, I am of the view that the issue can be decided by this Court on the materials already on record. A bare reading of the written statement shows the complete lack of pleadings as regards the particulars of HIBA like the date, time, place etc. The relevant



“The said Masthanammal had gifted her half share in the suit first item i.e., door No.29, East Veli Street, Madurai to this 3rd defendant in the presence of Dr.S.K.A.KAMARUS ZAMAN and Samba Narayanan, Seeni Pethamaal and Kamal Bacha. The said Mathan Ammal had also declared that she gifted her half share in door No.29, (First item of suit property) and 2.81 acres of Nanja land in Ayyan Thindiyur Village (item 4 of the suit property) to this third defendant (H.SAMSUDEEN ROWTHER) out of her own wish.”

21. Even the basic requirements of valid HIBA like intention, acceptance and delivery of possession are not pleaded. It is further pertinent to note here that even the pleading as regards the execution of the hiba nama dated 10.02.1986 confirming the gift effected in his favour refers to acceptance of the said gift and delivery of possession only to 1/2 share in item 1, but, as far as 4th item is concerned, there is no pleading. The hiba nama is marked as Ex.B.20 and the plaint averments with regard to the said hiba nama are as follows:

“The said Masthanammal had also executed a Hiba Nama dated 10.02.1986 confirming the gift effected infavour of this third defendant herein.”

22. According to the third defendant the hiba nama was only a confirmation of the earlier oral gift. I have gone through the hiba nama marked as Ex.B.20 and I find absolutely no whisper about the oral gift. The relevant portion of the hiba nama reads as follows:

*“நீ என்னுடைய சகோதரனாகவும், உன் பெயரில் எனக்கு
இருக்கிற அன்பும் பாசத்தையும் முன்னிட்டும் நீ என்னை*



சவரக்ஷணை செய்து வருவதை முன்னிட்டும், நான் சுயமாய் கிரையம் வாங்கி சர்வ சுதந்திர பாத்தியமாய் உபயோகித்து வருகிற ரூ.49,000/- முதிப்புள்ள அடியில் கண்ட சொத்துக்களை இதன் மூலம் உமக்கு நான் தானமாக கொடுத்து சுவாதினத்தையும் இந்த நிமிடமே ஒப்புவித்து விட்டபடியால் அடியில் கண்ட சொத்துக்களை இன்று முதல் நி உன் இஷ்டம் போல் தானாதி வினியோக விற்கிரையங்களுக்கு யோக்கியமாய் சர்வ சுதந்திர பாத்தியமாய் ஆண்டு அனுபவித்துக்கொள்வாயாகவும் வரி ரிஜிஸ்தரை உன் பெயருக்கு மாற்ற மனுவும் கொடுத்திருக்கிறேன்.

அடியில் கண்ட சொத்துக்களை பொருத்து எவ்வித வில்லங்க விவகாரம் செய்யவில்லை என்று உறுதி கூறுகிறேன்."

23. Therefore the contention of the defendant that there was an oral gift and the same was confirmed by the above hiba nama is not true. In Mohammedan law a gift need not be in writing and this is acknowledged by Section 129 of the Transfer of Property Act which states that nothing in Section 123 will affect a Mohammed gift. But according to Mohammedan law 3 essential requirements have to be satisfied for the validity of a gift (ie.) 1.deed of gift by donor; 2.acceptance of gift; and 3.delivery of possession. The learned counsel for the appellants contended that the three ingredients of a valid Hiba are not proved in the present case. Before going into the facts it would be relevant to refer to the Judgment of the Hon'ble Supreme Court and the Division Bench Judgment of our High Court relied on by the counsel for the appellant. The Hon'ble Supreme Court in 2011(6) MLJ 309 held as follows:

"In Mahboob Sahab v. Syed Ismail and Others AIR 1995 SC

1205: (1995) 3 SCC 693, this Court referred to the PRINCIPLES OF



“5. under Section 147 of the Principles of PRINCIPLES OF MAHOMEDAN LAW by MULLA, 19th Edn., edited by Chief Justice M.HIDAYATHULLAH, envisages that writing is not essential to the validity of a gift either of moveable or of immovable property. Section 148 requires that it is essential to the validity of a gift that the donor should divest himself completely of all ownership and dominion over the subject of the gift. Under Section 149, three essentials to the validity of the gift should be, (I) a declaration of gift by the donor, (ii) acceptance of the gift, express or implied, by or on behalf of the donee, and (iii) delivery of possession of the subject of the gift by the donor to the donee as mentioned in Section 150. If these conditions are complied with, the gift is complete. Section 150 specifically mentions that for a valid gift there should be delivery of possession of the subject of the gift and taking of possession of the gift by the donee, actually or constructively.”

So also Division Bench of this Court reiterated the same legal principles on the essential elements of hiba in *2023(1) LW 705*.

24. In the facts of the case, it is to be seen if the said ingredients are satisfied. The third defendant in his written statement refers to three witnesses, but, none of the said witnesses has been examined and further, as noted above even the date and time of thehiba are not given. There is absolutely no evidence except the self serving evidence of the third defendant to show the declaration of gift by donor, the acceptance of the same by



donee and delivery of possession. The oral evidence of D.W.1 with particular reference to possession is as follows:

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"3ம்பிரதிவாதி சான்றாவணம் 20-ல் வரி ரிஜிஸ்டர் மாற்ற மணுவும் கொடுத்து இருக்கிறோன் என்று கண்டு இருக்கிறது. 1வது இலக்க சொத்துக்கும், 4வது இலக்க சொத்துக்கும் வரி பதிவு இன்று வரை மஸ்தான் அம்மாள் பெயரில் இருந்து வருகிறது என்று சொன்னால் தவறு. யார் பெயரில் இன்று வரை வரி பதிவு இருந்த வருகிறது என்பதற்கு பட்டாவோ, கூரி விதிப்பு ரிஜிஸ்டரை தாக்கல் செய்யவில்லை. 10.02.86 முன்னால் தானசெட்டில்மெண்ட் பற்றி பேசி சொத்தை பெற்றுக்கொண்டேன். 3ம்பிரதிவாதி சான்றாவணம் 20-ல் ஏற்கனவே பேசி சொத்தை கொண்டேதாக முடிவாகவில்லை. 3ம்பிரதிவாதி தரப்பு சான்றாவணம் 20-ல் சுவாதினத்தில் இந்த நிமிடமே ஒப்புவித்தபடியால் என்று கண்டு இருப்பது தவறு. டாக்டர் காமாருஸ்சமான் எங்களுடைய குடும்ப மருத்துவர் ஆவார். எங்களுடைய எல்லா பத்திரங்களிலும் அவர் சாட்சி கையொப்பம் போட்டுள்ளார் என்று சொன்னால் சரிதான். மஸ்தான் அம்மாளுக்கு கையெழுத்து போட மட்டும் தான் தெரியும் 3ம்பிரதிவாதி சான்றாவணம் 20-ல் கண்டு உள்ள வாசகங்கள் யார் சொன்னார் என்று எனக்கு ரபகம் இல்லை. மஸ்தான் அம்மாள் 1987-ல் இறந்து போனார் ஆனால் எந்த தேதி என்று எனக்கு தெரியாது. மஸ்தான் அம்மாள் இறந்து போன இறப்பு சான்றிதழ் தாக்கல் செய்து இருக்கிறனோ என்று ரபகம் இல்லை. 3ம்பிரதிவாதி தரப்பு சான்றாவணம் எண், 20-ல் பத்திர ஸ்டேம்புகளை டாக்டர்.காமாருஸ்சாமன் வாங்கி வந்தார். எனக்கு டாக்டர் காமாருஸ்சாமன் எங்களது குடும்ப நண்பர் ஆனதாலும், விபரம் உள்ளவர் என்பதால் அவரை பத்திரம் வாங்க சொன்னேன். 3ம்பிரதிவாதி தரப்பு சான்றாவணம் எண்.20-ல்



யார் தட்டச்சு செய்தார் என்பது குறிப்பிட்டவில்லை. எவ்வளவு ரூபாய்க்கு பத்திரம் வாங்க வேண்டும் என்பதும் எனக்கு தெரியாது. 3ம்பிரதிவாதி தரப்பு சான்றாவணம் 20-ல், 1997 பின்பு தானும் டாக்டர் சாமனும் சேர்த்து தயாரித்து என்று சொன்னால் சரியல்ல. 3ம்பிரதிவாதி தரப்பு சான்றாவணம் 20ஐ தவிர மற்ற ஆவணங்களை மஸ்தான் அம்மாள் அவர்கள் பதிவு செய்யப்பட்ட பத்திரம் ஆக கொடுத்து உள்ளால் என்று சொன்னால் சரி....."

From the above evidence of D.W.1, it is clear as noonday that there is absolutely no evidence on the vital ingredients of Hiba.

25. In the light of law and the facts of the case issue No.3 is answered against the respondents.

ISSUE NO.2:

26. On the issue of nonjoinder of necessary parties the trial Court merely stated that inspite of specific plea being taken the plaintiff did not take steps to implead the purchaser of item 2. It is seen from the written statement of the thirteenth defendant that, though the thirteenth defendant had taken up the plea of nonjoinder of necessary party, the particulars of the purchasers of item 2 from Masthanammal are not given. It is the case of the plaintiffs that the purchasers of item 2 of the property are none other than the third defendant's own sons. It is further seen that the plaintiffs objected to the marking of Ex.B.

30 to Ex.B.32, which are the xerox copies of the sale deeds said to have been executed in



favour of the third defendant's sons. The marking of the said documents was objected to and the same was marked subject to objection.

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27. According to the plaintiffs Ex.B.30 to Ex.B.32 were inadmissible in evidence, as only xerox copies of the same were filed and that too without making out a case for receipt of secondary evidence. It is not known as to why the defendant did not produce the original sale deeds, when the purchasers were his own sons. The defendant has not given any plausible explanation for not marking the original documents. The plea of non-joinder of necessary parties is based on Exs.B.30 to Ex.B.32. The trial Court even without considering the admissibility of the documents dismissed the suit for non-joinder of necessary parties. It is clear from the facts that the foundation for the admission of secondary evidence has not been laid and hence the Ex.B30 to Ex.B32 relied on by the defendants cannot be accepted in evidence. The Hon'ble Supreme Court in its Judgment in the case of *R.V.E.Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P.Temple* reported in 2004 (1) Law weekly 728 has gone into distinction of objections to admissibility of a documents on the ground of document itself being inadmissible in evidence and mode of proof of the document. The Hon'ble Supreme Court has clearly held that when the objection is taken as to the admissibility of the document, the same can be raised at any stage of the proceedings, but if the objection is taken to the mode of proof, then the same can be taken at the time of marking of the document. The Hon'ble Supreme Court held as follows:

“20. Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The



objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as “an exhibit”, an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit.....”

28.It is therefore seen that plea of inadmissibility of the document is valid and therefore, Ex.B.30 to Ex.B.32 are held to be inadmissible in evidence and cannot form the basis for the plea of nonjoinder of necessary parties. Therefore, the finding of the lower Court that the suit is bad for nonjoinder of necessary parties is unsustainable and the same is set-aside and issue No.2 is found in favour of the appellants.

29.I therefore find on issue Nos.1 and 4 that the appellants are entitled to 6/20 share in Item 1 of the suit property and 6/10 share in Items 2 to 4 of the suit properties. For all the above reasons, I am of the view that the Judgment and Decree of the Trial Court is unsustainable, therefore the same is set aside.

30.In view of all the above discussions, the appeal is accordingly allowed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.



A.S.(MD).No.



01.06.2023

dsn

Index: Yes/No

Speaking Order: Yes/No

Neutral Citation: Yes/No

To

1. The Additional District Court (Fast Track Court No.2),
Madurai.

2. The Section Officer, V.R. Section,
Madurai Bench of Madras High Court.

N.MALA.J.,

dsn/sn



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A.S.(MD).No.



A.S.(MD)No.24 of 2010

01.06.2023