

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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SECOND APPEAL No.8 of 2000

JUDGMENT:

This appeal under Section 100 of the Code of Civil Procedure, 1908 by the unsuccessful plaintiffs is directed against the decree and judgment dated 29.01.1999 of the learned I Additional Chief Judge, City Civil Court at Secunderabad passed in AS.No.71 of 1995. The learned Additional Chief Judge while allowing the aforementioned appeal of the 1st defendant had set aside the decree and judgment dated 14.07.1995 of the learned I Assistant Judge, City Civil Court, Secunderabad passed in OS.No.892 of 1990 and had dismissed the said suit.

2. I have heard the submissions of the learned senior counsel for the appellants/plaintiffs ('the plaintiff's, for brevity). In spite of giving sufficient opportunities, there was no representation for the respondents and, therefore, it was treated that there are no submissions to be made on behalf of the respondents. I have perused the material record.

3. Be it noted that the 5th appellant/5th plaintiff had died during the pendency of this second appeal and his legal representatives were brought on record as appellants 10 to 13. The 1st defendant, who is the 1st respondent herein, had also died and his legal representatives were brought on record as respondents 2 to 8 in this second appeal.

4. At the time of admission of this second appeal, the following substantial questions of law were formulated.

1. Whether the reasons given by the appellate court for discarding Ex.A1 gift deed, are relevant and legally sustainable.

2. Whether the admission of DW1 relied upon by the trial Court in paragraphs 10 and 11 has been overlooked by the appellate Court thereby vitiating its finding.

[Reproduced verbatim]

5. To adjudicate the *lis* and answer the said substantial questions of law, it is necessary to refer to the pleadings of the parties and the facts that lead to the filing of this second appeal by the plaintiffs.

5.1 The introductory facts, in brief, are as follows: - 'The plaintiffs had brought the suit for a direction to the defendants to deliver vacant possession of the premises bearing nos.1-18-10 and 11 at Gun Bazar, Secunderabad and to pay Rs.1,000/- towards damages for illegal use and occupation from 16.04.1990 to 15.09.1990 at the rate of Rs.200/- per month and for costs. However, the plaint schedule is confined to a portion of house no.1-18-10 and 11 more fully described within the boundaries mentioned therein. The suit was resisted by the 1st defendant alone by filing a written statement. The 2nd defendant did not contest the suit. After full fledged trial, the trial Court had decreed the suit and directed the 1st defendant to vacate the schedule premises (portion of the house property) and deliver vacant possession of the same within two months from the date of the judgment of the trial Court to the plaintiffs and had also further awarded damages of Rs.1,000/- and future damages at the rate of Rs.200/- from the date of the suit till date of delivery of possession. As already noted, the 1st appeal preferred by the aggrieved 1st defendant was allowed. Therefore, the plaintiffs are before this Court.

5.2 The case of the plaintiffs, in brief, is this:

Originally one Sardar Bee was the owner of house bearing nos.1-18-10 and 11 situate at Gun Bazar, Police lane, Begumpet, Secunderabad Contonment. Sardar Bee had died in the year 1934 leaving behind her, her three sons namely Masood Khan, Ibrahim Khan and Ahmed Khan and also one daughter by name Sabira Khatoon. The said Sabira Khatoon is the mother of the defendants herein. Among the said three sons, Ahmed Khan had left for Pakistan in or about the year 1948. The suit house was under the custody of the custodian of Evacuee property. The husband of the 1st plaintiff and the father of the plaintiffs 2 to 9 by name late Mirza Ismail Baig had contested the matter before the custodian of Evacuee property and at that time he had met all the expenditure and got the suit house released. But, at the time of release, the said Mirza Ismail Baig had got the said property released in the name of his mother Sabira Khatoon, who is the daughter of the original owner- Sardar Bee. Later, the said Sabira Khatoon had executed a gift settlement deed on 02.01.1975 in favour of Mirza Ismail Baig and the said gift deed was registered in the

Sub-Registrar's Office, Maredpally, Secunderabad. At the request of the defendants, Mirza Ismail Baig, who is the husband of the 1st plaintiff and the father of the plaintiffs 2 to 9 had permitted the defendants to occupy the portions of the suit premises which are shown in the plaint sketch. On the instigation of the defendants, Sabira Khatoon who is their mother had filed a suit in OS.No.3646 of 1984 on the file of XI Assistant Judge, City Civil Court, Secunderabad for declaration and cancellation of Gift Deed executed in favour of late Mirza Ismail Baig. During the pendency of the said suit, Mirza Ismail Baig had died and the plaintiffs herein were brought on record as his legal representatives. The said Sabira Khatoon had also died on 06.11.1988 and ultimately the said suit was dismissed on 20.12.1988. Since the accommodation in possession of the plaintiffs is insufficient for their large family, they had requested the defendants to vacate and deliver vacant possession of the portion which is under their occupation as licensees. The defendants went on postponing the matter on some ground or the other. As such the plaintiffs were forced to terminate the license granted to the defendants on 02.04.1990 by written communication and had directed the defendants to handover the vacant possession to the plaintiffs by 15.04.1990. The 2nd defendant received the notice. The 1st defendant having come to know the contents of the said notice had returned the said notice in collusion with the postal authorities. There was no reply from the defendants 1 and 2. In fact the 2nd defendant after receiving the said notice had handed over a portion under his occupation to the 1st plaintiff. Therefore, he is a formal party to the suit. The portion in the occupation of the 1st defendant will fetch a rent of Rs.200/- per month. Hence the suit is filed for delivery of vacant possession of the portion of the suit premises no.1-18-10 and 11 Gun Bazar, Police lane, Secunderabad more fully described in the schedule annexed to the plaint and for recovery of profits.

5.3 The defence of the 1st defendant (since died), in brief, is this:

The material allegations in the plaint are false. The house bearing nos.1-18-10 and 11 situate at Gun Bazar, Secunderabad Contonment is the ancestral property of the plaintiffs and the defendants 1 and 2. It originally belonged to Sardar Bee, the grandmother of the defendants 1 and 2 and Mirza Mohammad Baig and Mirza Ismail Baig, who is the husband of the 1st plaintiff herein. The said Sardar Bee had three sons viz., Masood Khan, Ibrahim Khan and Ahmed Khan. Two

sons namely Masood Khan and Ibrahim Khan had died. Ahmed Khan had left for Pakistan. The house bearing nos.1-18-10 and 11 thus originally belonged to Sardar Bee. The Government had erroneously declared the suit house as Evacuee property. Sardar Bee had contested the matter and got the suit property released in her favour. Therefore, it is false to say that the husband of the 1st plaintiff and the father of the plaintiffs 2 to 9 by name Mirza Ismail Baig had contested the matter and met all the litigation expenses and had obtained the release of the property in the name of Sabira Khatoon. It is absolutely false to say that Sabira Khatoon had executed a registered gift deed dated 02.01.1975 in the name of Mirza Ismail Baig. Sabira Khatoon did not execute any such gift deed as alleged by the plaintiffs. The husband of the 1st plaintiff i.e., Mirza Ismail Baig had permitted the defendants to occupy portion of the suit premises as shown in the sketch is false. It is false to say that Sabira Khatoon had filed the former suit-OS.No.3646 of 1984 at the instigation of the defendants. The said suit was dismissed on the death of Sabira Khatoon. She had filed the said suit on her own accord having come to know that Mirza Ismail Baig was claiming the property under the guise of the Gift Deed which she did not execute. The 1st defendant is in the occupation and possession of house bearing no.1-18-10. The plaintiffs are in occupation of the house bearing no.1-18-11. The entire property bearing nos.1-18-10 and 11 is the joint family property. The 1st defendant and others who are having a share in the property had demanded the plaintiffs 1 to 9 for partition. But, they had declined to agree for partition and had set up title in the suit house. This defendant is in occupation of the house bearing no.1-18-10 in his own right, but, not as a licensee. The question of termination of the alleged licence does not arise. This defendant is not aware of the alleged termination notice. There is no cause of action. The suit may be dismissed.

5.4 Taking into consideration the above pleadings, the trial Court had framed the following issues for trial.

- 1. Whether the defendants are licensees of plaintiffs?**
- 2. Whether the plaintiffs are entitled for recovery of vacant possession by evicting the defendants from suit property?**
- 3. Whether the plaintiffs are entitled for damages of Rs.1,000/-?**
- 4. To what relief?**

5.5 At trial, the 1st plaintiff and a supporting witness were examined as PWs1 and 2 and exhibits A1 to A4 were marked on the plaintiffs' side. The 1st defendant was examined as DW1 and no documents were exhibited on his side. As already noted the trial Court decreed the suit. However, the Court of first appeal had allowed the appeal of the 1st defendant and had dismissed the suit of the plaintiffs.

6. The learned senior counsel for the plaintiffs would contend as follows:

The relationship between the parties is not in dispute. The plaintiffs are claiming exclusive right whereas the 1st defendant is claiming that the plaintiffs are in occupation of the portion of the house 1-18-11 and that he is in occupation of 1-18-10 and that the property is liable for partition among the defendants 1 and 2 and the legal heirs of Mirza Ismail Baig i.e., the plaintiffs herein. The suit is filed for recovery of possession of the portion in the occupation of the 1st defendant; as the 2nd defendant had already delivered the portion in his occupation, he was impleaded as the 2nd defendant as a formal party. The property originally belonged to Sardar Bee is not in dispute. She had three sons and a daughter, Sabira Khatoon. That daughter is the mother of the defendants 1 and 2. After Ahmed Khan, who is one of the sons of Sardar Bee had left for Pakistan and when this property was wrongly claimed by the Government as Evacuee property, Mirza Ismail Baig had contested the matter before the custodian of Evacuee property by spending the necessary money. However, at the time of the release of the property by the custodian, he had obtained the release in the name of Sabira Khatoon. Sabira Khatoon had executed a registered gift settlement deed dated 02.01.1975 under exhibit A1. She had later filed a suit-OS.No.3646 of 1984 at the instigation of the defendants for cancellation of the Gift Deed. During the pendency of the said suit Mirza Ismail Baig and also Sabira Khatoon have both died. That suit was dismissed on 20.12.1988. The Gift Deed has attained finality. It is true, valid and binding on the defendants. The trial Court, having appreciated the facts properly and the evidence correctly, had recorded findings on all issues in favour of the plaintiffs and had decreed the suit for eviction and also for profits. When a suit is filed for cancellation of the Gift Deed and was dismissed, it operates as estoppel by conduct. The defendants who are claiming through Sabira Khatoon cannot dispute the genuineness of the Gift Deed. No suit for partition was filed by the 1st defendant though he is claiming that he is having a share in the property. DW1 had admitted in his evidence that he was permitted by

late Mirza Ismail Baig to occupy a portion of the suit property. He was only in occupation of the suit house since 02.01.1975. The Court below ought to have held that the defendants are only licencees and have no right and interest in the property. Sardar Bee died in the year 1934. Merely on some discrepancies in the description of the parties to the Gift Deed, the Court below had erroneously suspected exhibit A1 gift deed and had erroneously held that the defendants are not the licencees and that exhibit A1 is a totally suspicious document. In the Gift deed, it is wrongly described that the executant is Sardar Bee though it was executed by Sabira Khatoon, the daughter of Sardar Bee. The finding of the Court below that the thumb impressions on the document-exhibit A1 are that of Sardar Bee and that she was alone identified as the executant is not correct. The wrong mention of the name in the document is not by itself the deciding factor. The Court below ought to have taken the explanation offered and ought not to have read certain stray sentences in the evidence to non suit the plaintiffs by ignoring the admissions in favour of the plaintiffs. The dismissal of the suit filed by Sabira Khatoon certainly advances the case of the plaintiffs and is sufficient to hold that the Gift Deed is valid. The certified copies of the plaint, the written statement, the judgment in OS.No.3646 of 1984 on the file of VII Assistant Judge, City Civil Court, Secunderabad are also produced before this court along with CMP.No.159 of 2000 to receive the same as additional evidence i.e., as exhibits A5 to A7. The Court below had failed to do justice in the matter. The judgment of the Court below reversing the well considered judgment of the trial Court is manifestly erroneous and palpably unjust in the light of the registered gift settlement deed dated 02.01.1975 executed by Sabira Khatoon in favour of her son Mirza Ismail Baig, who is the husband of the 1st plaintiff and father of the plaintiffs 2 to 9. Hence, the appeal may be allowed and the decree and judgment of the Court below may be set aside and the decree and judgment of the trial Court be restored.

7. As already noted no submissions are advanced on behalf of the respondents, who are the legal representatives of the deceased 1st defendant. To give a quietus to the *lis* at this stage this Court deems it appropriate to accord permission to the plaintiffs to adduce additional evidence by allowing CMP.No.159 of 2000. Accordingly, the copies of the plaint, the written statement and the judgment in OS.No.3646 of 1984 on the file of VII Assistant Judge, City Civil Court,

Secunderabad, which are public documents, are received on file as additional documents and are permitted to be exhibited as exhibits A5 to A7 as a reference to the same is necessary for arriving at a just decision in this appeal.

8. Now the substantial questions are taken up.

9. Admittedly, the property originally belonged to Sardar Bee. She had three sons by name Masood Khan, Ibrahim Khan and Ahmed Khan. Two of her first mentioned sons had died and her 3rd son Ahmed Khan had left for Pakistan in or about 1948. Subsequently, the Government took possession of the entire house property bearing nos.1-18-10 and 11 considering it as an Evacuee property. Subsequently, the property was released in the name of Sabira Khatoon. All these facts are not in dispute. According to the plaintiffs, the 1st defendant is in possession of a portion of the entire house as a licensee and that the said licence was terminated. According to the plaintiffs' case that portion in the possession of the 1st defendant is the plaint schedule property. Whereas the 1st defendant claims that he is in possession of the house portion bearing no.1-18-10 in his own right and not as a licensee and that the entire house property bearing nos.1-18-10 and 11 is the joint family property of the defendants 1 and 2 and that of late Mirza Ismail Baig and that, therefore, the plaintiffs who are the legal representatives are only having a share in the above said entire house property but not exclusive rights over the entire property.

10. Now the plaintiffs who are the wife and children of Mirza Ismail Baig are seeking recovery of possession of the portion in the occupation of the defendants 1 and 2 and also past profits in a sum of Rs.1,000/- for certain period and future profits at the rate of Rs.200/- per month. The plaintiffs had specifically admitted that at the time of release of the property by the custodian of evacuee property the property was released in the name of Sabira Khatoon who is no other than the mother of the defendants 1 and 2. The plaintiffs' case is that Sabira Khatoon had executed a registered gift/settlement deed dated 02.01.1975 under exhibit A1 in favour of Mirza Ismail Baig and, therefore, he has become the absolute owner of the entire property and that the defendants are licensees having entered into possession, of the respective portions in their respective occupations, with the permission of Mirza Ismail Baig. As already noted, the possession of the 1st defendant over the plaint schedule property is admitted. On the other hand, the case of the 1st defendant is that the property was released in the name of Sardar Bee, the original owner, who is

no other than the mother of Sabira Khatoon. The 1st defendant specifically contends that the plaintiffs are in possession of 1-18-11 and that he is in possession and occupation of 1-18-10 and that the entire property with house nos.1-18-11 and 1-18-10 is the joint property of the defendants and Mirza Ismial Baig and that, therefore, he is having a share in the property as it is a joint property.

11. Even though the trial Court had believed exhibit A1-Gift Deed, the Court below did not accept the truth and validity of exhibit A1; and the Court below having recorded a finding that it is a suspicious document had allowed the appeal and dismissed the suit of the plaintiffs. Therefore, it is necessary to refer to the contents of exhibit A1. Admittedly, as per the pleadings in the plaint, exhibit A1 was executed by Sabira Khatoon. But a perusal of exhibit A1 would bring to the fore the following facts: 'It is an indenture of deed of Gift Settlement executed by Sardar Bee, W/o. Mirza Khalendar Baig @ Dadey Sab, aged about 70 years. Thus, the executant of the document-exhibit A1, as per the recitals of the said document is Sardar Bee, aged 70 years but not Sabira Khatoon. No doubt, the said document discloses that it was executed in favour of Mirza Ismail Baig, S/o Mirza Khalendar Baig, aged 39 years. In this exhibit A1, it is mentioned that settler is the sole owner of the property i.e., the house property bearing no.1-18-10 and 11 and the settlee is her son. However, wherever the thumb impressions of the executant are found on the document, the same were mentioned as the LTIs (Left Hand Thumb Impressions) of Sardar Bee. Nowhere it is mentioned in the document that the LTIs are that of Sabira Khatoon though it is the specific case of the plaintiffs that the said exhibit A1 was executed by Sabira Khatoon. Even on the reverse of the first page of the document where the thumb impression of the executant was taken, obviously before the Sub-registrar at the time of registration, it was mentioned as the mark of Sardar Bee, W/o Mirza Khalendar Baig. In this exhibit A1-gift settlement deed of the year 1975, the age of the executant was mentioned as 70 years while mentioning the name of the executant as Sardar Bee. That Sardar Bee died in the year 1934 is borne out by the evidence. Even this age of the executant as mentioned in exhibit A1 does not correspond to the age of Sabira Khatoon as she was not 70 years of age and was much younger by the year 1975. The plaintiffs had now filed the copy of the plaint in the former suit – OS.3646 of 1984 filed by Sabira Khatoon and it is received as additional evidence. In the said plaint, the age of Sabira Khatoon in the year 1984 was shown as 60 years. If one goes by this age, the age of Sabira Khatoon by the

year 1975 works out to 51 years but not 70 years. In this plaint in the said former suit it is specifically averred that exhibit A1 Gift Settlement deed was obtained falsely through someone claiming to be Sardar Bee and it was not executed by Sabira Khatoon. The plaint in the instant suit is silent as to when the custodian of evacuee property had released the property. However, in the plaint in the former suit it was averred that a release deed was executed in the year 1984 on 21.05.1984. The details of such release deed could not be culled out either from the plaint or from the written statement of Mirza Ismail Baig filed in that suit which are also received as additional evidence in this second appeal. When the release deed was executed in the year 1984, it remained unexplained as to how the gift settlement deed was executed even by the year 1975. Exhibit A7, the copy of the judgment in the former suit, would show that the said suit was dismissed as adjusted out of Court and it was not brought to the notice of the Court that both the plaintiff and the defendant had died. Therefore, the said judgment is a nullity as both the parties to the suit had died and their LRs were not brought on record. Though the learned senior counsel for the plaintiffs had placed reliance upon a decision in

K.G. Premshankar v. Inspector of Police and another in support of the proposition that reliance can be placed on the previous judgment as provided under Sections 40 to 43 of the Indian Evidence Act in a civil suit between the same parties or the successors in interest, what is to be noted is that in the instant case the former suit filed by Sabira Khatoon against Mirza Ismail Baig was dismissed as adjusted out of Court after the deaths of both the parties and without bringing on record their legal representatives. Sections 40 to 43 of the Indian Evidence Act, therefore, have no application and the ratio in the decision is not helpful to the plaintiffs to advance their case. In exhibit A1 there was no recital as to when the property was released by the custodian of evacuee property. The plan annexed to the settlement deed also bears the thumb impression which is described as that of Sardar Bee. These are some of the suspicious circumstances which weighed with the Court below when it held that exhibit A1 is a suspicious document.

12. Further, the only witness examined in connection with this document is PW2. He had stated in his examination-in-chief that he is a resident of Gun Bazar and that the house bearing no.1-18-10 and 11 situate at Gun Barzar is gifted away by Smt Sardar Bee, W/o Mirza Khalendar Baig in favour of Mirza Ismail Baig and that the donee is the son of the donor under exhibit A1 and that it was duly registered and that he went to the Registrar's office and attested the deed. In his evidence, he had

identified his signature on exhibit A1 and had stated that at first Sardar Bee signed and then he had put his signature and had left that place. Thus, even in his examination-in-chief he had stated that the executant is Sardar Bee though he had also stated that the donee is the son of the donor. In his cross examination it was elicited that Sardar Bee had four sons and he does not know as to how many daughters she has and that Sardar Bee was aged about 70 years at the time of exhibit A1 and that he does not know the full name of the husband of Sardarbee but he is called as Dada. He also could not give the names of the sons of Sardar Bee but had stated that they have two names. He had further stated that the 1st defendant is the son of Sardar Bee. When it was suggested to him that 1st defendant is not the son of Sardar Bee he had denied the suggestion as not true. He had specifically stated that he does not know Sabira Khatoon and that he also does not know whether Sabira Khatoon is the daughter of Sardar Bee, but had stated that Mirza Ismail Baig is the son of Sardar Bee. He had denied the suggestion that Sardar Bee was not alive at the time of exhibit A1 and asserted that Sardar bee affixed her thumb impressions and denied the suggestion that Sardar bee did not execute exhibit A1 and it was done by someone else. Thus, his evidence adds more to the confusion and suspicion rather than clarifying the position. In the plaint there is no whisper that the name of the executant of exhibit A1 was wrongly described as Sardar Bee in the entire document though the executant is Sabira Khatoon. It is not even got stated by PW2 that though the executant is Sabira Khatoon her name was wrongly mentioned as Sardar Bee in exhibit A1. The law is well settled that any amount of evidence without a foundation in the pleading is of no avail and cannot be looked into. No deed of rectification was executed rectifying the mistake, if really the same was a mistake. Having regard to these discrepancies which had remained unexplained in the pleadings and the evidence, the court below had discarded exhibit A1 from consideration and had held that it is a suspicious document. When such a view is also plausible and possible on an analytical examination of the pleadings and the evidence, this Court finds that the Court below is justified in holding that exhibit A1 is a suspicious document and it is unsafe to rely upon it when the identity of the executant is doubtful and when it is also doubtful as to whether Sabira Khatoon was the executant in reality. The learned senior counsel had placed reliance on certain passages in the 1998 - 4th Revised Edition of Practical Guide to Deeds and Documents by Sri G.M. Divekar, Advocate(solicitor) published by Hindu

Law House in regard to effect of alterations made in a deed executed and accidental mistakes in the deed, which do not affect the deed or rights of persons there under. However, in the case on hand, in view of the contents of the deed and the evidence of PW2, a strong suspicion would arise as to the identity of the executant, which remained unexplained in the pleading of the plaintiffs and not clarified in the evidence brought on record.

13. Be that as it may. Admittedly, the original owner is Sardar Bee. She had three sons and a daughter i.e., Sabira Khatoon. On her death the property devolved on her legal heirs as per Muslim law of succession. Though the property was taken possession by the Government as an evacuee property ultimately it was released by the custodian of evacuee property. The plaintiffs contend that it was released in favour of Sabira Khatoon at the instance of Mirza Ismail Baig. The release deed under which the custodian has released the property has not seen the light of the day. Whether the property was released in the name of either Sabira Khatoon or in any other name, it inures for the benefit of all the legal heirs of Sardar Bee, the original owner. Therefore, as per muslim law of succession, Mirza Ismail Baig and the defendants 1 and 2 who are brothers and are sons of Sabira Khatoon will have equal shares in the property along with other sharers who may have shares as per muslim law of succession depending upon whether the parties belong to Shia sect or Sunni sect. Be that as it may. Nonetheless, without disturbing the finding supra that exhibit A1 is a suspicious document and for a moment assuming that exhibit A1 was executed by Sabira Khatoon, yet no right, title and interest in the entire property passes to Mirza Ismail Baig and the said document does not affect the rights of his brothers in the property to which they are entitled to as per the law of succession. Dealing with the admissions of DW1 and the contention that he had admitted that he is a licensee in the suit premises, the Court below held that the permission to continue in a portion is only an arrangement between the brothers and that when the plaintiffs had no exclusive right, the question of branding the defendants as licensees does not arise for consideration. This Court also found on an analytical examination of the evidence that the plaintiffs had failed to establish their exclusive right to the plaint schedule property; therefore, when the plaintiffs had failed to establish their right to seek eviction, the plaintiffs cannot be permitted to rely upon the stray admission of DW1 or for that matter on the weakness of the defendants as

the law is well settled that in a suit for eviction the plaintiffs have to succeed on their own strength but not on the weakness of the defendant.

14. Having regard to the reasons, this Court finds no reasons calling for interference with the well considered findings of the Court below supported by valid and cogent reasons and, hence, holds that the judgment and decree of the Court below do not suffer from any infirmities calling for interference. Accordingly, this Court holds that there is no substance in the substantial questions of law and that the second appeal is devoid of merit and is liable to be dismissed.

15. In the result, the Second Appeal is dismissed. There shall be no order as to costs.

Miscellaneous petitions, pending if any, in this second appeal shall stand closed.

M. SEETHARAMA MURTI, J

28th October, 2015

Vj/