

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CCCA No.318 OF 2003

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JUDGMENT:

This appeal is preferred by the D.3 (3rd defendant) out of 4 defendants impugning the preliminary decree and judgment dated 02.05.2003 in O.S.No.782 of 1995 on the file of the learned V Senior Civil Judge, City Civil Court, Hyderabad, filed by the 2 plaintiffs for partition of the plaint schedule house property and for allotment of 1/8th share to D.1, 7/40th share to each of the plaintiffs and D.2, and 7/20th share to D.3, with the contentions in the grounds of appeal that the trial Court failed to consider the documentary evidence under Ex. B.5 certified copy of RC.No.147 of 74, B.6 certified copy of RC No.148 of 74 and B.12 Memorandum of gift dated 30.07.1953 coupled with Ex. B.14 to B.22(letter from MCH, dated 09.08.1953, English translation of Ex.B.12, tax receipts, coupled with the evidence of D.W.2 which would clearly prove that the grandfather of the appellant gifted the property in favour of his father under an oral gift made on 07.05.1952 and subsequently confirmed in writing under Ex.B.12 on 30.07.1953; as such, the father of the appellant being the absolute owner and exclusive possessor of the suit schedule property, made a gift in favour of his wife(D.1) during his lifetime and in turn the D.1 being the mother of the appellant, gifted the suit schedule property in favour of the appellant herein and as such, the appellant herein is the absolute owner and exclusive possessor of the suit schedule property; that the respondents herein have no right or interest, whatsoever to claim the suit schedule property and the possession of the respondents 1 and 2(plaintiffs in the suit) is a permissive possession to the extent of the portion of the schedule property shown in Red and the remaining portion of the property which is shown in Green was in possession of the tenants who are remitting rents to the appellant herein and the Blue coloured portion is in exclusive possession of the appellant and that

the trial Court without considering Ex.B.12 and by taking extraneous considerations, decreed the suit for partition among the parties on the ground that the attesting witnesses on the document is not examined, the said finding is erroneous for the reason that the attesting witnesses were already dead and no person acquainted with the document is alive and, on the contrary, the lower Court failed to see that the suit schedule property was mutated in the name of the father of the appellant on the basis of Ex.B.12 coupled with possession which was accepted and acted upon that the trial Court has not given independent findings to each issue, by discussing issue No.1, the other issues were decided in favour of the respondents(plaintiffs) which is contrary to oral and documentary evidence on record and failed to consider presumption of law under old documents and the public documents which need not be proved independently but only to be acted upon, that the trial Court failed to consider the admitted fact of the respondents 1,2 and 4 (plaintiffs and D.2) that the appellant(D.3) is entitled to 1/8th share of D.1 and his 7/4th share and hence, to allow the appeal by setting aside the preliminary decree and judgment passed by the trial Court.

2. For clarity to say, the suit filed was originally against the 3 defendants. D.1 is mother of the plaintiffs and D.2 is sister of plaintiffs and D.3 is brother of plaintiffs. D.4 is no other than the paternal aunt's son to the plaintiffs. The D.4 himself subsequent to the suit on coming to know according to him, came on record as per the orders in I.A.No.999 of 2002 dated 28.08.2002. It is needful to say after filing of the suit at appearance of the D.1 and before filing any written statement of defence by her much less by others for even adopting by her, she breathed lost intestate on 13.11.1996.

3. The factual background of the case relevant for disposal of the appeal from the hearing of learned counsel from the appellant-D.3 vis-a-vis the learned counsel for the respondents 1 and 2/plaintiffs and the learned counsel for the D.4 in particular for D.2/R.4 not put forth her

appearance and R.3 mother of plaintiffs' D.1 to D.3 as referred supra died on 13.11.1996; is that one Hazi Mohammad Ameenuddin whose father's name as per Ex.B.25 sale deed dated 30.07.1940 the translation of which is Ex.B.26 obtained by him by virtue of his purchase; was Mohammad Quasim Saheb; the Ex.B.38 death certificate registered on dated 13.05.1956 of his(Mohammad Quasim Saheb) death dated 12.05.1956 also shows his father's name is Mohammad Quasim Saheb. The said Hazi Mohammad Ameenuddin died intestate on 12.05.1956 as referred supra from Ex.B.38, left behind him is only son no other than the husband of D.1 and father of plaintiffs, D.2 and D.3 besides daughter who is no other than mother of D.4. The father of the plaintiffs by name is Mohammad Mohiuddin and the name of the mother of D.4 is Sultan Zameerunnisa Begum @ Siddique Begum, who died as per Ex.B.27 (death certificate) undisputedly on 13.09.1983.

4. The suit filed by the plaintiffs against the D.1 to D.3 and subsequently impleaded in the suit D.4 claiming share over the property in the factual background is as legal heirs along with the D.1, D.2 and D.3 and plaintiffs for the property succeeded by their father undisputedly from their paternal grandfather by name Hazi Mohammad Ameenuddin. D.4 claims share in showing it is his maternal grandfather's property and as his maternal grandfather died on 12.05.1956 intestate and by then left behind him, the mother of D.4 also besides father of plaintiffs and D.2 and D.3, that the 1/3rd share of his mother is claimed succeeded by D.4 to be entitled for partition by middling in the suit claim. Whereas, the evidence adduced in support of the contest by the D.3, only brother besides in support of it by D.2- another sister to the plaintiffs is that, Hazi Mohammad Ameenuddin, original owner of the property under original sale deed dated 30.07.1940 died intestate under Ex.B.38, dated 19.05.1956 who before his death made oral gift in favour of his son Mohammad Mohiuddin i.e.

(husband of D.1 and father of plaintiffs, D.2 and D.3) and it is further averred as part of the defence by D.3 that said Hazi Mohammad Ameenuddin in recognition and acknowledgment of said oral gift executed Ex.B.12 memorandum dated 30.07.1953. It is also the claim that the property was also mutated in the name of father of D.3, the plaintiffs and D.2, husband of the D.1 pursuant to the said memorandum under Ex.B.12 of the year 1953. It is therefrom the claim that, while father of D.3(appellant herein) as donee from his father enjoying the property, orally gifted the same to his wife, no other than the D.1, and the further contest pursuant to which is D.1 before her death on 13.11.1996, orally gifted the property to the D.3 and subsequently executed in acknowledgment of that oral gift Ex.B.4 memorandum dated 17.09.1996. In support of the contest of D.3, he also placed reliance in his evidence upon Ex.B.5 and B.6 Rent Control Eviction Decrees maintained by D.1 against the two tenants in R.C.C.No.147 and 148 of 1974. It is in saying even D.1's husband Mahammad Mohiuddin also as a witness participated in that Rent Control Case in support of his oral gift to his wife for part of the present plaint schedule property. The other contest of D.1 therefrom is neither plaintiffs nor D.2 or D.3 much less by D.4 entitled to any even the part of the plaintiff schedule properties and the partition suit thereby is liable to be dismissed.

5. Whereas, it is important to note from evidence in support of the contest of the D.2, one of the sisters of plaintiffs and D.3(appellant herein) that the oral gift by the paternal grandfather of her in favour of her father acknowledged under Ex.B.12 in 1953 is true and while so, her mother (D.1) in her lifetime orally gifted her 1/8th share in the property to D.3 and but for the 1/8th share of her mother-D.1 being entitled by D.3, in all other respects, the entire plaint schedule property is liable to be partitioned between the plaintiffs, D.2 and D.3 and D.4 is not entitled to any share in the plaint schedule property.

6. In the factual background, the trial Court held that so far as Ex.B.12 so called oral gift and subsequent acknowledgment of the same by memorandum by the paternal grandfather of the plaintiffs in favour of the father of the plaintiffs set up by the parties to the suit other than D.4 is a created document and for that conclusion referred Ex.B.26 = B.25 and Ex.B.38 and noted therefrom the Grandfather's correct name of plaintiffs though Mahammad Quasim Saheb, it is subsequently manipulated Ex.B.12 with the grandfather's name as if Mahammaddin Ibrahim Sultan and therefrom no importance be given to the mutation even if at all in the name of the father of the plaintiffs, D.1 and D.3 for the reason Mahammad Mohiuddin is the son of Hazi Mohammad Ameenuddin, and D.4's mother is the daughter married already, and being the son when in managing property before partition, any mutation in his name, as can be said, no way confers title therefrom. By keeping this in mind though not in so many words the trial Court concluded that even the door numbers mentioned also not tallying in Ex.B.12 and further observed the D.3 in that suit neither in his written statement, leave about written statement of D.2 nor plaintiffs in plaint propounded the existence of Ex.B.12 much less even in the counters filed opposing implead petition of the D.4 but for after D.4 came on record by impleadment and filed written statement for the first time in the evidence to show no foundation for its existence for the past 30 years to the time it is adduced in evidence (might be to say it is outside the purview to draw any presumption under Section 90 of the Indian Evidence Act from the evidence on the document Ex.B.12), and there is no even any reference in the rent control proceedings if at all if it is in existence vide covered by Exs.B.5 and B.6 and Ex.B.12. It is also observed that, if at all D.1 gifted orally pursuant to the alleged gift by her father-in-law to her husband, it could have been find place so far as her title to maintain the rent control cases concerned in negating that contention and from belying all oral and documentary evidence in this regard from the inconsistencies referred supra supported by all the

cogent reasons. So far as that finding of the trial Court by scanning of the pleadings and evidence on all the facts appraised by this appellate Court being the final fact finding Court concerned, from said trial Courts conclusions since are sound and reasonable, there is for this Court nothing more to interfere. Suffice to say, the D.4 also entitled to the share by stepping into the shoes of his mother as legal heir out of the property covered by Ex.B.25 of Hazi Mohammad Ameenuddin being the grand-daughter.

7. Coming to what share the D.4 is entitled therefrom before coming to any shares between the plaintiffs, D.2 and D.3 including of D.1 concerned, as can be seen from the principles on Mohammadian law of Mullah, son is entitled to $\frac{2}{3}^{\text{rd}}$ and the daughter $\frac{1}{3}^{\text{rd}}$ which is not in dispute. Thereby out of the plaint schedule, D.4 is entitled to $\frac{1}{3}^{\text{rd}}$ and in the remaining $\frac{2}{3}^{\text{rd}}$ the plaintiffs, their sister-D.2 and their brother D.3 if at all along with D.1, where D.1 gifted to D.3 or otherwise among them from re-distribution, the shares to be entitled to define.

8. Now coming to this point in the controversy *inter se* between plaintiffs, D.2 and D.3 concerned, needless to repeat, D.2 is sailing with D.3 to some extent but for differing in saying gift by her father to her mother while saying her mother gifted her undivided $\frac{1}{8}^{\text{th}}$ share also to D.3 in saying under Ex.B.12 her paternal grandfather gifted orally to her father. In this regard, Ex.B.4 is the document in favour of D.3 of the so called oral gift by D.1. Ex.B.4 is the memorandum of the oral gift subsequently on dated 17.09.1996. There is no reference as to the date of oral gift even in Ex.B.4 memorandum, leave about no reference even of Ex.B.12, in saying under Ex.B.4 as to when the D.1's husband orally gifted to her but for saying her husband orally gifted to her for her in turn gifted to D.3. This factum of Ex.B.4 as referred supra not admitted by the parties *inter se*. What D.2 admitted is D.1 orally gifted her undivided $\frac{1}{8}^{\text{th}}$ interest to D.3. D.1 is not before the Court as without written statement she breathed the last on 13.11.1996. That is

the only supporting evidence of D.2 as D.W.1 to D.3 with reference to written statement pleading of D.2.

10. Needless to say for oral gift, the compliance required is in the presence of witnesses or by openly proclaiming, as the case may be, as one of the basic principles to validate besides acceptance and giving and taking of possession the three pre-requisites, here on the factual matrix, D.2 no other than the sister of the two plaintiffs and equally of D.3 their brother categorically deposed about their mother given her undivided interest by oral gift to D.3. No doubt as discussed supra, the so called oral gift of the grandfather to the father is not proved more particularly with reference to Ex.B.12 even and the so called oral gift by father of the parties to his wife i.e. D.1 not even proved particularly for the same not whispered in the proceedings covered by Ex.B.5 and 6 in R.C.C.No.147 and 148 of 1974; However, so far as gifting orally the interest of the mother to the son i.e. to D.3 by D.1 concerned which is to answer now, the D.1 did not state anything as breathed the last before filing written statement in the suit after put forth her appearance. The other evidence on record to appreciate is that of D.3 and D.2 and the plaintiffs. It is the case of the plaintiffs that their mother-D.1 never gifted her share to their brother-D.3 by declaring openly much less in their presence. Whereas, the D.2 categorically deposed being the neutral witness and equally related to plaintiffs and D.3 about her mother orally gifted to her brother(D.3). D.2(D.W.1) was subjected to cross-examination by the plaintiffs vigorously but could elicit nothing. Suffice to say, there is nothing to believe said contest and evidence of D.2 in support of the version by D.3. Merely because plaintiffs say their mother-D.1 gifting orally to their brother (D.3) was not declared in the so called presence of the plaintiffs, it is not suffice to belie said oral gift once it is proved declared in the presence of D.2 as it satisfies the pre-requisites of the three conditions of oral gift so far as the interest of D.1 made to D.3 concerned. Thus the trial Court's conclusion to that extent requires to set aside.

11. Accordingly and in the result, the appeal is partly allowed while confirming the trial Court's findings in the judgment of D.4 is entitled to $\frac{1}{3}^{\text{rd}}$ of the mother of D.4 out of the property of his maternal grandfather, the other $\frac{2}{3}^{\text{rd}}$ of the plaint schedule property is entitled by the father of the plaintiffs, D.2 and D.3-cum-husband of D.1 that is succeeded by them all as laid down in the principles of Mahammadian law and out of that $\frac{2}{3}^{\text{rd}}$, D.3 is entitled to $\frac{14}{40}^{\text{th}}$, D.1 being the wife of late Mohiuddin S/o Hazi Mahammad Ameenuddin, entitled to $\frac{1}{8}^{\text{th}}$ out of plaint schedule $\frac{2}{3}^{\text{rd}}$, that is orally gifted being entitled as held above by the D.3 and out of the remaining $\frac{7}{8}^{\text{th}}$ out of the $\frac{2}{3}^{\text{rds}}$, the plaintiffs each entitled to $\frac{7}{40}^{\text{th}}$ each, and D.2 is entitled to $\frac{7}{40}^{\text{th}}$ and D.3 respectively. There is no order as to costs in the appeal. Parties are at liberty to approach the trial Court in any pending final decree application and even if no final decree petition filed and pending the trial Court shall consider as its decree is merged with this appellate Court's decree herein with reference to the modification, in working out the rights accordingly for partition and separate possession of the respective shares of all parties supra.

12. Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:07.12.2015
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