

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 05.12.2016

PRONOUNCED ON : 15.12.2016

CORAM

THE HONOURABLE DR.JUSTICE G. JAYACHANDRAN

S.A.No.736/2006 & CMP No.11946/2016

Sowkath Ali

Appellant/Plaintiff

..Vs..

1.Mohammed Basha Sahib(Deceased)
2.Fathima Beebi
3.Akbar Sharif
4.Thahrula
5.Sheik Basullah
6.Bibi John
7.Shabeer Basha
8.Misbullah
9.Amanullah
10.Jafarullah
(All are residing at Sorathur Village,
Gingee Taluk,Villupuram District).
(Respondents 5 to 10 brought on record as
LR's of the deceased first respondent.vide
Order of Court dt.05.12.2013 made in
MP.Nos.1 to 3 of 2007 in s.A.736 of 2006).

..Respondents/
Defendants

Prayer: Appeal filed Under Section 100 C.P.C. against the Decree and Judgment in A.S.No.28/2005 dt.30.09.2005 on the file of the Principal Sub Court, Tindivanam in reversing the Decree & Judgment dt.18.03.2005 made in O.S.No.185/97 on the file of Principal District Munsif Court, Gingee.

For Petitioner : Mr.P.Srinivas
For RR-2 to 10 : Mr.S.V.Jeyaraman
Senior Counsel
for Mr.S.Raghu

JUDGMENT

The plaintiff is the appellant herein. This appeal is directed against the judgment of Lower Appellate Court, reversing the decree passed by the Trial Court which allowed the suit for declaration and injunction.

2.As per plaint, suit property originally owned by one Abdul Kadar Sahib. He orally gifted the Suit Scheduled properties items 1 to 7 to the plaintiff which is permissible under Muslim personal law. On 02.03.1994, he executed a settlement deed reiterating the oral gift made earlier. After the demise of Abdul Kadar Sahib, the plaintiff is in possession and enjoyment. The first defendant is the brother of the plaintiff. Second defendant is wife of the first defendant. Third and fourth defendants are children of defendants 1 and 2. The defendants are trying to interfere the possession and enjoyment of the property, hence the suit.

3.As per the written statement of the defendants, Abdul Kadar Sahib died intestate leaving behind his wife, three sons and one

daughter. The plaintiff illegally got chitta to the suit property, solely in his name which was later cancelled. In so far as suit property item 7, it is a dwelling house where the defendants are residing. The Abdul Kadar Sahib never gifted the property to the plaintiff orally or in writing, the document relied by the plaintiff was not executed by Abdul Sahib.

4.The Trial Court framed 7 issues. Examined 6 witnesses and marked 16 exhibits on behalf of the plaintiff. On behalf of the defendants 5 witnesses examined and 25 exhibits were marked. On appreciating the evidences, the Trial Court disbelieved the gift deed marked as Ex.A-16. However, relied Ex.A.6 a memo filed by the Abdul Kadar in a previous proceedings O.S.No.107/1993 and held that a compromise has arrived between the plaintiff and his father in the suit O.S.No.107/1993, wherein the suit properties were given to the plaintiff. Holding that Ex.A.6 is true, trial Court decreed the suit in favour of the plaintiff in respect of properties mentioned as item 1 to 6 and declined relief in respect of item 7, having found it to be in possession of second defendants.

5.If the First Appellate Court held that, the oral gift is not proved. Ex.A-16 deed is not a genuine document. PW-2 & PW-3, the

witnesses to the document Ex.A-16 are inconsistent about the year of oral gift. The full satisfaction memo Ex.A.6 cannot be a proof for oral gift. For the above said reasons the First Appellate Court reversed the Trial Court finding and allowed the appeal.

6.The aggrieved plaintiff is before this Court by way of Second Appeal. This Court has formulated the following substantial question of law for consideration.

1. Whether the oral gift made is sufficiently proved by the execution of the Hiba?
2. When the gift has been affirmed in a final settlement memo filed before a civil court in another suit and is also supported by oral evidence adduced by the testator whether the finding that the Hiba in itself is not proved is material for evaluating the genuineness of the claim?
3. Whether the mention of the transfer of patta in favour of the done in the Hiba can be considered to vitiate the same when the Hiba is

only an acknowledgment of the oral gift already made?

4. Whether the examination of two witnesses to the Hiba is sufficient when 6 persons have witnessed the Hiba?

7.The learned counsel for the appellant after introducing the facts of the case submitted that, Abdul Kadar Sahib, the father of the plaintiff though questioned the validity of his own gift deed, later filed memo. Ex.A-6 in his suit O.S.No.107/1993 affirming the factum of oral gift given to the plaintiff in respect of suit property. In the same memo Abdul Kadar has also mentioned about the properties gifted to the first defendant. There is no reason for the First Appellate Court to disbelieve Ex.A-6, but the Lower Appellate Court has erred in appreciating Exhibit A-6 in proper prospective.

8.Per contra, the counsel for the respondent submitted that Ex.A.6 memo filed in the Court was not considered or accepted by the Court. This document was filed on 25.04.1994, but never subjected to judicial scrutiny. No order passed on this memo. In fact, the genuineness

of this memo was questioned within few days of its filing. So the memo was pending for several years and later closed on 18.03.2008 for non-representation.

9.To substantiate this, the learned counsel has filed an application to receive the certified copy of the order passed by the Court. It being a document related to judicial pronouncement, this Court is of the considered view that it is needless to admit as exhibit at the appellate stage. It is suffice to take judicial notice of the fact found in their proceedings.

10.This Court is of the opinion, that Ex.A-6 is not a relevant document in this case. The courts below ought not to have relied upon it for any purpose, what so ever, since it is only a statement of a dead person, not proved in any manner in the earlier proceedings. It is not cover under Section 33 of the Indian Evidence Act. The law and reason for the above conclusion is discussed in detail as under:-

11.The core issue in this case is one Abdul Kadar made a Hiba-oral gift in favour of the plaintiff. That was latter reduced into

writing in 02.03.1994. This was denied and questioned by Abdul Kadar himself in O.S.No.107/1993. Earlier the plaintiff has filed O.S.No.93/1992 against his father, and a counter suit O.S.No.107/1993 by his father Abdul Kadar in respect of the same properties. In the said circumstances, Ex.A-6 memo has been filed in O.S.No.107/1993 signed by Abdul Kadar as plaintiff on 25.04.1994. In this memo Ex.A-6 – Abdul Kadar has stated that 7 items of properties which are subject matter of the present suit is given in possession to his third son Sougath Ali (the plaintiff in this suit) by way of settlement out of Court. Abdul Kadar has prayed the Court to record the memo and dismiss his suit without cost. It is an admitted fact by both the parties that in the memo filed on 25.04.1994, no order was passed till the present suit was filed. The Court takes judicial notice of the fact that this memo was closed on 18.03.2008 much after the subsequent suit between the sons of Abdul Kadar which is the subject matter of the present appeal. Abdul Kadar was dead before the memo could be heard and recorded. No judicial pronouncement delivered based on merit after giving opportunity to the party adverse to it given.

12.Thus Ex.A-6 fall under the category of statement made by a person in a previous judicial proceedings, who died later. This

statement is relied by one of the party to the previous proceeds.

Under Section 157 of the Indian Evidence Act former statements of witness may be proved to corroborate later testimony as to same fact.

"In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

12. In normal course when there is dispute over the property between two donees' examination of the donor, and any deed disclosing the factum of gift will be the best evidence. In the case in hand, the donor is no more so his previous statement in a judicial proceedings is sought to be relied.

Under Section 33 of the Indian Evidence Act relevancy of certain evidence for proving in subsequent proceeding, the truth of facts therein stated :-

"Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding or in

a latter stage of the same judicial proceeding, the truth of the fact which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided-

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation:- A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

13. Section 33 proviso 1 & 2, makes clear that a statement of a dead person in a judicial proceedings will be relevant only if the proceedings was between the same parties and the adverse party in the first proceedings had the right and opportunity to cross. In this case the defendant was not a party in the previous judicial proceedings therefore no opportunity was available for him to cross examining the maker of the statement.

14. The fact sought to be proved is the division of the properties among the sons of the Abdul Kadar and settlement of property mentioned in. When the maker of the previous statement is dead, the memo filed by Abdul Kadar in the previous suit is admissible in such a statement evidence only if it is relevant under Section 32 or 33 of Indian Evidence Act.

15. To the facts of this case Section 33 is applicable, since it relates to proving the truth of facts stated in the previous statement.

16. Ex.A-6, being a document which does not satisfy the proviso to Section 33 of the Indian Evidence Act, it is in-admissible and no decision could be arrived based in this inadmissible document.

17.If A-6 is eschewed, nothing survives in this appeal since both the courts have concurrently held that the Hiba deed Ex.A-16 is not proved.

18.In the result Second Appeal is dismissed. First Appellate Court Judgment confirmed. No Costs. Consequently the connected Civil Miscellaneous Petition closed.

15.12.2016

KP

To
The Principal Sub Court, Tindivanam.
The Principal District Munsif Court,
Gingee.

DR.G.JAYACHANDRAN.,J.
KP

Judgement in
S.A.No.736 of 2006

15.12.2016

<http://www.judis.nic.in>