

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 28.03.2017

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

SA.No.236/2017 & CMP.No.5572/2017

1.Habeebunissa
2.Siddiqa
3.Shaila
4.Mohamed Essoc @ Abdul Khader

... Appellants /
Defendants 1 to 3 and 5

Versus

1.Kareemunissa
2.Shamshunnissa
3.Alla Bakash
4.Nayeemunissa
5.Jabeena
6.Shabana
7.Akbari

... RR 1 to 6 /
Plaintiffs 1 to 6
... 7th Respondent /
4th Defendant

Prayer: Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree of the learned XVIII Additional Judge, City Civil Court, Chennai dated 06.09.2016 in AS.No.164/2015 confirming the judgment and decree dated 19.07.2013 passed in OS.No.12313/2009 on the file of the learned VI Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.Inamdar Ameenur Rahman

JUDGMENT

The defendants 1 to 3 and 5, who lost before the Courts below are the appellants herein.

2 The facts leading to the filing of this Second Appeal, briefly narrated, are as follows:-

[a] The respondents 1 to 6 herein filed OS.No.12313/2009 on the file of the Court of the VI Assistant

City Civil Judge, Chennai, against the appellants and another, praying for a preliminary decree, directing the defendants 1 to 4 to partition the suit property bearing Door No.9/19, Strahans Road, 5th Street, Dadeshankar, Chennai-12, admeasuring to an extent of 1332 sq.ft., standing on the land belongs to Dada Peer Darga, comprised in OS.No.2653, RS.No.2811/30 and CC.No.1270 with the specific boundaries by metes and bounds and allotted 11/88th share to the 1st plaintiff ; 7/88th share to plaintiffs 2, 4 to 6 and 14/88th share to the 3rd plaintiff in the suit property and also prayed for a decree for mesne profits as well as decree for permanent injunction, restraining the defendants, or their men, servants or agents from in any manner interfering with their peaceful possession and enjoyment in the suit schedule property and also prayed for the cost of the suit.

[b] It is the case of the plaintiffs / respondents 1 to 6 that the 1st plaintiff is the wife of [late] Abdul Jabbar and plaintiffs 2 to 6 and the defendants 1 to 4 are the children of the 1st plaintiff and [late] Abdul Jabbar. The land on which the suit property / superstructure has been put up, originally belonged to Dada Peer Darga and it was leased out to Abdul Jabbar with Leasehold Rights and he died on 25.01.1991 leaving behind the plaintiffs and the defendants 1 to 4 as his surviving legal heirs to succeed the estate.

[c] The plaintiffs would further aver that the 5th defendant is the husband of the 1st defendant and he is not entitled to any right in the suit property. The 1st defendant was managing the suit property and collected the rents from the tenants with the physical assistance of her husband, viz., the 5th defendant and however, not paying due share to the plaintiffs. Therefore, the plaintiffs demanded for partition and separate possession of the suit property by metes and bounds and since no response is forthcoming, a legal notice dated 29.01.2007 [Ex.A3] was sent to the defendants, calling upon them to partition the suit property and give them separate possession of the same. The defendants 1 to 5 had responded by giving a reply dated 10.02.2007 [Ex.A4] with false allegations, for which the plaintiffs had sent a rejoinder on 25.02.2007 [Ex.A5], for which the defendants 1 to 5 sent further reply on 05.03.2007 [Ex.A6]. Since the request made by the plaintiffs for partitioning the suit property and allot them separate shares, have not been met with any favourable response, they came forward to file the above suit.

[d] The defendants 1 to 3 and 5 had filed their written statement, denying the averments made in the plaint and contended that the land in which the superstructure has been put up, does not belong to Dada Peer Darga ; but it is the absolute property of the 5th defendant. It is further averred by them

that at the time of the demise of Abdul Jabbar on 25.01.1991, there was no permanent superstructure and only Tin/Zinc Sheet shed was there and the 5th defendant developed the suit property out of the benefits derived from the Buckingham and Carnatic Mills [B&C Mills]. It is also contended that when Abdul Jabbar had died and left behind his widow and minor children who were in helpless condition and were also unmarried, the 1st defendant, being the eldest daughter in the family, had borne out all the responsibilities and she along with her husband, the 5th defendant herein, had removed the Zinc Shed and put up a superstructure, consisting of four shops ; one portion in the ground floor, First and Second Floors from out of his funds and they had also taken care of the entire maintenance of the family including construction work/activities. It is the further stand that since the superstructure was put up by the 5th defendant out of his funds, he has got every right and authority to lease out the premises and further that Abdul Jabbar, while he was alive, has executed a Hiba in favour of the 5th defendant dated 06.02.1990 [Ex.B1] and also executed a Memorandum of Agreement dated 30.11.1990 [Ex.B8] and by virtue of the same, he became the absolute owner of the property and he is entitled to lease the property in his own right and therefore, prayed for dismissal of the suit.

[e] The 4th defendant had filed a separate written statement, contending that his father had purchased the property and put up the superstructure and in respect of the land in which the superstructure has been put up, it was a lease hold right and he was periodically renovating the building out of his own funds. He being the legal heir of Abdul Jabbar, he is entitled to 14/88th share from the suit property and therefore, prayed for preliminary decree for allocation of 14/88th share to him.

[f] The Trial Court, on a consideration of the pleadings, had framed the following issues:-

- Whether the 1st plaintiff is entitled for 11/88 share, the plaintiffs 2, 4 to 6 are entitled for 7/88 share each and the 3rd plaintiff is entitled for 14/88 share partition from the suit property?
- Whether the plaintiffs is entitled for permanent injunction?
- To what relief?

[g] During the course of trial, the 2nd plaintiff was examined as P.W.1 and Exs.A1 to A6 were marked and on behalf of the defendants, the 5th defendant was examined as DW1 and Exs.B1 to B16 were marked.

[h] The Trial Court, on a consideration of pleadings and on appreciation of oral and documentary evidences, has

granted a preliminary decree for partition and also for mesne profits ; but negatived the claim of the plaintiffs with regard to the permanent injunction. The defendants 1 to 3 and 5, aggrieved by the granting of preliminary decree by the Trial Court, filed an Appeal in AS.No.164/2015 on the file of the Court of the 18th Additional City Civil Court Judge, Chennai. The plaintiffs did not prefer any appeal as against the rejection of their prayer for permanent injunction.

[i] The Lower Appellate Court, on a consideration of the Memorandum of Grounds and materials placed before it, had formulated the following point for consideration:-

- Whether the appeal can be allowed?

[j] The Lower Appellate Court considered the pleadings as well as the contentions put forth by the respective learned counsel for the parties and found that according to the 5th defendant, Hiba/Gift was executed in his favour by his father-in-law Abdul Jabbar vide Ex.B1 dated 06.02.1990. But, in the subsequent communication written by his father-in-law under Ex.B7 dated 08.03.2004, nothing has been stated about the Hiba. The 5th defendant examined himself as DW1 and in the course of his evidence denied the suggestion that his father-in-law has put up superstructure and in the year 1992, he has mortgaged the superstructure and in the document, it has been stated that his father-in-law is also having a right and so also in Exs.B8 and B9-Memorandum of Agreement and General Power of Attorney dated 30.11.1990 and 25.09.1990 respectively and even in the EB Card, the name of his father-in-law continues to be there and so also the revenue records continue to stand in the name of his father-in-law.

[k] The Lower Appellate Court found that though the 5th defendant claim that Hiba was executed by his father-in-law under Ex.B1 dated 06.02.1990, the 5th defendant, in his testimony as DW1 has accepted that till 30.11.1990, his father-in-law was the owner of the property and the subsequent documents relied on by him had also revealed that the name of his father-in-law continues to remain as the owner of the superstructure. The Lower Appellate Court further recorded the finding that the father-in-law of the 5th defendant has executed the General Power of Attorney dated 25.09.1990 under Ex.B9, it was accepted by him and acted upon and even the clauses/recitals of the General Power of Attorney do not give any indication as to the execution of the Gift Deed/Hiba under Ex.B1 on 06.02.1990. The Lower Appellate Court further found that the revenue records relating to the superstructure under Exs.B10, B13 to B16, continue to remain in the name of the father-in-law of the 5th defendant and subsequently, transferred in the name of the 5th defendant. But,

those documents came into being in the year 2011 and after filing of the suit on 16.09.2009. The Lower Appellate Court, taking into consideration the above materials, has dismissed the appeal suit vide impugned Judgment and decree dated 06.09.2016, thereby confirming the judgment and decree passed by the Trial Court in granting preliminary decree and also decreeing the mesne profits in favour of the plaintiffs. The defendants 1 to 3 and 5, aggrieved by the dismissal of the appeal suit by the Lower Appellate Court, had filed the present Second Appeal.

3 In the Memorandum Grounds of Second Appeal, the following Substantial Questions of law are raised:-

- Whether the Registered Power of Attorney will become ineffective and invalid if the execution of the Hiba is not mentioned in the contents of the General Power of Attorney?
- Whether the Hiba that has been rightly executed become ineffective if the witnesses to the same have not been examined?
- Whether the Hiba becomes invalid if the donee seeks appropriate compensation from the other parties who have not been given share as per Hiba?

4 The learned counsel for the appellants / defendants 1 to 3 and 5 would strenuously contend that Hiba under Ex.B1 dated 06.02.1990, was executed by the father-in-law of the 5th defendant with full and conscious state of mind and after the demise of Abdul Jabbar, his daughter, viz., the 1st defendant - wife of the 5th defendant, was looking after the affairs and the superstructure was also put up by the 5th defendant out of his own funds and in the light of the oral and documentary evidences, it has been conclusively proved and established that Hiba under Ex.B1 has been acted upon and the Courts below, without properly appreciating the factual aspects and legal position, have erroneously granted the preliminary decree in favour of the plaintiffs and prays for allowing of the appeal.

5 This Court paid its best attention to the rival submissions and also perused the materials placed before it.

6 The relationship between the parties in not in dispute and the sole issue arise for consideration is as to whether Ex.B1-Hiba has been executed by Abdul Jabbar in favour of the 5th defendant and whether it was acted upon?

7 Ex.B1-Hiba is dated 06.02.1990 and the subsequent documents came into being, viz., Exs.B10, B13 to B16, only

during the year 2011, in the name of Abdul Jabbar and he continue to be the owner of the superstructure and if really Abdul Jabbar had executed Hiba on 06.02.1990 in favour of the 5th defendant, under Ex.B1, the General Power of Attorney executed by him under Ex.B9 dated 25.09.1990 would have disclosed the said fact and admittedly, it was not so and the 5th defendant who was the Power Agent, has also acted as per Ex.B9. The 5th defendant was examined as DW1 and he made a crucial admission conceding to the fact that the superstructure was subsequently mortgaged wherein, in the said document, it has been stated that his father-in-law [Abdul Jabbar] is also having a right and in Exs.B8 and B9 also there are recitals to the effect that his father-in-law is the owner of the property and in the relevant revenue records also, his father-in-law name was there and those records were mutated only in the year 2011, long after filing of the suit.

8 The majority of the documents filed on behalf of the defendants, would clearly reveal that the name of Abdul Jabbar continue to be there as the owner of the superstructure despite the plea of the 5th defendant that in pursuant to Ex.B1-Hiba, he became the absolute owner. The plaintiffs has also disputed about the execution of Hiba in favour of the 5th defendant and therefore, the burden lies heavily on the 5th defendant to prove and substantiate that such a gift was made by his father-in-law and was also acted upon. But, unfortunately, his own testimony as DW1 coupled with the documents filed on behalf of him, would prove otherwise.

9 The Courts below, on thorough consideration of the evidence available and other circumstances, had rightly reached the conclusion to grant a preliminary decree in favour of the plaintiffs as well as the decree of mesne profits and declined the relief of permanent injunction, for which, no appeal has been preferred by the plaintiffs. The findings rendered by the Courts below are concurrent in nature and this Court, on an independent application of mind to the reasons assigned by the Courts below, is of the considered view that there is no error apparent in the findings rendered by the Courts below, warranting interference of this Court.

10 The substantial questions of law formulated in the Memorandum of Grounds of the Second Appeal, have been answered by the Courts below. Therefore, no substantial questions of law arise for consideration.

11 In the result, the Second Appeal is dismissed at the admission stage itself, confirming the judgment and decree passed by the learned XVIII Additional Judge, City Civil Court, Chennai, in AS.No.164/2015 dated 06/09/2016. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

AP
To

- 1.The XVIII Additional Judge
City Civil Court, Chennai.
- 2.The VI Assistant Judge
City Civil Court, Chennai.

Copy to:
The Section Officer
VR Section, High Court,
Madras.

+lcc to M/s.Inamdar Ameenur Raiman, Advocate sr.19360

SA.No.236/2017

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