

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:09.11.2016

DATE OF DECISION:03.03.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.401 of 2008

1.S.M.Shamsudeen
2.S.M.Musahudeen Appellants/Defendants
Vs

1.S.M.Farook
2.Habibunnissa Respondents

This appeal is filed under Section 96 C.P.C. against the judgement and decree of District Court, Nagapattinam, dated 26.02.2007 made in O.S.No.69 of 2004.

For Appellants : Mr.S.Sounther
For Respondents : Mr.R.Natarajan

J U D G E M E N T

The defendants 1 and 2 in O.S.No.69 of 2004 on the file of the District Court Nagapattinam are the appellants. The suit was filed by the 1st respondent seeking partition and separate possession of his 2/7 share in the suit property.

2. According to the plaintiff the suit property belonged to the father of the parties namely, Mr.Mohamed Hussain. He died on 7.04.1995 leaving his three sons namely, the plaintiff and defendants 1 and 2 and one daughter, the 3rd respondent. The mother of the plaintiff died on 22.03.1998. Therefore, according to the plaintiff, each son would be entitled to 2/7 share and the 3rd defendant would be entitled to 1/7 share.

3. The 3rd defendant remains exparte. The 1st defendant filed written statement and the same was adopted by the 2nd defendant. The 1st defendant would contend that the father of the parties namely, Mohamed Hussain had gifted the suit properties to the 1st defendant by way of oral gift "Hiba". He would further

contend that the said "Hiba" was confirmed by an affidavit of declaration dated 28.03.1994. The 1st defendant also stated that the plaintiff had filed a suit in C.S.No.621 of 2000 on the file of this Court seeking partition of the properties of their mother and the said suit came to be dismissed accepting the plea of oral gift made by the 1st defendant. The 1st defendant would also rely upon the fact that the lease in respect of the land over which the suit building (lodge) has been transferred in his name, pursuant to the oral "Hiba" by the land owners, namely Myuranatha Swamy Temple under the control of Thiruvaduthurai Adheenam. Therefore, he would contend that the lease of the land stands in his favour. The 1st defendant also denied the quantum of income claimed by the plaintiff. On the above pleadings, the 1st defendant has sought for dismissal of the suit.

4. The learned District Judge, Nagapattinam, who tried the suit had framed the following issues for determination in the suit:

1) Whether there was an agreement to divide the properties between the parties after the death of their mother?

2) Whether the claim of the 1st defendant that his father had gifted the property to him on 24.03.1994, by way of "HIBA" and that he has been in possession and enjoyment of the property from the said date?

3) Whether the plaintiff is in possession of the property as joint owner?

4) Whether the plaintiff is entitled to 2/7 share?

5) Whether the plaintiff is entitled to account for the period from 1.7.2000 to 30.02.2003?

6) Whether the plaintiff is entitled to past mense profits as prayed for?

7) Whether the plaintiff is entitled to a preliminary decree as sought for?

8) To what other relief, is plaintiff entitled to?

The following additional issues were framed on 12.02.2007.

1. Whether the plaintiff is entitled to the reimbursement of Rs.15,000/- paid by him towards the property tax for the suit property?

2. Whether the plaintiff is entitled to get the same with future interest?

5. The plaintiff has examined himself as PW1. The 1st defendant apart from examining himself as DW1, he has also examined two other witnesses. Exs.A1 to A12 were marked on the side of the plaintiff and Exs.B1 to B11 were marked on the side of the Defendants.

6. Upon consideration of oral and documentary evidence, the learned District Judge, Nagapattinam disbelieved the theory of Gift and decreed the suit as prayed for.

7. Aggrieved by the same, the defendants 1 and 2 have come forward with the above appeal.

8. I have heard Mr.S.Sounther, learned counsel appearing for the appellant and Mr.R.Natarajan, the learned counsel appearing for the respondents.

9. Going by the pleadings, evidence on record and the arguments advanced by the learned counsel on either side, I find that the only question that has been raised in the suit is the validity of the oral gift said to have taken place on 24.03.1994. It is not in dispute that the land on which the suit building stands belongs to Arulmigu Mayuranatha Swamy Devasthanam and the father of the plaintiff and defendants, namely Mr.Mohamed Hussain possessed only the lease hold rights. It is also admitted that the said Mohamed Hussain had constructed the suit building in the land taken on lease by him.

10. It is also the case of the parties that the other properties of the father, namely, agricultural lands were divided among the parties and the plaintiff had sold the land that were allotted to him to the wife of the 1st defendant. The fact that the plaintiff filed the suit in C.S.No.621 of 2000 in this Court seeking partition of the properties that belonged to the mother Nathoom Bivi and the suit was dismissed accepting the plea of oral gift by Nathoom Bivi. In order to prove the oral gift said to have been made by the late Mohamed Hussain, the father of the parties, the 1st defendant would heavily rely upon the document styled as Declaratory and Confirmation Affidavit marked as Ex.B4. Ex.B4, is claimed to have been executed on 28.03.1994. Ex.B4 reads as follows:

"I, Mohamed Hussain, son of (late) Sulaiman Mirasu, Muslim, aged about years, residing at No.3/106, Happy Mahal, Beach Street, Arangakudi Village, Ilayanur Circle, Tranqubar Taluk, Nagai Quaide Millath District, have come down to Chennai, do hereby solemnly affirm and sincerely state as follows:"

There is no description of the property in the said document. The age of the executant is left blank. The door number of the property is also left blank. The stamp papers bear the seal of stamp vendor from Devikapuram. Devikapuram is situated near Ambur in Vellore District. The stamp papers have been purchased on 25.03.1994. In the said affidavit, the deceased Mohamed

Hussain declared that he had made oral gift " HIBA " on 24.03.1994 at Arangakudi Village, Trangubar Taluk, Nagapattinam District.

11. It is a common knowledge that the name of City of Madras has been changed as Chennai on 17.09.1996. However, the declaratory affidavit extracted above contains the recital to the effect that that the executant has come down to Chennai. This discrepancy, creates a great doubt as to the genuineness of the said affidavit. Though the said affidavit is stated to have been executed at Madras and notarized at Madras, two witnesses have signed, one of them hails from Arangakudi and the address of the executant is also same. The other witness is said to belong to Vadakarai.

12. The other attesor namely, Najimudeen has been examined as DW2. I have gone through his evidence. He would depose that Mohamed Hussain told him four or five days prior to the execution of the said declaratory affidavit that he had orally gifted the property to the 1st defendant. In his cross-examination he has deposed that he does not know the date of the alleged oral gift. He claims that he has signed in Madras. According to him Mohamed Hussain Car Driver took him to the advocate's house. In the course of cross-examination, he has deposed that he had not signed in the village. A reading of the entire testimony does not inspire the confidence of the Court and I am afraid that he is not speaking the truth.

13. The 1st defendant as DW1 had in his evidence admitted that he had filed a caveat before the Sub Court under Ex.A3. He has not disclosed the factum of " HIBA " in the said caveat. He deposes that Exhibit-A3 was filed by him on 01.11.2002. In the reply notice dated 19.04.2003 marked as Ex.A10, it is claimed that the oral gift was of the 1994. Again the 1st defendant in his evidence has said that the oral gift was on 28.03.1994 that is the date of execution of the confirmation affidavit Ex.B4. DW1 would claim that the attesting witnesses came along with his father and were staying in their house at Triplicane. D.W.2 would however depose that he came on his own and was staying in his mother-in-law's house.

14. A person claiming oral gift should prove the same beyond all reasonable doubts. The evidence on record when tested, fails to meet the standard of poof required for establishing a oral gift. Several contradictions in the evidence, both oral and documentary as high-lighted above, lead to the conclusion that the 1st defendant has miserably failed to prove the oral gift as claimed by him. Once the oral gift fails and the relationship having been admitted, there may not be any problem in concluding that the plaintiff is entitled to the

share as prayed for by him.

15. The learned Trial Judge has also directed an enquiry relating to mesne profits and as such I do not find any infirmity or illegality in the conclusion arrived at by the learned District Judge, Nagapattinam and hence, the judgement and decree of the learned District Judge, Nagapattinam deserve to be confirmed and they are accordingly confirmed.

16. In fine the appeal is dismissed confirming the judgement and decree of the learned District Judge, Nagapattinam in O.S.No.69 of 2004 dated 26.02.2007. Considering the relationship between the parties, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To
The District Judge, Nagapattinam

+1cc to Mr.S. Sounthar, Advocate, S.R.No.13999
+2cc to Mr.R. Natarajan, Advocate, S.R.No.13934

ev (CO)
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