

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.04.2017

CORAM:

THE HON'BLE MR.JUSTICE S.VAIDYANATHAN

Second Appeal No.526 of 2012
and Second Appeal Nos.753 and 962 of 2013

S.A.No.526 of 2012

Sirajudeen

... Appellant/Defendant

vs.

1. Sadurudeen (died)
2. Badurunnissa
3. Mohammed Rafi
4. Hassina Begum

... Respondents/Plaintiff

(R2 to R4 brought on record as LRs of the deceased sole respondent vide order dated 28.02.2014 made in M.P.Nos.2 and 3 of 2012 in S.A.No.526 of 2012)

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 22.09.2011 made in A.S.No.8 of 2011 on the file of the Principal Sub Court, Mayiladuthurai reversing the judgment and decree of the Principal District Munsif, Mayiladuthurai dated 27.01.2010 made in O.S.No.291 of 2008.

S.A.No.962 of 2013

Sirajudeen

... Appellant/Plaintiff

vs.

1. Sadurudeen (died)
2. Kumar
3. Badurunnissa
4. Mohammed Rafi
5. Hassina Begum

... Respondents/1 & 2
Defendants

(R3 to R5 brought on record as LRs of the deceased sole respondent vide order dated 03.12.2012 made in M.P.No.1 of 2012 in S.A.SR No.42728 of 2012)

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 22.09.2011 made in A.S.No.87 of 2010 on the file of the Principal Sub Court, Mayiladuthurai, modifying the judgment and decree of the Principal District Munsif, Mayiladuthurai dated 27.01.2010 made in O.S.No.286 of 2008.

S.A.No.753 of 2013

Sirajudeen

... Appellant/Defendant

vs.

1. Sadurudeen (died)
 2. Kumar
 3. Badurunnissa
 4. Mohammed Rafi
 5. Hassina Begum
- ... Respondents/Plaintiffs

(R3 to R5 brought on record vide order dated 28.06.2013 in M.P.No.1 of 2013 in S.A.SR.No.42724 of 2012)

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 22.09.2011 made in A.S.No.55 of 2010 on the file of the Principal Sub Court, Mayiladuthurai, modifying the judgment and decree of the Principal District Munsif, Mayiladuthurai dated 27.01.2010 made in O.S.No.286 of 2008.

For Appellant
in all Appeals ... Mr.S.Sounthar

For Respondents
in all Appeals ... Mr.A.Mohamed Ismail
R2 to R4, R1Died,
in SA.526/2012
R3 to R5 in SA.753/2013
R2 NA
R1 Died
and R2 to R4 in SA.962/2013
R1-NA

C O M M O N J U D G M E N T

The above three Second Appeals arise out of two suits, viz. O.S.No.286 of 2008 and O.S.No.291 of 2008. Since the issue involved in all the three Appeals is one and the same, the Appeals are taken up for disposal by a common judgment.

2. O.S.No.286 of 2008 was filed by the appellant, viz. Sirajuddin seeking permanent injunction and O.S.No.291 of 2008 was filed by the deceased respondent, viz. Sadurudeen for recovery of possession. Both the suits were dismissed by the Principal District Munsif Court, Mayiladuthurai, by a common judgment and decree dated 27.01.2010. Hence, aggrieved by the same, the deceased respondent preferred an appeal in A.S.No.87 of 2010 as against O.S.No.286 of 2008 and also filed A.S.No.8 of 2011 as against O.S.No.291 of 2008. Aggrieved by the finding in O.S.No.286 of 2008, the appellant herein filed an appeal in A.S.No.55 of 2010. All the three appeals were taken up together and disposed of by a common judgment dated 22.09.2011, whereby, the First Appellate Court negatived all the contentions of the appellant herein and held in favour of the deceased respondent/Sadurudeen. Aggrieved by the same, the appellant has come up with the present Second Appeals.

3. Initially, O.S.No.291 of 2008 was filed by the deceased respondent, viz. Sadurudeen for recovery of possession and for damages with respect to a room in the first floor of the building at Door No.23 in Rasthamanavalli Street, Mayiladuthurai Town. According to Sadurudeen, the suit property originally belonged to his father Sahib Khan Sahib, his brother Moinudeen Khan and himself under Ex.A1, Partition Deed dated 06.05.1954 and after the death of Sahib Khan Sahib, his property devolved upon Moinudeen Khan and himself equally and after the death of Moinudeen Khan, he succeeds to the suit property by interstate succession. According to the deceased Sadurudeen, after the death of Moinudeen Khan and his wife Habija Beevi, who have no issues, he alone is entitled to the entire suit property as the sole legal heir. Since he permitted the appellant/Sirajudeen to occupy the suit property as a permissive occupant and subsequently cancelled the permission given to the appellant, he filed the suit in O.S.No.291 of 2008 for recovery of possession and for damages.

4. While so, it is the case of the appellant/Sirajudeen before the Trial Court that during the lifetime of Moinudeen Khan, he orally gifted the suit property in favour of his wife, Habija Beevi and after his death, Habija Beevi enjoyed the same by collecting rent from the tenant, one Kumar, arrayed as one of the respondents in the present appeals. According to the appellant, Habija Beevi, during her life time, orally gifted the suit property to him and hence, he is entitled to Moinudeen's half-a-share in the suit property and that Moinudeen Khan and Habija Beevi, treated him as an adopted son and he lived along with them. It is his contention that he is not a permissive occupant as claimed by the deceased respondent, Sadurudeen.

Hence, he filed a suit in O.S.No.286 of 2008 seeking permanent injunction restraining the deceased respondent/Sadurudeen from alienating the suit property.

5. The Trial Court, on examination of the entire oral and documentary evidence, held that the appellant/Sirajudeen is entitled to half-a-share in the suit property in O.S.No.286 of 2008 with absolute right over the superstructure in Item I of the suit property at Door No.23, Rasthamanavalli Street, Mayiladuthurai Town and dismissed the relief of permanent injunction, as the respondent/Sadurudeen's rights as a co-owner would be affected. Insofar as the suit in O.S.No.291 of 2008 filed by the respondent/Sadurudeen is concerned, the Trial Court dismissed the same. Challenging the dismissal of the relief of permanent injunction sought by him, the appellant/Sirajudeen preferred an appeal in A.S.No.55 of 2010 and challenging the common judgment and decree passed in O.S.No.286 of 2008 and O.S.No.291 of 2008, respectively, the deceased respondent, Sadurudeen preferred A.S.Nos.87 of 2010 and A.S.No.8 of 2011, respectively.

6. The First Appellate Court, by a common judgment and decree dated 22.09.2011, finding that the Hiba pleaded by the appellant/Sirajudeen as not proved, dismissed the appeal filed by the appellant/Sirajudeen in A.S.No.55 of 2010 and allowed the appeals filed by the respondent/Sadurudeen in A.S.No.87 of 2010 and A.S.No.8 of 2011, holding that the appellant/Sirajudeen is a permissive occupant and thereby allowed the suit for recovery of possession. Aggrieved by the common judgment and decree of the First Appellate Court, Sirajudeen has come up with the present appeals.

7. The core issue involved in all the Second Appeals is whether the suit property belongs to the appellant/Sirajudeen or the deceased respondent/ Sadurudeen.

8. The substantial questions of law that arise for consideration in these appeals are:

(i) Whether the judgment of the First Appellate Court is vitiated in its holding that Hiba pleaded by the appellant is not valid in the absence of physical delivery of possession especially when the Trial Court found that both Donor and Donee lived together in the suit property both before as well as after Hiba and hence, only constructive delivery is possible?

(ii) Whether the Courts below misread the material evidence on record in decreeing the suit of the respondent?

9. Learned counsel for the appellant contended that the First Appellate Court erred in rejecting the evidence of D.W.3 by relying on the truncated portion of his evidence without considering his entire evidence. According to the learned counsel, a reading of his entire evidence including chief examination makes it clear that he was present at the time of oral gift and he had first hand knowledge about the same. Hence, the finding of the First Appellate Court is vitiated by misreading of material evidence in support of Hiba and the same is liable to be set aside as perverse.

10. It is the further contention of the learned counsel for the appellant that the First Appellate Court erred in holding that there is no evidence for physical delivery. According to him, both the Donor and the Donee lived in the same house before and after Hiba and that when they have lived under the same roof, the delivery may be constructive and physical delivery is not necessary. It is also his contention that even assuming that the Hiba by Habija Beevi in favour of the appellant has not been proved, still Habija Beevi's share in the property will not go to the deceased Sadurudeen as falsely claimed by him, but it will go to the sisters and brothers of Habija Beevi.

11. In support of his case, learned counsel for the appellant has relied on the following decisions:

(i) Ram Das vs. Salim Ahmed and another (1998) 9 SCC 719

"4. It, however, appears to us that although the High Court indicated in the impugned judgment that the defendant's claim of easement right and also the claim of title by way of adverse possession could not be accepted, such weakness in the defendant's title to the suit property cannot establish the plaintiff's title. The High Court has failed to consider the specific finding made by the lower appellate court that the plaintiff had failed to establish the plaintiff's title. It may be noted that the plaintiff was not entitled to get declaration of title if such title could not be established by the plaintiff by leading convincing evidence. The lower appellate court had considered the evidence in detail and by giving cogent reasons had come to the finding that the plaintiff failed to establish the title to the property. Such finding was not reversed by the High Court by indicating any reason for such reversal but indicating the weakness of the defendant's title the plaintiff's suit was decreed. Even if it is assumed that the property

in question was bequeathed by Bandi Jaan by executing the Will, the title to the suit property cannot be declared in favour of the plaintiff unless the title of the executor of the Will is fully established. In the aforesaid facts, the impugned judgment of the High Court cannot be sustained and the same is therefore set aside by allowing this appeal. The judgment and decree of the lower appellate court are restored."

(ii) S.M.M.Mohamed Mydeen vs. S.N.Peer Mohamed
(2012 (2) CTC 76)

"27. It has been held in decided cases that where the donee is in possession along with the donor and both residing in the same property at the time of gift, the gift may be completed by the indication of a clear intention on the donor's part to transfer possession. The delivery of possession may be presumed from the circumstances of the case and actual transfer of possession will not be needed, when the property is in the use of donor and the donee jointly for purposes of residence. It is also well settled that in the case of a gift of immovable property by the husband to the wife, the fact that the husband continues to live in the house gifted or to receive the rents after the date of gift, will not invalidate the gift, the presumption being that the rents are collected by the husband on behalf of the wife and not on his own accord."

12. In reply, learned counsel appearing for the respondents contended that the appellant ought to have proved two oral gifts viz. the one from Moinudeen Khan to his wife Habija Beevi and the other from Habija Beevi to the appellant. Though documents were marked and evidences were let in attempting to prove the second Hiba from Habija Beevi to the appellant, no evidence was let in to prove the first Hiba, being from Moinudeen Khan to Habija Beevi. Moreover, it is the contention of the learned counsel that when the first Hiba stands not proved, there is no question of second Hiba, as the same is hit by the legal principle, "Nemo dat quod non habet".

13. To the plea taken by the appellant, being the legal heir of Habija Beevi in the capacity of Habija Beevi's sister's son, that he is entitled to legal possession of the suit property, learned counsel for the respondents contended that the said question does not arise, as Mumtaj Begum, mother of the

appellant and sister of Habija Beevi is alive and that succession has not opened further.

14. As regards the first substantial question of law as to whether the judgment of the First Appellate Court is vitiated in its holding that Hiba pleaded by the appellant is not valid in the absence of physical delivery of possession, it is seen that the suit property belonged to one Sahib Khan Sahib, his sons Moinudeen Khan and Sadurudeen by way of a partition deed dated 06.05.1954 and after the death of Sahib Khan Sahib, the property devolved upon his sons, i.e. Moinudeen Khan and Sadurudeen, equally. According to the respondents, as Moinudeen Khan and his wife Habija Beevi had no issues, after the death of Moinudeen Khan, his brother Sadurudeen succeeds to the suit property by intestate succession. But, it is the case of the appellant/Sirajudeen that Moinudeen Khan orally gifted the suit property to his wife Habija Beevi, when he was alive and after his death, Habija Beevi, orally gifted the same to the appellant. Firstly, the appellant claims that he is the adopted son of Moinudeen Khan. Secondly, he claims that Habija Beevi, during her lifetime, orally gifted the suit property to him.

15. It is the further case of the respondents that the deceased Sadurudeen permitted the appellant/Sirajudeen to occupy the suit property as permissive occupant and subsequently cancelled the permission given to him in July 2008. While so, it is the case of the appellant/Sirajudeen that on 22.02.2008, by means of Hiba, the suit property was given to him by Habija Beevi in the presence of Salaudeen, son of Bashirudeen and Nasser, son of Subhan and from then onwards, he is in possession and enjoyment of the suit property and he is not a permissive occupant, as pleaded by the respondents. It is submitted by the appellant that the deceased respondent/Sadurudeen tried to alienate the suit property and hence, the appellant was constrained to file O.S.No.286 of 2008 seeking permanent injunction forbearing the deceased Sadurudeen from alienating the suit property. According to the appellant/Sirajudeen, the respondents are entitled to seek partition and not the entire possession of the suit property.

16. As per Muslim Law, when a husband dies without any issue, his property naturally goes to his brother. In this case, it is pleaded that when Moinudeen Khan was alive, he orally gifted the suit property to his wife Habija Beevi. Since they had no issues, ultimately, after the death of Habija Beevi, the property devolves upon her brothers and sisters. It is not in dispute that Habija Beevi is having a share in the suit property. Admittedly, oral gift has got to be proved, but the same has not been proved in this case. The appellant/Sirajudeen

is the son of one Mumtaj Begum, who is the sister of Habija Beevi and he resided in the suit property after her death. Merely because the appellant/Sirajudeen resided in the suit property, the same cannot be taken advantage by him that there is a Hiba. The First Appellate Court, in its judgment has clearly held that the first Hiba supposedly given by Moinudeen Khan to his wife Habija Beevi has not been proved. However, it is not disputed by either of the parties that Habija Beevi, after the death of Moinudeen Khan resided in the suit property till her death.

17. Also, a perusal of the evidence of D.W.3 - Bashirudeen shows that none had been a witness to the Hiba given by Habija Beevi to the appellant/Sirajudeen and that he came to know about the said Hiba given to the appellant, only through Habija Beevi. Further, in his cross-examination, he has clearly stated that at the time of Hiba, the suit property was not handed over to the appellant/Sirajudeen and that he is not aware as to whether the possession of the suit property had later on been handed over by Habija Beevi to the appellant/Sirajudeen.

18. When there are two ways of interpretation to a particular evidence and when a particular view has been taken by the Trial Court and the First Appellate Court, this Court, sitting in Second Appeal cannot hold that the Courts have misread the evidence. At this juncture, it is worth referring to the Apex Court decision in the case of W.M.Agnani vs. Badri Das reported in (1963) 1 LLJ 684, wherein, the Industrial Tribunal put one interpretation upon the resolution of the Management and the High Court thought it better to put another. The Apex Court held that it cannot be said to introduce an error apparent on the face of the record in the order of the Industrial Tribunal and if it can be said that the view taken by the Tribunal is not even reasonably possible, perhaps an argument can be urged that the error is apparent on the face of the record. In the said case, the High Court exceeded in its writ jurisdiction in interfering with the finding of the Industrial Tribunal based on the construction put by it upon the resolution of the Management.

19. For better appreciation, relevant portion of the judgment rendered in Agnani's case (cited supra) is extracted hereunder:

"11. ... The Tribunal took the view that this resolution clearly showed that the enquiry had to be held about the incident which took place on November 16, 1959 and it thought that the reference to his previous conduct was incidental and may

have been necessary for determining the question of sentence, but it was not intended to be the subject matter of the enquiry. The High Court has taken a different view. Apart from the correctness of one view or another, it seems to us plain that in a matter of this kind, if the Tribunal put one interpretation upon the resolution and the High Court thought it better to put another, that cannot be said to introduce an error apparent on the face of the record in the order of the Tribunal. If it can be said that the view taken by the Tribunal is not even reasonably possible, perhaps an argument may be urged that the error is apparent on the face of the record; but, in our opinion, it would not be possible to accept Mr. Setalvad's argument that the construction placed by the Tribunal is an impossible construction. On the other hand, while conceding that the view taken by the High Court may be reasonably possible, we are inclined to think that the construction put upon the resolution by the Tribunal is also reasonably possible; in fact, if we had to deal with the matter ourselves, we would have preferred the view of the Tribunal to the view of the High Court. "

20. Further, the Apex Court in a recent decision in the case of Syeda Rahimunnisa vs. Malan Bi (dead) represented by L.Rs. reported in (2016) 10 SCC 315 has held that the Court cannot go into the finding of fact, more particularly concurrent finding, in the absence of perversity, when a roving enquiry about factual aspects of appeal is improper and that the paramount consideration for the High Court while hearing a Second Appeal is the exercise of powers of High Court as per Section 100 C.P.C.

21. From a reading of the evidence of D.W.3, it is very clear that Habija Beevi, even though enjoyed the suit property and collected rent, it will not give any right to her nephew, i.e. the appellant/Sirajudeen to contend that he has right to the suit property as a co-owner and as the legal heir of Moinudeen Khan. Admittedly, it has been pointed out by the parties that the sister of Habija Beevi, i.e. the mother of the appellant is alive. Even though the appellant/Sirajudeen has

been residing in the suit property, he cannot as a matter of right contend that he is one of the co-owners and the same cannot be accepted. He may be the son of one of the co-owners, as they are legal heirs of Habija Beevi and may not be a trespasser, however, the respondent herein has got every right to seek possession of the suit property.

22. As stated supra, there are more than one legal heirs of Habija Beevi and admittedly, the appellant is not one of the legal heirs. The direct legal heirs of Habija Beevi are her sisters and brothers. That apart, the appellant/Sirajudeen has also not established that there is a proper Hiba from Moinudeen Khan to Habija Beevi. That being the case, the subsequent Hiba from Habija Beevi to the appellant cannot be accepted.

23. Further, the appellant/Sirajudeen has not proved that he has got absolute right over the suit property and none of the other legal heirs of Moinudeen Khan are party to the suit and whether they are entitled to a share in the suit property and 1/4th share of Moinudeen Khan and whether they are entitled to seek partition, are all matters to be decided in a separate suit and in the present case on hand, this Court cannot go into such questions, as they are beyond the scope of the suit. Even if a family tree is drawn with regard to legal heirs of Moinudeen Khan, the appellant will not be treated as one of his legal heirs as on date, as, his mother Mumtaj Begum, who is the sister of the deceased Habija Beevi, is very much alive.

24. Hence, I am of the view that no donor/donee relationship is established between Moinudeen Khan and his wife Habija Beevi. When the first Hiba has not been established, naturally there cannot be any donor/donee relationship between Habija Beevi and the appellant/Sirajudeen.

25. Thus, the substantial questions of law are answered against the appellant/Sirajudeen. However, it is open to the appellant's mother and other legal heirs of Habija Beevi to seek partition.

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In fine, all the Second Appeals stand dismissed. The Judgment and decree of the first Appellant court are Confirmed. No costs. Consequently, connected M.P.No.1 of 2012 in S.A.No.526 of 2012 is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To:

1. The Principal Sub Court, Mayiladuthurai.
2. The Principal District Munsif, Mayiladuthurai.

Copy to:

The Section Officer,
V.R. Section,
High Court, Madras.

+3cc to Mr.S.Sownthar, Advocate, S.R.No.23735,23736,23737
+3cc to Mr.A.Mohamed Ismail, Advocate, S.R.No.23769

S.A.No.526 of 2012
& S.A.Nos.753 and 962 of 2013

SSI (CO)
RS(10/05/2017)

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