

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.10.2019

PRONOUNCED ON : 08.11.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

A.S.No.70 of 2013

1.S.Sathar
2.S.Rahimabee
3.Shakeela

...Appellants/Defendants

Vs.

Basheera

... Respondent/Plaintiff

Prayer :- First Appeal has been filed under Section 96 of the Civil Procedure Code against the Judgement and Decree dated 31.07.2012 passed in O.S.No.1 of 2010 on the file of the Additional District Judge, Krishnagiri, Krishnagiri District.

For Appellants : Mr.S.Senthilnathan

Respondent : No appearance
set exparte vide order
dated 24.10.2019

JUDGMENT

Aggrieved over the Judgement and Decree dated 31.07.2012 passed in O.S.No.1 of 2010 on the file of the Additional District Court, Krishnagiri, Krishnagiri District, the defendants have preferred the first appeal.

2.For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3.Suit for partition, future mesne profits and permanent injunction.

4.The case of the plaintiff in brief is that the first defendant is her elder brother and the second defendant is the mother of the plaintiff and the first defendant and the third defendant is the wife of the first defendant and daughter-in-law of the second defendant. The suit properties absolutely belonged to Sheik Mohideen Saheb, the father of the plaintiff and the first defendant and the husband of the second defendant and he died on 14.12.2000 leaving behind the plaintiff and the defendants 1 & 2 as his legal heirs to succeed the suit properties. After the demise of her father, the plaintiff allowed her brother, who is the only male member

of the family to manage the suit properties and the first defendant was enjoying the suit properties on behalf of himself and on behalf of the plaintiff and his mother, hence the second defendant and the plaintiff are deemed to be in the joint possession and enjoyment of the suit properties along with the defendants 1 & 2. As per Mohammaden Law, the second defendant is entitled to a common $1/8^{\text{th}}$ share in the suit properties and in the remaining common $7/8$ share, the first defendant and the plaintiff are entitled in the ratio of 1 : 2, thus, the plaintiff is entitled to $7/24$ share and the first defendant is entitled to $14/24$ share and the second defendant is entitled to $3/24$ share in respect of the suit properties. The first defendant was providing the plaintiff's share of Magasools derived from the suit properties either by way of Magasools or by way of cash, however, from July, 2009 onwards, the first defendant stopped giving the plaintiff's share in respect of the income derived from the suit properties and on the plaintiff questioning the same, the first defendant abruptly denied the right of the plaintiff in respect of the suit properties in collusion with the other defendants and suspecting foul play, the plaintiff applied for a computer Chitta from the Taluk office, Pochampalli and shocked and surprised to find that the first defendant has managed to get a patta in his name and in the name of his wife, stealthily in respect of the suit properties without the knowledge of the plaintiff and the obtainment of the patta by the defendants as above stated would not in any manner defeat the claim of the plaintiff's share in respect of the suit properties and on the basis of which, the defendants are not entitled to deny the claim of the plaintiff's share in the suit properties and hence, according to the plaintiff, she has been necessitated to lay the suit against the defendants for appropriate reliefs.

5. The defendants filed the written statement contending that the suit properties were succeeded by the father of the plaintiff and the first defendant and in the possession and enjoyment of the same till 28.03.1972 and as he was unable to cultivate the lands for want of funds to dig the Well, he gifted the suit lands orally on 28.03.1972 in favour of the defendants 1 & 3 in the presence of Yakub Sahib, Sheik Mohammed Gouse, Syed Beer and Rahimabi, the second defendant and handed over the possession of the same to the defendants 1 and 3. Yakub Sahib and Sheik Mohammed Gouse had died. The defendants 1 & 3 accepted the abovesaid gift and took possession of the suit properties. For digging Well and installing electricity pump set and put pipelines, the first defendant obtained loan from the Land Development Bank, Uthankarai in the year 1972 and the father of the first defendant had also given a statement stating about the gift and put forth no objection for the grant of loan. After the obtainment of the loan, the first defendant dug a Well,

installed electricity pump set and also imbedded pipelines underneath the suit properties and accordingly, the defendants 1 & 3 had been engaged in the cultivation of the suit properties on their own and planted coconut saplings and accordingly, the revenue officials in recognition of the defendants' possession and enjoyment of the suit properties granted patta in favour of the defendants 1 & 3 in or about the year 1984 and

accordingly, the defendants 1 & 3 are paying the kist and other taxes in respect of the suit properties and also enjoying the same even during the life time of their father till his death and continue to enjoy the same and the plaintiff was provided by her father necessary jewells and utensils at the time of the marriage and hence, the father had chosen to give the suit properties in favour of the defendants 1 & 3 and therefore, the plaintiff is not entitled to claim any share in the suit properties and it is false to state that the defendants had been providing Magasools to the plaintiff in proportion to her share as claimed in the plaint and at no point of time, the defendants had provided any Magasools to the plaintiff in respect of the suit properties. By virtue of the acceptance of the oral gift and the obtainment of the possession, the defendants 1 & 3 had been enjoying the suit properties absolutely in their own right and therefore, the plaintiff is not entitled to claim any share in the suit properties as prayed for and the plaintiff has never been in the possession and enjoyment of the suit properties and therefore, her claim that she is deemed to be in the joint possession and enjoyment of the suit properties is false and the plaintiff has no cause of action to lay the suit and the suit is liable to be dismissed.

6. On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the trial Court for determination:

"(1). Whether the 1st defendant and the 3rd defendant are entitled to the suit property as per oral gift effected by the father Sheik Mohideen on 28.03.1992?

(2). Whether the plaintiff is entitled to 7/24 shares in the suit properties?

(3). Whether the plaintiff is entitled to the relief as prayed for in the plaint?

(4). To what relief if any plaintiff is entitled to?"

7. In support of the plaintiff's case, PW1 was examined and Exs.A1 & A3 were marked. On the side of the defendants, DWs1 & 2 were examined and Exs.B1 to B21 were marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to declare that the plaintiff is entitled to 7/24 shares in the suit properties and relegated the determination of the mesne profits by way of a separate proceeding under Order 20 Rule 12 CPC and also granted the relief of permanent injunction in favour of the plaintiff as prayed for and accordingly, granted the preliminary decree in favour of the plaintiffs and disposed of the suit. Impugning the same, the defendants have preferred the present first appeal.

9. The following points arise for determination in this first appeal:

" (1). Whether the plaintiff is entitled to obtain partition and separate possession of 7/24 shares in the suit properties as prayed for?

(2). Whether the plaintiff is entitled to obtain the relief of permanent injunction as claimed in the plaint?.

(3). Whether the oral gift put forth by the defendants effected by Sheik Mohammed Saheb in favour of the defendants 1 & 3 on 28.03.1972 is true, valid and binding on the plaintiff?

(4). To what relief the plaintiff is entitled to?

(5). To what relief the defendants/appellants are entitled to?"

10. Point Nos.1 to 3

The relationship between the parties is not in dispute. It is also found that the parties are not at issue that the suit properties originally belonged to Sheik Mohideen Sahib. It is found that Sheik Mohideen Sahib died on 14.12.2000. The parties are governed by Mohamman Law. Accordingly, it is the case of the plaintiff that after the demise of her father, Sheik Mohideen Sahib, she is entitled to 7/24 shares in the suit properties and as the defendants failed to allot her share in respect of the suit properties, it is put forth by the plaintiff that she has been necessitated to lay the suit against the defendants for appropriate reliefs.

11.The defendants resisted the plaintiff's suit mainly contending that during the life time of the father, Sheik Mohideen Sahib, he had orally gifted the suit properties in favour of the defendants 1 & 3 on 28.03.1972 in the presence of the witnesses and since then, it is only the defendants 1 & 3, who had been enjoying the suit properties and cultivating the same with the assistance of the loan obtained from the Bank and also by securing patta, paying kist etc., and also put forth the case that the plaintiff had been provided with adequate jewells and utensils at the time of her marriage and hence, the father Shiek Mohideen Sahib had deemed it fit to gift the suit properties in favour of the defendants 1 & 3 and hence, according to the defendants, the plaintiff is not entitled to claim any share in respect of the suit properties.

12.In the light of the above position that the suit properties admittedly belonged to Sheik Mohideen Sahib and both the plaintiff as well as the defendants are claiming right only through him in respect of the suit properties as put forth by them respectively and the defendants have put forth the plea that the plaintiff is not entitled to claim share in the suit properties on account of the oral gift effected in favour of the defendants 1 & 3 in respect of the suit properties by Sheik Mohideen Sahib on 28.03.1972 and when the abovesaid case of the oral gift projected by the defendants 1 & 3 is being stoutly repudiated by the plaintiff, accordingly, it is found that as determined by the trial Court, the burden is upon the defendants to establish that the oral gift pleaded by them is true, valid and binding on the plaintiff.

13.Now, according to the defendants, Sheik Mohideen Sahib had orally gifted the suit properties in favour of the defendants 1 & 3 in the presence of four witnesses viz., Yakub Sahib, Sheik Mohammed Gouse, Syed Beer and Rahima Bi, the second defendant and it is the case of the defendants that of the abovesaid four witnesses, Yakub Sahib and Sheik Mohammed Gouse had expired. In such view of the matter, as rightly put forth by the plaintiff, to sustain their case of the oral gift, the defendants should have endeavoured either to examine Syed Beer or at least, the second defendant. However, despite the availability of the witness, Syed Beer and also the admission made by the first defendant DW1 that he would examine Syed Beer, for the reason best known to the defendants, they had not chosen to examine Syed Beer to sustain their case of oral gift said to have been made by Sheik Mohideen Sahib. Assuming for the sake of arguments that the defendants are unable to examine Syed Beer for one reason or the other, at least the defendants should have endeavoured to examine the second defendant in support of their plea of oral gift. The second defendant being a Muslim Lady, even if she is experiencing any difficulty to appear in the Court and depose the facts, nothing prevented the defendants from examining the second defendant by way of a commission.

Therefore, it is found that despite the availability of the witnesses to establish their case of oral gift said to have been effected by Sheik Mohideen Sahib, the defendants had not chosen to examine them. In such view of the matter, it is seen that the defendants have failed to produce the best evidence in respect of the case of oral gift.

14.The defendants, in support of their case, had chosen to examine one G.Srinivasan as DW2. DW2 would claim that he was informed about the oral gift by Sheik Mohideen Sahib in favour of the defendants 1 & 3. So, it is found that the evidence of DW2 is only hearsay and the defendants had not chosen to produce any direct witness to sustain the case of oral gift. Therefore, the trial Court is found to be justified in not relying upon the evidence of DW2 for upholding the case of oral gift projected by the defendants.

15.Therefore, we have only the oral evidence of the first defendant examined as DW1 and the documents projected by him as Exs.B1 to B21. In this connection, the defendants would project the mortgage deeds said to have been executed in respect of certain suit properties as Exs.B17 and B18. Exs.B17 & 18 are found to have come into existence after the alleged oral gift said to have been made on 28.03.1972. If really, the oral gift had been truly made by Sheik Mohideen Sahib in favour of the defendants 1 & 3, while mortgaging the suit properties subsequent thereto, it is only the defendants 1 and 3, who would have endeavoured to mortgage the same and on the other hand, it is found that by way of Exs.B17 & 18 both Sheik Mohideen Sahib as well as the first defendant had jointly executed the abovesaid mortgage deeds. Therefore, it is found that inasmuch as no oral gift had been effected by Sheik Mohideen Sahib in favour of the defendants 1 & 3 on 28.03.1972 and on the other hand, as Sheik Mohideen Sahib continued to enjoy the suit properties absolutely, he had chosen to mortgage the suit properties, subsequent to 28.03.1972, no doubt along with the first defendant. Merely because the first defendant had joined in the execution of the mortgage deeds that by alone would not be sufficient for upholding that Sheik Mohideen Sahib had orally gifted the suit properties in favour of the defendants 1 & 3. If that be so, necessary recitals to that effect would have been incorporated in Exs.B17 & B18. Exs.B19 & 20 are found to be discharge documents of the abovesaid mortgage transactions. The abovesaid documents had come into existence after the institution of the suit. Be that as it may, when it is found that the abovesaid discharge receipts are found to have been executed in the name of Sheik Mohideen Sahib and the first defendant, in such view of the matter, no safe reliance could be attached to Exs.B19 & B20 for upholding the plea of oral gift projected by the defendants.

16.The receipts and notices have been marked by the defendants said to have been issued by the Land Development

Bank as Exs.B1 to B8. The abovesaid documents would not in any manner advance the case of oral gift for claiming exclusive title to the suit properties as put forth by them. Therefore, the abovesaid documents have been rightly not considered and relied upon by the trial Court.

17.The remaining documents projected by the defendants are only patta marked as Exs.B9 & B11 and the Kist receipts marked as Exs.B11, B12, B15 & B16 and EB receipt has also been marked as Ex.B14. No doubt, Exs.B9 & B10 stand in the name of the defendants. However, when the defendants have failed to establish the plea of oral gift by projecting the best evidence as above pointed out and when as above pointed out even after the alleged oral gift, Sheik Mohideen Sahib continued to enjoy the suit properties by mortgaging the same as the absolute owner thereof, no doubt, along with the first defendant, in such view of the matter, merely from the production of patta documents, we cannot safely conclude that Sheik Mohideen Sahib during his life time had orally gifted the suit properties in favour of the defendants 1 & 3. No doubt, for sustaining the plea of oral gift, it is sufficient on the part of the defendants to establish that the same had been accepted by them and the possession of the suit properties had been delivered to them. When admittedly the plaintiff is one of the legal heirs of Sheik Mohideen Sahib and entitled to claim partition in respect of the suit properties on his demise, when it is found that the defendants would put forth the case that the pattas had been granted in their favour during the Updating Registry Scheme in or about the year 1984 and would also put forth the case that at the time of the obtainment of the patta, the father, Sheik Mohideen Sahib had informed about the gift made in favour of the defendants 1 & 3 and instructed the officials to issue the patta in favour of the defendants 1 & 3, to sustain the abovesaid case, the defendants should have summoned the relevant records from the Taluk Office to hold and conclude that only as per the instructions of Sheik Mohideen Sahib for the grant of patta in favour of the defendants 1 & 3, the patta had been issued in their favour. However, the defendants had not chosen to adopt the abovesaid course for holding and determining that the patta had been issued in their favour based on the oral gift said to have been given by Sheik Mohideen Sahib in their favour and if really, any such gift had been made by Sheik Mohideen Sahib, the same would have been recorded by the concerned officials in the relevant records and the defendants could have proved their case by summoning the said records or at least, by examining the officials, who had issued the pattas in their favour for sustaining their case of oral gift. Other than marking the pattas as Exs.B9 & B10, the defendants had not endeavoured to establish that the pattas abovesaid had been lawfully issued in their favour, particularly, during the life time of Sheik Mohideen Sahib and that too, as per the oral gift said to have

been given by Sheik Mohideen Sahib. When the abovesaid case of the defendants had been stoutly challenged and repudiated by the plaintiff, in such view of the matter, as held by the trial Court, merely on the production of the patta documents, which cannot be considered as documents of title, it cannot be held that the same had been issued in favour of the defendants 1 & 3 on the basis of the alleged oral gift said to have been made by Sheik Mohideen Sahib, the father. In such view of the matter, the kist receipts projected by the defendants abovestated and of them, two having come into existence after the institution of the suit and too prior to the filing of the suit, merely on the basis of the same, we cannot hold that the defendants 1 & 3 had been enjoying the suit properties as the absolute owners thereof based on the alleged oral gift said to have been made in their favour by Sheik Mohideen Sahib. Therefore, the same would be equally applicable even to EB receipt projected by the defendants marked as Ex.B14. In the light of the abovesaid factors, as held by the trial Court, the oral and documentary evidence projected by the defendants are not sufficient to sustain the case of the oral gift said to have been effected by Sheik Mohideen Sahib in favour of the defendants 1 & 3, particularly, when it is found that the absolute right over the suit properties had been exercised by Sheik Mohideen Sahib by mortgaging the same, even after the alleged oral gift as above pointed out. The defendants have failed to establish that the patta had been issued in their favour by the concerned Revenue Officials based on the proper enquiry, particularly, on the alleged oral gift said to have been made by Sheik Mohideen Sahib by summoning the concerned records or by examining officials concerned. Merely because, the plaintiff has been provided Jewells and Utensils at the time of the marriage that by itself would not automatically lead to the conclusion that the oral gift projected by the defendants should be a true and valid one. As rightly put forth by the plaintiff in the plaint that if the abovesaid oral gift put forth by them is true and valid, nothing prevented the defendants from taking notice to the plaintiff before the obtainment of the patta in their favour, so as to elicit the response of the plaintiff with reference to the same. On the other hand, when it is found that the patta had been issued in favour of the defendants behind the back of the plaintiff and without her knowledge and as above pointed out, the defendants having failed to establish the oral gift said to have been effected by Sheik Mohideen Sahib, in all, the documents projected by the defendants cannot be safely relied upon for sustaining the oral gift projected by them and therefore, the trial Court is found to be justified in holding that the defendants have failed to establish the truth and validity of the oral gift said to have been effected by Sheik Mohideen Sahib on 28.03.1972. For the reasons aforestated, the abovesaid finding of the trial Court needs no interference.

plaintiff being one of the legal heirs of Sheik Mohideen Sahib and the parties being governed by Mohammadan Law, it is found that the trial Court as rightly declared that the plaintiff is entitled to 7/24 shares in the suit properties. Accordingly, it is also found that the trial Court has rightly granted the relief of permanent injunction in favour of the plaintiff as prayed for.

19. In the light of the abovesaid discussions, I hold that the case of the defendants that Sheik Mohideen Sahib had orally gifted the suit properties in favour of the defendants 1 & 3 on 28.03.1972 is not true, valid and binding upon the plaintiff. I therefore hold that the plaintiff is entitled to obtain partition and separate possession of 7/24 shares in the suit properties as claimed by her in the plaint and as rightly determined by the trial Court, I therefore would hold that the plaintiff is entitled to obtain the relief of permanent injunction as prayed for. Accordingly, the point Nos.1 to 3 are answered.

20. Point Nos.4 & 5

For the reasons aforesaid, the Judgement and Decree dated 31.07.2012 passed in O.S.No.1 of 2010 on the file of the Additional District Court, Krishnagiri, are confirmed and resultantly, the first appeal is dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS-V)

//True copy//

Sub Assistant Registrar

sms

To

The Additional District Judge,
Krishnagiri, Krishnagiri District.

Copy to

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

+1cc to Mr.S.Senthilnathan, Advocate SR.No.93118

A.S.No.70 of 2013

KJ(CO)

GMV(26/08/2020)