

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.12.2018

PRONOUNCED ON : 06.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.O.P.Nos.13014 of 2010 & 4818 of 2011

Crl.O.P.No.13014/10:

1.Samshath Begum

2.Nazheer Khan ... Petitioners / Accused 1 & 2

Vs

1.R.S.Kurshid Begam ... Respondent No.1 / Complainant

2.F.Shariffudin

3.Elango ... Respondents 2 & 3 / Accused 2 & 3

For Petitioners : Mr.C.R.Prasanan

For Respondents : Mr.L.Mouli for R.1

Crl.O.P.No.4818/11:

Rama Subbu ... Petitioner / 6th Accused

Vs

R.S.Kurshid Begam ... Respondent / Complainant

For Petitioner : Mr.M.Mohana Sundaram

For Respondent : Mr.L.Mouli

COMMON PRAYER: Petitions filed under Section 482 of the Code of Criminal Procedure, to call for the records in C.C.No.335 of 2009 on the file of the learned Judicial Magistrate No.VI, Coimbatore and to quash the same.

COMMON ORDER

Crl.O.P.No.13014 of 2010 is filed by accused 1 & 2 in C.C.No.335 of 2009 on the file of the learned Judicial Magistrate No.VI, Coimbatore. Crl.O.P.No.4818 of 2011 is filed by the 6th accused in C.C.No.335 of 2009 on the file of the learned Judicial Magistrate No.VI, Coimbatore. They have filed these petitions to quash the proceedings pending as against them in C.C.No.335 of 2009 on the file of the learned Judicial Magistrate No.VI, Coimbatore.

2. Since the issue involved in both the petitions relates to the calendar case in C.C.No.335 of 2009, which was lodged by one Kurshid Begum / first respondent herein (hereinafter referred to as complainant), both are heard together and are disposed of by way of this common order. For the sake of convenience and brevity, the petitioners are referred to as per their rank before the trial Court.

3. The case of the complainant, in brief, is as follows:

3.1. The property in S.F.No.280/2 in Vilankurichi Village, Coimbatore was purchased by the first accused. The first accused and the complainant are sisters, belonging to Muslim community and according to the complainant, the first accused, as per the personal law, viz., Mohammedan Law, made a oral gift [Hibba] on 02.12.2005, in respect of the subject property, in her favour. On the same day, it was effected by handing over the original title deed and vacant possession to the complainant. In this regard, a confirmation deed was also executed by the first accused on 05.12.2005, in which, the second accused and the complainant's brother are witnesses. Thereafter, on 13.12.2005, the complainant has executed a settlement deed, in respect of four properties including the subject property, in favour of her daughter, viz., Dilshath Begum, before the District Registrar, Coimbatore, in which, the first accused is one of the attestor, as such, on and from 02.12.2005, the first accused is seized to be the owner of the property and on and from 13.12.2005, the complainant's daughter / Dilshath Begum is the owner of the property.

3.2. When such being the position, the first accused, due to some misunderstanding and also with a dishonest intention to alienate the subject property, has executed a general power of attorney in favour of the second accused / her husband, on 19.02.2009, in respect of the subject property, knowing fully well that she is not the owner of the same. According to the complainant, the accused 4 & 5 are the attestors in the said power document and they abetted the accused 1 & 2 in creating such false document. The 6th accused has approached the

complainant's brother and informed that the accused persons had made a dealing with him to sell the subject property and therefore, asked the complainant to settle the matter amicably, otherwise, he will be dealing with the same by purchasing the property. Alleging that the accused 1 & 2 are trying to alienate the property, the complainant has lodged a complaint before the police officials, however, it was not registered, stating that the dispute is civil in nature. Hence, the complainant has lodged the present private complaint before the learned Judicial Magistrate No.VI, Coimbatore, on 15.04.2009, for the offence punishable under Sections 420, 423, 427, 447, 465, 468, 471, 474 IPC.

4. Sum and substance, the arguments advanced by the learned Counsel for the petitioners / accused are as follows:

4.1. The subject property was purchased by the first accused vide registered sale deed dated 27.11.1985 from one Shanmugam. The first accused, due to financial constraints, borrowed a sum of Rs.40,000/- from the complainant, for which, the title deeds in respect of the subject property were handed over to her as security and they had also given several blank papers with the signatures of accused 1 & 2. Using these documents, the complainant, I attempted to interfere with their peaceful possession over the subject property and therefore, they have filed a suit in O.S.No.1200 of 2009 before the District Munsif Court, Coimbatore, for a mandatory injunction directing the complainant and her daughter to return the original title deeds dated 27.12.1985 as well as permanent injunction. Since the dispute is civil in nature, the learned Counsel would contend that the present complaint is not at all maintainable and therefore, the learned Counsel prays for allowing the present petitions.

4.2. Even assuming without admitting that the first accused has executed a Hibba in favour of the complainant, in respect of the subject property, then the question arises for consideration is what is the necessity for the first accused to do so. The signatures obtained in blank papers were utilized for creating the cooked up documents, such as confirmation deed, settlement deed. The complainant has to prove the existence of Hibba and the confirmation deed before the appropriate Civil Court and as such, the present complaint is not maintainable. Moreover, the alleged Hibba is an unregistered one, as such, it lacks evidenciary value.

4.3. The learned Counsel has also relied upon the following decisions in support of their claim:

- AIR 1996 Allahabad 235 - burden is on the complainant to prove the valid execution of the document; and

- 1954 2 MLJ 113 - unregistered Hibba(gift) is inadmissible in evidence, especially when it relates to immovable property.

5. Countering the arguments advanced by the learned Counsel for the petitioners / accused, the learned Counsel for the complainant has answered thus:

5.1. After the institution of the complaint, the first accused, on 22.04.2009, has cancelled the power of attorney dated 19.02.2009, executed in favour of her husband / second accused and on the very same day, ie., on 22.04.2009, she has executed a registered settlement deed in favour of her husband / second accused in respect of the subject property. The second accused, in turn, has executed a registered sale deed on 29.09.2010 in favour of one Lilly Abraham. The accused persons had done all these things, during the pendency of the present complaint before the learned Magistrate. Therefore, the complainant has also filed a suit in O.S.No.439 of 2011 before the learned IV Additional District Munsif, Coimbatore, to declare the settlement deed dated 22.04.2009 as well as the sale deed dated 29.09.2010 as null and void.

5.2. After the institution of the private complaint in C.C.No.335 of 2009 before the learned Judicial Magistrate No.VI, Coimbatore, the accused persons, in order to give a civil colour to their criminal act, have filed the suit in O.S.No.1220 of 2009 before the learned District Munsif, Coimbatore. Moreover, during the pendency of the present quash petitions, the accused 1 & 2 have sold the subject property in favour of one Lilly Abraham, on 29.09.2010.

5.3. Relying upon the decision of the Hon'ble Supreme Court in AIR 2011 SC 1695, the learned Counsel contended that under Mahamadhan Law, oral gift is valid and confirmation of Hibba need not be registered. सत्यमेव जयते

5.4. Knowing fully well that the complainant's daughter is the owner of the property on and from 13.12.2005, the accused persons have trespassed into the same, executed power deed, settlement deed as well as sale deed. All these were executed during the pendency of the criminal complaint, as such, they are liable for criminal prosecution and therefore, prayed for dismissal.

6. Heard the learned Counsel appearing on either side and perused the documents placed on record.

7. Admittedly, the subject property was purchased by the first accused on 27.12.1985. The case of the complainant is that the first accused, as per Mohammed Law, made a oral gift [Hibba] on 02.12.2005 in respect of the subject property in her favour and she, in turn, has executed a settlement deed dated 13.12.2005 in favour of her daughter. Though, the Hibba itself is disputed by the first accused, the fact remains that a confirmation deed of Hibba was executed by the first accused on 05.12.2005, in which the second accused is one of the witness. Moreover, the first petitioner is one of the attesor in the settlement deed dated 13.12.2005.

8. According to the first accused, she borrowed a sum of Rs.40,000/- from the complainant, for which, the original title documents in respect of the subject property were handed over to the complainant and no such Hibba was executed by her. A suit was also filed by them in O.S.No.1220 of 2009 seeking mandatory injunction directing the complainant to return the documents. If that be so, then it is clear that without the title document in hand, the first accused has executed a power of attorney in respect of the subject property in favour of the second accused on 19.02.2009, though cancelled it on 22.04.2009 and later, on the same day, executed a registered settlement deed in favour of the second accused, in respect of the same property. In fact, without the original document, the subject property was sold to one Lily Abraham, by the second accused, vide registered sale deed dated 29.09.2010, as such, there are prima facie materials available in this case. A civil suit in O.S.No.439 of 2011 is also filed by the complainant in this regard, challenging the settlement deed dated 22.04.2009 and sale deed dated 29.09.2010, which is still pending.

9. The three essential requisites to make a gift valid are (i) declaration of the gift by the donor; (ii) acceptance of the gift by the donee expressly or impliedly; and (iii) delivery of possession to and taking possession thereof by the donee actually or constructively. Here, in the present case, according to the complainant, declaration of gift was made on 02.12.2005; on that day itself, it was accepted; and possession was also handed over. A confirmation deed was also executed on 05.12.2005, but the same is in dispute.

10. The Hon'ble Supreme Court in Hafeeza Bibi and others v. Shaikh Farid (Died) by LRs. and others, reported in (2011) 5 SCC 654, has held as follows:

"27. In our opinion, merely because the gift is reduced to writing by a Mohammedan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by a

Mohammedan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammedan Law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting a valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in Mohammedan Law."

11. The documents which are relied upon by the complainant itself are disputed by the accused. Be that as it may, this Court, under Section 482 Cr.P.C., is not the forum to decide the authenticity of the same. Therefore, this Court is not inclined to entertain Crl.O.P.No.13014 of 2010. But, at the same time, the only overtact that was raised by the complainant as against the 6th accused / petitioner in Crl.O.P.No.4818 of 2011 is that the 6th accused has approached the complainant's brother and informed that the accused persons had made a dealing with him to sell the subject property and therefore, he asked the complainant to settle the matter amicably, otherwise, he will be dealing with the same by purchasing the property. This, in the opinion of this Court, does not constitute any offence and other than the above, there is no specific overtact as against the sixth accused.

12. Under the above circumstances, the proceedings pending as against the sixth accused in C.C.No.335 of 2009 on the file of the learned Judicial Magistrate No.VI, Coimbatore is quashed. In fine, Crl.O.P.No.13014 of 2010 is dismissed and Crl.O.P.No.4818 of 2011 is allowed. The petitioners in Crl.O.P.No.13014 of 2010 / accused 1 & 2 are at liberty to raise all their grounds before the trial Court. Considering the age of the proceedings, the learned Magistrate is directed to expedite the trial and dispose of the same, on its own merits and in accordance with law, as expeditiously as possible. Consequently, connected miscellaneous petitions, if any, are closed.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

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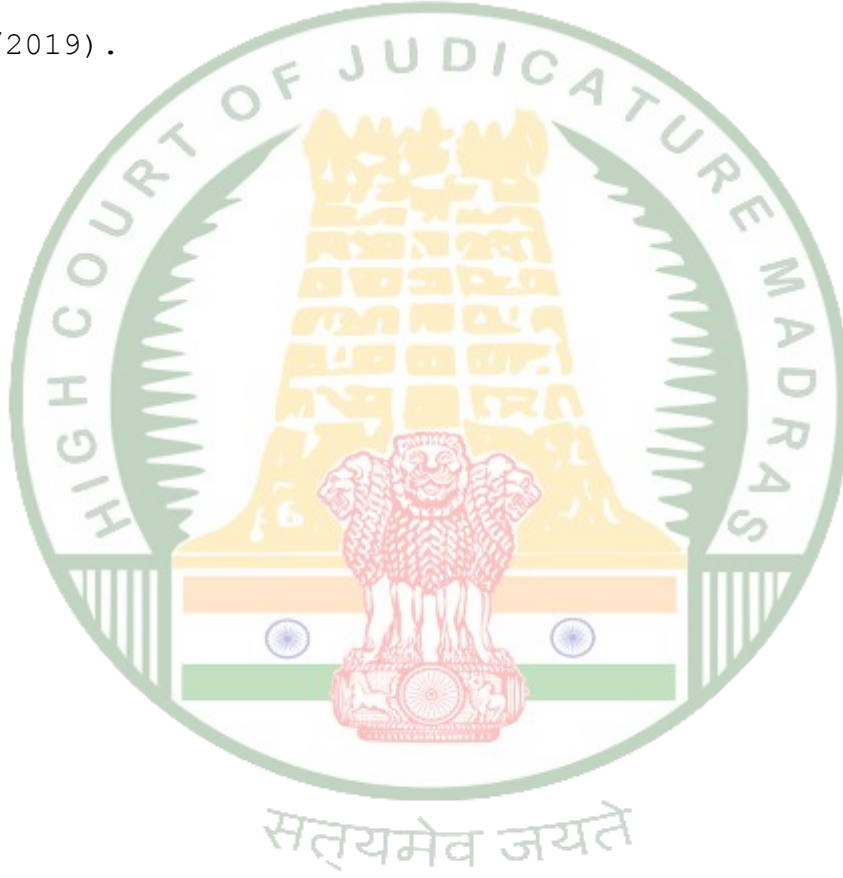
The Judicial Magistrate No.VI,
Coimbatore.

+1 cc to Mr.C.R.Prasanan, Advocate, S.R.No.21145

+1 cc to M/s.L.Mouli, Advocate, S.R.No.21229

Order made in
Crl.O.P.Nos.13014 of 2010
& 4818 of 2011

PPA (CO)
SSM(10/04/2019) .



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