

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 21.06.2019

Judgment Pronounced on : 28.06.2019

CORAM : THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.Nos. 12 & 13 of 2008

Ramachandran

Rep. by his Power Agent Krishnaveni

... Appellant/Appellaant/2nd Plaintiff in SA No.12/2008

... Appellant/Appellaant/2nd Defendant in SA No.13/2008

Vs

Thaiyub Ali

... Respondent/Respondent/Defendant in SA No.12/2008

... Respondent/Respondent/Plaintiff in SA No.13/2008

Prayer in S.A.No.12 of 2008 : Second Appeal filed under Section 100 of CPC against the judgment and decree made in A.S.No.121 of 2004 dated 28.2.2005 on the file of the Court of Additional Subordinate Judge, Mayiladuthurai, confirming the judgement and decree passed in O.S.No.151 of 2004 dated 30.06.2004 on the file of Court of District Munsif Court, Sirkali.

Prayer in S.A.No.13 of 2008 : Second Appeal filed under Section 100 of CPC against the judgment and decree made in A.S.No.120 of 2004 dated 28.02.2005 on the file of Court of Additional Subordinate Judge, Mayiladuthurai, confirming the judgement and decree made in O.S.No.152 of 2004 dated 30.6.2004 on the file of District Munsif Court, Sirkali.

For Appellant : Mr.A.Muthukumar (in both SA's)

For Respondent : Mr.S.Sounthar (in both SA's)

JUDGMENT

These twin appeals arise out of a common judgment in two separate appeals which in turn are preferred against the decrees passed in two separate suits.

2.1. The suits may be briefly be explained :

- The dispute is chiefly between brothers. It is Abdul Hameed Vs Thayub Ali. The dispute is over a plot measuring 35 cents iin R.S.No.310 of Kathanchavadi, Erukkantanchery Village in Tranquebar Taluk. The

property is admittedly owned by their mother Sayeed Gani Ammal. The quintessence of the controversy is that while Abdul Hameed claims title to the suit property under the settlement deed dated 29.4.1981 (marked Ext.A11), the defendant, Thaiyub Ali claims title to the same property under a oral hiba granted to him by Sayeed Gani Ammal on 25.3.1980, which was later evidenced Vide document dated 12.4.1980.

- A third character had entered the fray as a pendete lite purchaser of Abdul Hameed. And, Abdul Hameed died when the suit was pending trial, and this pendente lite purchaser impleaded himself as his legal representative.
- Abdul Hameed laid a suit in O.S.No.151 of 2004 for declaration of title over the suit property and for recovery of possession with mense profits., whereas Thaiyub Ali had filed a suit in O.S. No.152 of 2004 for bare injunction. The suits were originally filed before Sub Court, Mayiladuthurai and then transferred to Munsif Court, when the pecuniary jurisdiction of the Munsif Court was enhanced. Thereafter, both suits were transferred and consolidated by the District Court, and finally the matter was taken up as O.S.No.151 of 2004 and O.S.No.152 of 2004. It may be stated that during the pendency of the suits, Abdul Hameed had passed away, but not before he executed a sale deed in favour of one Ramachandran Vide sale deed dated 29.4.1981, marked as Ext.A11. Promptly, the purchaser pendente lite had impleaded himself to represent the estate of Abdul Hameed.

2.2. The trial Court after appreciating the evidence made available by the parties had dismissed O.S.No.151 of 2004 (the one filed by Abdul Hameed for declaring his title etc.,) and decreed the suit for bare injunction filed by Thaiyub Ali in O.S.No.152 of 2004. Aggrieved by the same, the purchaser of the suit property from Abdul Hameed had preferred twin appeals in A.S.No.121 of 2004 and A.S.No.120 of 2004 respectively, both of which came to be dismissed. From the decrees of the first Appellate Court, the present appeals are preferred.

2.3. Since the present appellant has impleaded himself as a successor-in-interest of Abdul Hameed, except where the context requires, his interest would be considered in reference to his vendor, and hence would be referred to as the plaintiff, and respondent Thaiyub Ali would be referred to as defendant. The pleadings in this case can be briefly summarised :

- Plaintiff's case is that, the suit property and others originally belonged to one Syed Gani Ammal, that on 20.12.1977, a family arrangement took place in which both Abdul Hameed and Thaiyub Ali were allotted some

properties. As regards the suit property and other properties, on 10.12.1979, a release deed was executed by the defendant after receiving a consideration of Rs.10,000/-. However, the defendant Thaiyub Ali had not vacated the property, but he promised to do so. Later, he went to Dubai and Thaiyub Ali delayed vacating the property. In the meantime on 29.4.1981, Sayeed Gani Ammal had executed a settlement deed in favour of Abdul Hameed.

- While so, it has come to the knowledge of Abdul Hameed that his brother Thaiyub Ali had fabricated a hiba document dated 12.4.1980, wherein it was stated that the suit property was orally gifted by the mother in his favour. Therefore, Abdul Hameed has moved the Judicial Magistrate Court, Mayiladuthurai, accusing Thaiyub Ali for fabricating the document, and this was taken on file by the Court in CC.No.736 of 1989. However, it came to be dismissed on a technical ground. As the alleged hiba documents created a cloud over the 1st plaintiff's (Abdul Hameed) title, the present suit in O.S.No.151 of 2004 was laid.

3.1 In the written statement of Thaiyub Ali, while he admitted that his mother Syed Gani Ammal originally had title to the suit property, chose to deny and impugn the settlement deed dated 29.4.1981, as not genuine as it has been executed by an old illiterate lady by coercion, threat, misrepresentation or fraud and this document is fraudulent.

3.2. Abdul Hameed has been irresponsible right from his early days, and he had sold his share of his father's properties to which he had succeeded to on his father's demise, and that he was not on cordial terms either with the mother or with his brother Thaiyub Ali. On the contrary, the defendant has been doing several businesses since he was 18 years, and has been caring his mother. While so, sometime in 1977, Abdul Hameed approached his mother, sought her forgiveness, consequent to which, some of the misunderstandings between them were removed. Subsequently a panchayat took place in 1977, wherein it was agreed Thaiyub Ali would be given 3.61 acres of land. Indeed, Sayeed Gani Ammal herself came to know the extent of property she was having, only then. It was also agreed that in lieu of an house property Sayeed Gani Ammal has to pay her son Thaiyub Ali a sum of Rs. 10,000/- within a period of three months. This amount was not paid, instead Rs.4000/- was paid, and in the meantime, Abdul Hameed coerced Thaiyub Ali to execute the release deed dated 10.12.1979. And Syed Gani too executed a hiba dated 10.12.1979 in favour of the defendant. The hiba in favour of the defendant did not represent the entire 3.56 acres., but only 1/7th share therein. She had executed a separate settlement deeds regarding 6/7 share in the property in favour of his (defendant's) children. When Thaiyub Ali voiced his

displeasure over this change of strategy at the eleventh hour, Syed Gani persuaded him to accept it.

3.3. Once the documents are executed by Syed Gani Ammal, Abdul Hameed reverted to his old ways. She would then visit Thaiyub Ali at his place, during which time the latter had conveyed his disappointment to the former as to how he was cheated over the extent of property conveyed to him under the gift. It is in this circumstances she had orally gifted the suit property to him 25.3.1980, and this came to be confirmed on 12.04.1980 under a written document executed in the presence of witnesses. Ever since, Thaiyub Ali came to be in possession of the property.

3.4. So far as the role of Abdul Hameed's pendente lite transferee is concerned, he is not a bonafide purchaser since the sale deed under which he claims title was drafted by the counsel for the Abdul Hameed in these litigations. The same counsel also continued as the counsel for the pendente lite purchaser as well. Therefore, it is inconceivable that the transferee pendente lite would not have known about the pending litigation. Secondly, pendente lite purchaser Ramachandran is a citizen of Republic of Singapore. He had not obtained any permission from the Reserve Bank of India as per Section 31 of FERA. The said sale is therefore invalid. Thirdly, Syed Gani Ammal is a necessary party to the suit, and her non-impleadment implies that the suit is bad on the non-joinder of parties. In the additional written statement subsequently filed, it is alleged that the said pendente lite sale deed is also a sham document.

4. On the same set of facts, parties contested the injunction suit in O.S.No.152 of 2004 filed by the defendant Thaiyub Ali.

5.1 Besides these suits, there was another suit filed by the pendente lite purchaser (present appellant) in O.S.153/2004. All the three suits were tried together and evidence was recorded in O.S.151/2004. The outcome of the suits involved in these appeals as already indicated has been in favour of Thaiyub Ali. So far as the third suit in O.S.153/2004, the same came to be decreed in favour of the present appellant, and has attained finality.

5.2 Before the trial Court, for the plaintiff, the power of attorney of the present appellant and another were examined as P.W.1 and P.W.2. Defendant examined himself as D.W.1. The documents relevant for the current purposes are marked as Ext.A-8, A-10, Ext. A-11, Ext.B-1, Exts. B-6 to B-9, Ext.B-10.

6.1 The dispute may be restricted to the most essential. Sy.No:310 originally had an extent of 2.92 acres. This is one of the properties covered by Ext.A-10 release deed executed by the defendant in favour of his mother Syed Gani Ammal. This is an admitted fact. Out of this, under Ext.A-11 dated

29-04-1981, Syed Gani Ammal had executed a settlement deed for an extent of 2.55 acres. The remaining extent is 37 cents, in which there is a house. While so, on 01-08-1991, Syed Gani Ammal along with her son Abdul Hameed had executed a sale deed in favour of the present appellant. This document is marked Ext.A-8. The defence was that even on 25-03-1980, under an oral hiba, Syed Gani Ammal had given the suit property to the defendant, and later confirmed it under Ext.B-1, dated 25-03-1980. On getting wind of the same, Abdul Hameed had proceeded to launch a criminal case in CC 736/1989. In this he had given his evidence as P.W.1 on 07.04.1986 and it was marked Ext.B-7. The present suit was originally laid as O.S.142/1990, and Syed Gani Ammal had died a decade later on 18-09-2002 as evidenced by her death certificate Ext.B-10.

6.2 The issue is whether Syed Gani Ammal had title over the suit property when she executed Ext.A-8 sale deed in favour of the appellant.

6.3. The trial Court finds that Ext.A-11 does not include the suit property and hence the sale in favour of the appellant, the pendent lite purchaser under Ext.A-8 tracing the vendor's title to Ext.A-11 is incompetent. In arriving at this conclusion, it considered that Syed Gani Ammal, whose alleged hiba in favour of the defendant was the center of the controversy was alive till 18-09-2002. At no time before her death plaintiff chose to examine Syed Gani Ammal either in the criminal case accusing the defendant of fabricating Ext.B-1 in C.C.736/89 (originally laid as STC 938/1984 before JM I, before it was transferred to JM-II), or in the present. The suit which he originally laid as O.S.142/1990. Still he chose not to examine Syed Gani Ammal in any of the two cases at any time before her death. Secondly, on the date when the suit was laid, Syed Gani Ammal was alive and she was a necessary party to the suit, but was not impleaded. While in his testimony before the criminal court in C.C.736/1989, marked Ext.B-7, Abdul Hameed had deposed that he knew about the Hiba sometime in 1984, in the suit, he makes a false statement that he came know of it only on 10-06-1989. Also, the defendant has effected mutation of property tax register and has been paying tax to the house in the suit property, and that the defendant is in possession. And, it proceeded to dismiss the suit.

6.4 When the dispute reached the first appellate Court, it confirmed the decrees of the trial Court, adopting the very line of reasoning that the trial court had adopted. The first appellate Court spent time to explain why handing over possession is an indispensable aspect of a hiba, and finds that possession has not been handed over to Abdul Hameed pursuant to Ext.A-11 settlement deed.

7. This appeal is admitted to decide the following substantial questions of law:

1. When the defendant admits the title of the plaintiffs'

predecessor-in-interest and the 2nd plaintiff has purchased the same from her under Ex.A8, whether the lower appellate court erred in law in holding that the 2nd plaintiff has no title to the suit property?

2. Whether the finding of the lower appellate court that the defendant has proved oral gift is perverse?

3. Whether the courts below have committed an error in law in dismissing the suit on the ground of non-joinder of necessary parties since the vendor of the second plaintiff was not made a party?

8. The learned counsel for the plaintiff would submit that Ext.B-1 was not proved, as none of the witnesses thereto are examined before the Court. The burden is chiefly on the defendant to sustain Ext.B-1, or more specifically the oral hiba which Ext.B-1 purports to evidence, but this is not done. Turning to non-examination of Syed Gani Ammal, she had died on 18-09-2002, after the chief examination of PW1 on 11-07-2002, but before her cross examination on 25-09-2002. Therefore, there was no possibility for the plaintiff to examine Syed Ganiammal. Turning to the other aspect touching on possession of property, the suit property is shown as property having 35 cents with a building bearing No:22, and D.W.1 has admitted in his evidence that he had vacated and handed over possession of the residential building bearing No:22 in his evidence.

9. Defending the decree passed in respondent's favour, his counsel argued:

- The suit itself is misconceived and is not maintainable. The plaint traces title of the plaintiff to Ext.A-11, and it has emerged that it does not include the suit property. It is now impermissible for the appellant to abandon his case in the midstream of the litigious journey, and rely on Ext.A-8.

- Secondly, the second plaintiff (the pendente lite transferee of Abdul Hameed and the present appellant), had impleaded himself as the legal representative of the first plaintiff, even though no part of the cause of action had devolved on him. Reliance was placed on the ratio in New Okhla Industrial Development Authority v. Pooran Singh and Others etc., [AIR 2004 Allahabad 218].

- Thirdly, the present appellant, is a citizen of Republic of Singapore, which his wife and Power of Attorney, P.W.1 admits in her cross examination. However, there is no evidence to establish that he had purchased the suit property under Ext.A-8 after obtaining permission from the RBI. Reliance was placed on Shoba Viswanathan Vs D.P.Kingsley [1996-1-LW 721(DB)] Sahruvan Nachiar & another Vs V.S.Mohammed Hussain Maracaiar

10. Replying the same, the learned counsel for the appellant would argue that the appellant traces his title to Ext.A-8 sale deed, and Syed Ganiammal is a co-executant of this document alongside Abdul Hameed, and hence even if Ext.A-11 does not include the suit property, the same will have no consequence on Ext.A-12. On the aspect of FERA violation, the learned counsel relied on R. Sambasivam Vs Thangavelu Dhanabagyam [2001-1-LW 161].

11. The question, in the perception of this Court, roams in a narrow space, the multi-layered arguments advanced by rival sides notwithstanding. It is not so much about whether Ext.A-11 included the suit property, but whether Syed Gani Ammal was competent to execute Ext.A-8 sale deed on dated 01-08-1991. Or, had she already lost her title in the oral hiba and evidenced by Ext.B-1 dated 12-04-1980, when she executed Ext.A-8?

12.1 Few facts are indisputable and they form the basic premise: First the entire property in Sy.No:310/2 Burke Thottam, WardNo.14, Erukkattanchery Village and Vattam, Tranquebar Taluk belonged to Syed Gani Ammal. Second, she executed Ext.A-11 settlement deed in favour of her son Abdul Hameed that dealt with all but 35 cents and house in Sy.No:310/2. This 35 cents is the subject matter of Ext.B-1 dated 12.04.1980 in favour of the defendant. Third, she along with Abdul Hameed conveyed this 35 cents (the subject matter of Ext.B-1) to the appellant some ten years thereafter on 01.08.1991 under Ext.A-8.

12.2 When Ext.A-11 does not grant title to suit property (the 35 cents now under discussion) to Abdul Hameed, what is his locus to claim title to it based on the said document? By the same logic, what is his locus standi to even institute a criminal case alleging that the hiba deed is fraudulent? If at all someone had right to challenge, at stage 1, Syed Gani Ammal had, and after Ext.A-8 sale in favour of the appellant under Ext.A-8, he had. This right is independent to him and not one derived from Abdul Hameed. In that sense, the mere fact Abdul Hameed had joined as a co-executant of Ext.A-8 sale deed does not, and cannot alter this equation and make the appellant a pendete lite transferee in the strict sense of the term, for the title is provided to him by a third party to the litigation that Syed Ganiammal is.

13.1 The Courts below have held that Syed Ganiammal is a necessary party to the suit. This Court agrees with it. Here is a hiba evidenced by Ext.B-1, and according to Abdul Hameed (the first plaintiff) he came to know of the same sometime in 1984. He proceeds to file the suit only in 1990, and in between he had laid a criminal case against the defendant. The only person who could to speak to the genuineness of hiba and Ext.B-1 or for that matter her title to execute Ext.A-8

was Syed Ganiammal. Did she ever know that one of her sons had challenged a document (Ext.B-1), claimed to have been executed in favour of her other son? Is there a person who is more competent to speak about it than her? She was alive for the next 18 years since 2004, the year in which Abdul Hameed gained knowledge about Ext.B-1. And, when Abdul Hameed laid the suit on the basis of Ext.A-11, he knew that Ext.B-1 would be a thorn in his flesh. Is it not then necessary for him to implead his mother? And when the second plaintiff (the present appellant) stepped into the shoes of Abdul Hameed, he takes a chance with the pleading of the first plaintiff, but the same does not take him anywhere since Ext.A-11 settlement deed in favour of Abdul Hameed does not feed his claim of title under Ext.A-8.

13.2 When the appellant joined the party array as second plaintiff, Syed Ganiammal was still alive. Even he did not feel it necessary to implead her. The attempt has been to keep the lady, who is most ideally positioned to speak about the genuineness or otherwise about Ext.B-1, was never brought before the Court, and her non-impleadment in the suit denied the Court an opportunity to know what her version on hiba.

13.3 This Court holds that Syed Gani Ammal appears to have been strategically left aside, and this conduct of the plaintiffs deserves drawing an adverse inference, as it offends the rule of fairness on which the justice-dispensation mechanism operates. This case is not a proxy war on behalf of Syed Ganiammal, but a shadow-boxing without the real characters in the party array.

14. The Court below appeared to have been guided by the rule of best evidence when they have faulted the appellant for not examining Syed Ganiammal. Here this Court differs. The indisputable fact remains that Syed Ganiammal had died during the course of the trial of the suits, and hence the plaintiff cannot be faulted for not doing something which it is impossible for him to do. This apart, the defendant as D.W.1 had deposed that Syed Ganiammal had been a paralytic for few years before her death, and that she could not communicate much. After all, law does not require or expect a party to perform that which is incapable of being performed.

15. The next question, though not seen raised before the Courts below is the locus standi of the present appellant to sustain the appeal. This is partially touched earlier. True that Ext.A-11 did not deal with the suit property, and that the appellant had not derived title under Ext.A-11 on the strength of which the suit was laid. His claim of title is independent, and this has to be traced to Ext.A-8. However, when he was impleaded this appellant was not told that he lacked locus standi to present the suit even though an additional written statement was filed by the defendant. Now, it is too late in the day to canvass it,

though it must be recorded that the argument against the locus standi of the appellant is not without merit.

16. An adjunct issue crops up. This aspect also does not appear to have been canvassed adequately before the Courts below, since not even an issue is seen framed on it: That Ext.A-8 under which the appellant claims contravenes Sec.31 of the FERA and hence is invalid. This is specifically pleaded in the additional written statement. Hence, when the case has gone for trial, the appellant, who by then had joined the party array as the second plaintiff, ought to know the same. His case was spoken to before the Court by his wife (examined as P.W.1), and she concedes that her husband is a citizen of Singapore and concedes that she was not aware if any permission was obtained. Till date no permission is placed before this Court. To this Court, this issue is critical. In support of his argument, the learned counsel for the respondent/defendant argued placed reliance on an authority of a Division Bench of this Court in Shoba Viswanathan Vs. D.P.Kingsley [1996-1-L.W.721], and another by the learned Single Judge in Sahruvan Nachiar and another Vs. V.S.Mohammed Hussain Maracaiar [(2001) 1 MLJ 188] . The case before the Division Bench arises from an appeal against the decree passed by the Original Side of this Court in a suit for specific performance. The plaintiff, who claimed to be the tenant of the suit property, laid a suit for specific performance and one of the points that came before the Bench was whether the title of defendant, a foreign national, to the suit property stood affected by Sec.31 of the FERA. After considering the various judgements on the subject, the Court held in the affirmative. In the other case, in Sahruvan Nachiar and another Vs. V.S.Mohammed Hussain Maracaiar [(2001) 1 MLJ 188], the learned Single Judge, as he was then arrived at the same conclusion.

17. To counter the effect of these authorities, the appellant placed reliance on the authority in R.Sambasivam Vs. Thangavelu Dhanabagyam [2001-1-L.W.161] . The significant aspect of this judgement is that the ratio of the Division Bench in Shobha Viswanathan' case [1996-1-L.W. 721], was not brought before the Court.

18. After a careful consideration of the ratio of these authorities, and after giving a careful appreciation of the facts and evidence in this case, and abiding by the rule governing the precedence, this Court holds that the ratio in Shobha Viswanathan's case will have applicability and will affect the title of the appellant obtained under Ext.A-8. Therefore, the reprieve granted earlier on the point of appellant's want of locus standi to step into the shoes of the first plaintiff Abdul Hameed, is lost to violation of Sec.31 of FERA.

19. The writing is on the wall for the appellant. These appeals have to fail. In conclusion, the appeals are dismissed and the judgment in A.S.Nos.121 & 120 of 2004 dated 28.2.2005 on the file of the Court of Additional Subordinate Judge, Mayiladuthurai, confirming the judgement and decree passed in O.S.No.151 & 152 of 2004 dated 30.06.2004 respectively on the file of Court of District Munsif Court, Sirkali is hereby confirmed. No costs.

Sd/-

Assistant Registrar(CS-V)

//True copy//

Sub Assistant Registrar

To:

1. The Additional Subordinate Judge,
Mayiladuthurai.
2. The District Munsif,
Sirkali.
3. The Section Officer
VR Section, High Court, Madras.

+1cc to Mr.A.Muthukumar, Advocate SR.No.53853

+2cc to Mr.S.Sounthar, Advocate SR.No.54182, 54183

S.A.Nos. 12 & 13 of 2008

GMR(CO)

GMV(23/11/2020)

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