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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :26.11.2021

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THE HON'BLE Mr. JUSTICE G.CHANDRASEKHARAN

S.A.No.980 of 2021

and

C.M.P.No.18435 of 2021

Noorjahan

... Appellant/Defendant

Vs.

1.Sarvardeen

Represented by his power agent

Muthukrishnan

2.Mathivanan

3.Muthezhilan

Represented by his power agent

Mathivanan

...Respondents/Plaintiff & Defendants 1 & 2

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 04.03.2020 made in A.S.No.10 of 2016 on the file of the Additional District Court, Mayiladuturai confirming judgment and decree dated 23.03.2016 made in O.S.No.55 of 2013 on the file of the Principal Sub Court, Mayiladuturai.

For Appellant : Mr.S.Sounthar

JUDGMENT

This Second Appeal is directed against the judgment of the learned Additional District Judge, Mayiladuturai in A.S.No.10 of 2016 confirming the judgment of the learned Principal Sub Judge, Mayiladuturai in O.S.No.55 of 2013.

2.The first respondent filed the suit for declaration that he is the owner of the suit property and directing the defendants to surrender possession of the suit property and for costs against the appellant and respondents Mathivanan and Muthezhilan. The case of the first respondent/plaintiff is that



the suit property belongs to one Fathamuthu Joharan. She gave the suit property to her grandson Mohamed Sarvardeen, the first respondent by way of oral Hiba on 15.02.1997. It was followed by execution of a confirmation deed dated 27.01.1998 by Fathamuthu Joharan. The Hiba was given in the presence of Hidyathulla and Akbar Ali. Fathamuthu Joharan gave documents regarding the suit property to the first respondent at the time of giving Hiba. The first respondent accepted the Hiba, took possession of the suit property. House tax was transferred to his name and he paid the house tax. The door No.3/9 was changed as 3/11 by the local panchayath. Sabir Mohamed, father of first respondent, not satisfied with his mother Fathamuthu Joharan that she has given her property to the first respondent, attempted to interfere with the property given to the first respondent. Therefore, Fathamuthu Joharan filed a suit in O.S.No.142 of 1998 on the file of the Additional District Munsif Court, Mayiladuturai. That suit was decreed as prayed for. Sabir Mohamed gave torture to first respondent and his mother. Therefore, first respondent was forced to leave the suit village. First respondent's father managed to lease the property to Tamil Nadu Electricity Board. The second respondent Mathivanan issued notice to the first respondent stating that he purchased the suit property from Sabir Mohamed on 27.01.2005. It is said in that notice that Sabir Mohamed was given Hiba by his mother and there was also a settlement in his favour. Since, the property was already given to the first respondent by oral Hiba, confirmed by written document dated 27.01.1998, any Hiba or settlement by Fathamuthu Joharan to Sabir Mohamed or to anybody else is invalid. A notice was given to Junior Engineer, TNEB, on 24.07.2010 followed by notice dated 22.09.2012 for vacating the suit property. Thereafter, second respondent as a power agent of the third respondent sold the suit property to the fourth respondent on 14.02.2013. In such circumstances, the suit is filed for the aforesaid relief.

3.The third defendant/fourth respondent filed written statement. The case of third defendant in brief reads as follows:

Third defendant purchased the suit property through the power agent of second defendant on 14.02.2013 for Rs.10,00,000/-. Second defendant was enjoying the suit property as an owner by purchase on 13.10.2005 from first defendant. First defendant purchased the suit property from Sabir Mohamed. Sabir Mohamed's mother Fathamuthu Joharan executed a settlement deed dated 29.11.2004 to Sabir Mohamed. Subsequently, house tax receipts had been changed in the name of the third defendant and she is in possession and enjoyment of the suit property. The



alleged oral Hiba dated 15.02.1997 claimed by the first respondent/plaintiff is false and not true. It was not given in accordance with muslim personal law. The deed of confirmation dated 27.01.1998 is also not true. The house tax receipts for the period of 1998 to 2003 had been created for the purpose of the suit. The decree in O.S.No.142 of 1998 is not true and it will not bind the defendant. Third defendant is in possession and enjoyment of suit property as a matter of right and therefore suit has no merits.

4.On the basis of the above pleadings, the following issues had been framed by the Trial Court:

i)Whether the plaintiff is entitled for the relief of declaration and possession in respect of the suit property?

ii)Whether the suit is barred by limitation?

iii)Whether the suit is bad for non-joinder of necessary parties?

iv)to what relief if any, plaintiff is entitled?

5.During the trial, PW1 and PW2 were examined and Exhibits A1 to A18 were marked on the side of the plaintiff. DW1 to DW3 were examined and Exhibits B1 to B16 were marked on the side of the defendants. On considering the oral and documentary evidence, the learned Principal Sub Judge, Mayiladuturai, found that oral Hiba in favor of the first respondent was proved and acted upon and therefore, original owner Fathamuthu Joharan has no right to execute settlement deed in favour of her son. Subsequent, settlement deed will also not bind the first respondent/plaintiff. In this view of the matter, decreed the suit.

6.The third defendant preferred an appeal in A.S.No.10 of 2016. The learned Additional District Judge, Mayiladuturai has also found from the evidence produced, submissions made by the counsel for the parties and the judgment of the Trial Court, no reason to interfere with the judgment of the Trial Court. Thus, confirmed the judgment decree of the Trial Court and dismissed the appeal. Therefore, appellant/third defendant come up with this Second Appeal before this Court.

7.The learned counsel for the appellant submitted that the oral Hiba alleged by the first respondent was not proved in accordance with law. Though oral Hiba was said to have been given in the presence of two witnesses, only one witness was



examined and his evidence was not discussed by the Courts below. House tax receipts will not show that oral Hiba was acted upon for the reason that first respondent was the grand son of Fathamuthu Joharan and he was living with her. Subsequent to the execution of settlement deed by Fathamuthu Joharan in favour of her son, there was mutation of revenue records and patta stands in the name of the appellant. Appellant is in possession and enjoyment of the suit property. These factors had not been considered by the Courts below. Without considering these facts, the Courts below have wrongly appreciated the evidence and came to the conclusion that oral Hiba in favour of the first respondent was acted upon and subsequent settlement deed executed by Fathamuthu Joharan in favour of her son and the subsequent transactions are not valid. Therefore, learned counsel for the appellant prayed for setting aside the judgments of the Courts below and for allowing this Second Appeal.

8. Considered the submission of the learned counsel for the appellant and perused the records.

9. As seen from the facts narrated above, it is the case of the first respondent that the original owner of the suit property Fathamuthu Joharan is the grand mother of the first respondent and mother of his father Sabir Mohamed. She had given the suit property to him by way of oral Hiba on 15.02.1997. It is also claimed that there is a deed of confirmation executed on 27.01.1998 confirming the oral Hiba. The deed of confirmation has been marked as Exhibit A1. There is no dispute with regard to the fact that the suit property belong to Fathamuthu Joharan and she is entitled to gift away the suit property to the person of her choice by oral Hiba. What is to be considered is whether there was really an oral Hiba in favour of the first respondent on 15.02.1997.

Hiba or gift: A Hiba or gift is "a transfer of property, made immediately, and without any exchange," by one person to another, and accepted by or on behalf of the latter.

Thus, gift is the transfer of movable or immovable property with immediate effect and without consideration by one person called the donor to another person called the donee and the acceptance of the same by one himself or by some one authorized on his behalf, provided that making the gift must totally renounce all his title and rights in the property gifted away of his independent free will.

The basis of the principle or gift is the



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Prophet's saying, "Exchange gifts among yourselves so that love may increase."

The three essentials of a gift: It is essential to the validity of a gift that i) there should be a declaration of gift by the donor, ii) an acceptance of the gift, express or implied, by or on behalf of the donee, and iii) delivery of possession of the subject of the gift by the donor to the donee. If these conditions are complied with, the gift is complete.

10. Though oral Hiba alleged by the first respondent is denied and disputed by the appellant, there is one clinching evidence available in the form of a suit filed by Fathamuthu Joharan against her own son Sabir Mohamed in O.S.No.142 of 1998. In this suit, it is observed in the judgment, that Fathamuthu Joharan has clearly admitted gifting the suit property to her grand son Mohamed Sarvardeen through oral Hiba and executing a confirmation deed on 27.01.1998. As already stated, this confirmation deed has been marked as Exhibit A1. It is observed in the judgment of the Appellate Court that the signature of Fathamuthu Joharan in Exhibit A1 is not denied by the respondent. There is a positive evidence available through the mouth of Fathamuthu Joharan in the form of pleadings in O.S.No.142 of 1998 that she confirmed giving the suit property to her grand son Mohamed Sarvardeen through oral Hiba. It was also reiterated by confirmation deed dated 27.01.1998. It is claimed by the first respondent that he had accepted the oral Hiba and took possession of the suit property. It is also his specific case that there had been change of house tax in his name and he paid house tax for the suit property. Exhibit A3 house tax receipts had been filed evidencing the name change in the name of the first respondent and payment of house tax receipts to the suit property by the first respondent. It again confirms that the oral Hiba was true, accepted and acted upon, possession was taken. There had been necessary changes in the revenue records and it was enjoyed by the first respondent, until he was dispossessed. Therefore, he has come up with the suit for declaration of title and recovery of possession. Once, the oral Hiba is accepted, acted upon, possession taken, enjoyed any subsequent alienation in the form of settlement or whatever document by Fathamuthu Joharan to her son or anybody claiming through him, no doubt, will not bind the first respondent.

11. Thus, the Courts below have rightly appreciated the evidence and came to the conclusion that the first respondent is entitled for the declaration and possession as prayed. Merely



because PW2's evidence was not discussed in the judgment, we cannot come to the conclusion that his evidence was not considered at all. Even, in the absence of PW2's evidence there are other evidences, as indicated above, available to conclude that the oral Hiba was true and acted upon. This Court finds no reason to interfere with the judgment of the learned Additional District Judge, Mayiladuturai in A.S.No.10 of 2016 confirming the judgment of the learned Principal Sub Judge, Mayiladuturai in O.S.No.55 of 2013 and the judgment of the Court below is confirmed. There is no substantial question(s) of law involved for consideration in this Second Appeal.

12. Accordingly, this Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petition stands closed.

Sd/-

Assistant Registrar (CS-I)

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Sub Assistant Registrar

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To

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

+1cc to Mr.S.Sounthar, Advocate SR.No.61602

S.A.No.980 of 2021
and C.M.P.No.18435 of 2021

SR(CO)
GN(05/01/2022)