



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 01.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE **G.R.SWAMINATHAN**

S.A.(MD)No.501 of 2006

Thoulath Basheera

... Appellant/Appellant/Defendant

-Vs-

1.Syed Abbas Rowther (Died)

...Respondent

2.Abdul Khani

3.Farook

4.Janoon

5.Sahul Hameed

6.Najee

...Respondents 2 to 7

(R2 to R6 are the legal heirs of the deceased R1 as per order dated 19.11.2018.)

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the Judgment and decree of the learned Principal District Judge, Thoothukudi, dated 30.06.2003 in A.S.No.140 of 1998 confirming the Judgment and decree of the learned Subordinate Judge, Thoothukudi, dated 10.08.1998 in O.S.No.45 of 1993.

For Appellant : Mr.J.Ashok

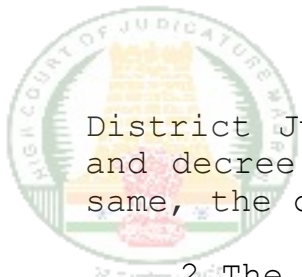
For R1 : Died

For R2 to R6 : Mr.V.Meenakshisundaram

For Mr.D.Nallathambi

JUDGMENT

The defendant in O.S.No.45 of 1993 on the file of the Sub Court, Thoothukudi, is the appellant in this second appeal. The said suit was filed by Ummu Salma Beevi. She sought the relief of partition in respect of her share in the suit property. There is no dispute that the suit property belonged to Pathumuthu Beevi. Pathumuthu Beevi passed away on 08.04.1970. She left behind a son Noohu Ibrahim and a daughter namely the plaintiff Ummu Salma Beevi. Noohu Ibrahim passed away on 15.09.1992 leaving behind the appellant herein. The suit claim was resisted by the appellant on several grounds. The first plea put forth by the defendant was that even during her life time, Pathumuthu Beevi had gifted the suit property to her son by way of Hiba. In the alternative, the defendant also pleaded that the plaintiff lost her rights on account of ouster. The learned trial Judge framed the necessary issues. The son of the plaintiff was examined as P.W.1. One Leyasutheen was examined as P.W.2. Ex.A1 and Ex.A2 were marked. The defendant examined himself as D.W.1. Ex.B1 to Ex.B21 were marked. The learned trial Judge passed preliminary decree in favour of the plaintiff on 10.08.1998 declaring her 1/3rd share in the suit property. Aggrieved by the same, the defendant filed A.S.No.140 of 1998 before the Principal



District Judge, Tuticorin. The first Appellate Court, by judgment and decree dated 30.06.2003, dismissed the appeal. Questioning the same, the defendant filed the above second appeal.

2.The second appeal was admitted on the following substantial questions of law:-

"(a) Whether the Courts below are correct in holding that oral Mohammedan Gift is not valid in law?

(b) Whether the Courts below are correct in rejecting the claim of title by adverse possession and ouster on the ground that no plea of ouster was taken when there was specific plea of perfecting title by adverse possession and ouster?

(c) Whether the Courts below are correct in holding that the plaintiff was entitled to 1/3rd share in the suit scheduled properties?"

3.Heard the learned counsel on either side.

4.The learned counsel appearing for the appellant pointed out that the Courts below have completely overlooked the plea of ouster when that had been specifically pleaded in the written statement. He therefore submitted that the substantial questions of law deserve to be answered in favour of the appellant. He called for setting aside the impugned Judgment and decree.

5.Per contra, the learned counsel appearing for the respondents submitted that the impugned Judgment does not call for any interference.

6.I have carefully considered the rival contentions and examined the evidence on record. It is true that the plea of hiba was putforth by the defendant. It is well settled that for hiba to be valid, three ingredients must be established:-

a) offer of gift

b) acceptance of the gift

c) delivery of possession either physical or constructive as the situation may permit.

Even according to the appellant, her grand mother passed away way back in the year 1970. The details regarding Hiba have not been furnished. It is the duty of the person propounding the plea of Hiba to establish that it was validly made. There is absolutely no evidence forthcoming in this regard. Therefore, the Courts below rightly rejected this plea. The first substantial question of law has been incorrectly framed. As per Section 129 of the Transfer of Property Act, 1882, provision of Transfer of Property Act would not attract gifts made under Mohammedan law. Therefore, oral gift is very much valid in Mohammedan law. In the case on hand, the defendant could not establish that the suit property was orally gifted by Pathumuthu Bivi in favour of her son Noohu Ibrahim. The



first substantial question is answered accordingly against the appellant.

7.It is true that there is a plea of ouster in the written statement. But it has been held in more than one case that the plea of ouster has to be specifically pleaded and established. It has also been held that mere mutation of revenue records in favour of one co-sharer cannot determine the rights of the parties. Merely because, one of the co-sharers had remained away from the property for a very long time, the same will not prove ouster. The Hon'ble Apex Court in the decision reported in **(2009) 15 SCC 747 (Jai Singh Vs. Gurmej Singh)** held as follows:-

"The principles relating to the inter-se rights and liabilities of co-sharers set out in the following items:-

1. A co-owner has an interest in the whole property and also in every parcel of it.

2.Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

3. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

4.The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other.

5.Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

6.Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

7.Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to disturb the arrange without the consent of others except by filing a suit for partition."

8.The fact that the electricity connection stood in the name of the appellant or that the tax receipts stood in her name will not in any way prove the plea of ouster. Therefore, I hold that the Courts below rightly decreed 1/3rd share in the suit property in favour of the original defendant. The second and third substantial



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questions of law are answered against the appellant. I do not find any merit in this appeal. The second appeal stands dismissed. No costs.

Sd/-

Assistant Registrar (Co)

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Sub Assistant Registrar(CS)

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To

- 1.The Principal District Judge, Thoothukudi.
- 2.The Subordinate Judge, Thoothukudi.
- 3.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.(2 Copies)

+1cc to Mr.J.Ashok, Advocate in Sr.No.21159

+1cc to Mr.D.Nallathambi Advocate in Sr.No.20925

Judgment made in
S.A.(MD)No.501 of 2006

01.07.2021

CN(23.08.2021) 4P 7C