



CRP.No.2043 of 2018 & S.A.No.442 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.08.2022

DELIVERED ON : 08.11.2022

CORAM

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.R.P.No.2043 of 2018
and
Second Appeal No.442 of 2018

C.R.P.No.243/2018

Najimunissa (since deceased)

Fathima alias Mumtaz

... Petitioner

vs.

A.Khairunnissa

... Respondent.

Prayer in CRP : Civil Revision Petition filed under Section 115 of C.P.C. against the judgment and decree dated 25.01.2016 passed by the learned XIX Additional Judge, City Civil Court at Chennai in C.M.P.No.30 of 2014 in A.S.No.106/2014.

For Petitioners : Mr.H.Navas Basha

For respondent : Mr.D.Nellaiappan

S.A.No.442 of 2018

Najimunissa (deceased)

Fathima alias Mumtaz

..Appellant



vs.

1. A.Khairunnissa

2. E.A.Basheerunnissa Bi

Legal heir of deceased 1st appellant Nijimunissa.. ...Respondents

Prayer in Second Appeal:

Second Appeal filed under Section 100 of C.P.C. Against the judgment and decree dated 25.01.2016 passed by the learned XIX Addl.Judge, City Civil Court, Chennai in A.S.No.106 of 2014 confirming the Judgment and Decree dated 20.12.2013 passed by the XIII Asst.Judge, City Civil Court at Chennai in O.S.No.2371 of 2010.

For Appellants : Mr.H.Navas Basha

For respondents : Mr.D.Nellaiappan

COMMON JUDGMENT

The petitioners/appellants herein who are the defendants in the suit have filed the Civil Revision Petition and the Second Appeal against the order of dismissal of C.M.P.No.30 of 2014 and the dismissal of A.S.No.106/2014 by the learned XIX Additional Judge, City Civil Court at Chennai, dated 25.01.2016.

2. The brief facts of the case are as follows:

The Second Appeal and the Civil Revision Petition arise from

O.S.No.2371 of 2010, in which, a judgment was passed on 20.12.2013 by



the learned XIII Assistant Judge, City Civil Court, Chennai. The said suit was filed for partition and separate possession of 7/16th undivided share in the suit schedule property and also for rendition of accounts. The suit was filed by a daughter with respect to a property of her father and the defendants, against whom, she claimed partition and separate possession, are her mother and another sister. She claims as aforesaid an undivided 7/16th share, her sister was said to be entitled to an undivided 7/16th share and the mother was said to be entitled to an undivided 2/16th share. Apart from the plaintiff and the sister/defendant, there were two other sisters for the plaintiff who have not been impleaded in the suit and the reason was that one of them had predeceased the father and the other had been settled with a property of the father and therefore, the plaintiff had deemed it sufficient to implead only the mother and the remaining sister as defendants. The primary contention of the defendants was that the father had executed an oral Hibba in respect of the suit property in favour of his wife. During the course of trial, Ex.B.3 and Ex.B.7 were marked which are xerox copies and original affidavit respectively of the father confirming the oral Hibba. There were also witnesses to the said affidavit. It was also contended that the Hibba had been acted upon and the proof thereof, Ex.B.4 and Ex.B.5 were relied upon by the defendants which are



settlement deeds executed by the mother with respect to the same property, which is the subject matter of the suit and it was contended that such settlement had been executed only on the strength of the hibba. The suit was however, decreed with respect to partition and separate possession and dismissed with respect to rendition of accounts. First appeal was filed by the defendants in A.S.No.106 of 2014 and the same was dismissed by the learned XIX Additional Judge, City Civil Court, Chennai on 25.01.2016. During the pendency of the first appeal, the appellants/defendants filed C.M.P.No.30 of 2014 under Order 41, Rule 27 and Rule 28 of the Civil Procedure Code, seeking permission to adduce further oral evidence namely the witnesses to the affidavit Exs. B.3 and B.7. Both the said petition and the first appeal were dismissed by the first appellate court, necessitating the defendants to file a revision petition in C.R.P.No.2043 of 2018 questioning the dismissal of C.M.P.No. 30 of 2014 and S.A.No.442 of 2018 challenging the dismissal of A.S.No.106 of 2014.

3. At the time of admission of the Second Appeal, the following substantial questions of law were framed for consideration.

(i) Whether an oral Hiba should be independently proved in the manner known to law or whether an affidavit confirming oral Hiba is sufficient and whether



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such affidavit should also be proved by examining the witnesses to the said affidavit.

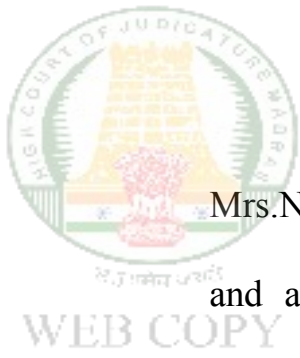
(ii) Whether in a suit for partition under Mohammedan Law a predeceased daughter and a daughter on whom property had been settled are necessary parties to the suit.

4. For the sake of convenience, the parties are referred to as appellants and respondents.

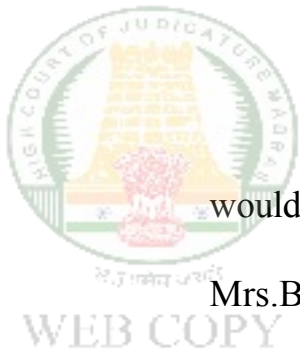
5. Learned counsel for the appellants would submit that the suit property absolutely belonged to Mr.P.E.Abdul Ahad and he died leaving behind his wife Mrs.Najmunnissa, Fathima Bee, Basheerunnissa Bi and Khairunnissa as his surviving legal heirs and as such, the respondent will be legally eligible only for 7/24th share in the suit property. But the lower Appellate Court, has granted a decree allotting 7/16th share in favour of the respondent which is against law. He would further submit that Mr.P.E.Abdul Ahad purchased totally three properties viz., (i) Door No.109, New No.34, Thoppai Mudali Street, Royapuram, Chennai – 600 013; (ii) Door No.2/3, New No.25, Market Lane, Royapuram, Chennai – 600 013 and (iii) a property at Thangal. Out of the said properties, he retained the property at Old Door No.109, New No.34, Thoppai Mudali



Street, Royapuram Chennai-13, the suit property for himself and for his wife, his first daughter Mrs.Fathima alias Mumtaz and the children of his deceased daughter Mrs.Mohboob Bi and the other two properties viz., New Door No.25, Market Lane, Royapuram, Chennai – 600 013 was settled in favour of Mrs.Basheerunnissa and the property situated at Thangal Village was settled in favour of the respondent Mrs.A.Khairunnissa. He would further submit that the possession was delivered to the mother, viz., Mrs.Najimunissa and she was in absolute possession and enjoyment of the property and the said delivery of possession through Oral Hiba is fortified in the execution of Settlement Deed by the said Mrs.Najimunissa in the year 2009. Without setting aside the Settlement Deed executed by Mrs.Najimunissa in favour of Fathima alias Mumtaz and in favour of the children of deceased Mrs.Mahaboob Bi, the respondent is not entitled to seek for the relief of partition, since the said Settlement Deed is a registered document and unless the said Settlement deed is set aside, the respondent is not entitled to claim partition in respect of the suit property. He would further submit that the validity of Oral Hiba is tested by the existence of Donor, Donee and execution of Hiba and delivery of possession and acceptance of possession and admittedly, the delivery of possession of the property was effected to



Mrs.Najimunissa and she was in possession and enjoyment of the property and as such, barring the affidavit, evidencing the Oral Hiba, as the possession absolutely vest with Mrs.Najimunissa, it can easily be presumed that the Hiba was validly given by the deceased P.E.Abdul Ahad in favour of Najimunnisa and as such, she is entitled to execute the Settlement Deed in favour of the appellant. He would further submit that the lower appellate Court has erred in finding that Hiba was not properly proved by the appellant and the property at Thangal was sold to clear the debts of the respondent's husband and that the encumbrance certificate produced before the trial Court clearly shows that the Thangal property was mortgaged by the respondent and only for the purpose of clearing the mortgage deed, the Settlement Deed was cancelled and a Sale Deed was executed by paying the entire sale consideration to the respondent and absolutely there is no necessity for her father to execute the Sale deed in favour of his daughter by receiving valid sale consideration. Learned counsel would further submit that both the Courts below have come to the conclusion that the affidavit declaring the Oral Hiba is a fabricated one and as such, the appellant is not entitled for any relief, but if it is proved that there is a valid oral Hiba executed by the deceased, the appellant can claim right over the property as per the settled principles of Muslim law. He



would further submit that the suit is barred for non-joinder of parties since Mrs.Basheerunnissa Bi, who is the daughter of P.E.Abdul Ahad is alive and she is also having a share in the property and as such, the suit is also barred for non-joinder of parties and the said fact is not properly considered by both the Courts below. He would further submit that the lower appellate Court relied on the finding of the trial Court that in respect of the stamp paper purchased in the name of the appellant and the signature found in the alleged Hiba but the oral Hiba can be proved by witnesses in the presence of whom the oral Hiba was executed. The appellant can prove the existence of oral Hiba declared by the said P.E.Abdul Ahad by examining the witnesses who were available at the time of execution of Oral Hiba and the learned Appellate Judge has not properly appreciated the scope of Order XLI Rule 27 CPC and dismissed the C.M.P.No.30 of 2014 which is against law. The appellant should have been given an opportunity to prove her case. Further, as the appeal suit is a continuation of the suit proceedings, the appellant is entitled to give evidence in the appellate stage. Therefore, the learned counsel would pray to allow both C.R.P. and the Second Appeal.

6. In support of his argument, the learned counsel for the appellants



would rely on the following decisions of the Hon'ble Supreme Court.

- i) AIR 2011 SC 1695 (Hafiza Bibi @ ors vs. Shaik Farid)
- ii) AIR 1992 ALL 346 (Hamida vs. Humer and ors.)
- iii) AIR 1997 Mad 226 (Shanmugam and ors vs. Saraswathi and ors)
- iv) AIR 1973 Mad 133 (T.Panchapakesan and Ors vs. Peria Thambi Nakier)
- v) 2006(5) SCC 545 (Hero Vinoth (Minor) Vs. Sehsammal)

7. Per contra, learned counsel for the respondents would submit that late P.E.Abdul Ahad, while alive, settled the property at Door No.25, Market Lane, Royapuram and 3 shops in favour of his wife, the 1st appellant and after her life time to his daughter E.A.Basheerunissa and her minor children viz. Ghouse Bi, H.Mohammed Ibrahim, H.Mohammed Mohideen and H.Zubeda Be, reserving for himself, the life interest in the property and after his demise, his wife the 1st appellant and his daughter, the said E.A.Basheerunnissa shall enjoy the property during their life time and after their life time, the property shall be taken by the above said four children absolutely with full power of alienation. The settlement deed was filed by the appellant themselves under Ex.B2 and that is why, one of the legal heir of P.E.Abdul Ahad was not arrayed as one of the defendants in the suit. It is stated by the appellant that P.E.Abdul Ahad also settled the



property under Ex.A6 dated 3.1.2000, the property bearing Door No.37, Beer Bailwan Tharga 2nd Lane, Thangal vide registered document No.851 of 2000 in the office of the Sub Registrar, Thiruvottiyur, Chennai. But under Ex-B6, P.E.Abdul Ahad revoked the settlement by a Deed of Revocation dated 12.07.2006 and registered as document No.4385 of 2006 in the office of Sub Registrar, Thiruvottiyur. P.E.Abdul Ahad could not sign the said deed and he was permitted to put his left thumb impression in the said deed. Later, P.E.Abdul Ahad sold the same property to the respondent on 08.08.2006 under a sale deed and registered as Document No.5014 of 2006. The respondent thereafter, sold the said property to third party under a sale deed and registered as document No.6256 of 2008 in the office of Sub-Registrar, Thiruvottiyur, Chennai. Therefore, it is not correct to state that P.E.Abdul Ahad settled the property to the respondent. The encumbrance certificate for the relevant period filed by the appellants as Ex.B1 will show the above said four documents. Learned counsel would further submit that the appellant as defendant filed written statement in the suit, accepting the settlement of the property at No.25, Market Lane, Royapuram, Chennai. He would further submit that the appellate Court has held that in appeal that the appellant/defendant cannot fill lacuna in evidence. Learned counsel would



further submit that the date of execution of Hiba and before whom, it was executed was not pleaded in the written statement and hence, the execution of Hiba has not been properly proved. It was also proved by cross examination of DW1 that there was no possibility for giving Hiba. Therefore, he would pray to confirm the judgment and decree passed by both the Courts below.

8. In support of his argument, the learned counsel for the respondents would rely on the judgments of the Hon'ble Supreme Court made in (i) (Janaki Narayan Bhoir vs. Narayan Namdeo Kadam) passed in Appeal (Civil) No.11194 of 1995 17.12.2002 and (ii) (N.Kamalam (dead) and anr. vs. Ayyasamy & another) passed in Appeal (Civil). No.3164-3166 of 1997.

9. This Court has carefully considered the submissions made by the learned counsel appearing for the appellants and the learned counsel appearing for the respondents and also perused the materials available on record.

10. Admittedly, the property in dispute is property at Old Door



No.109, New No.34, Thoppai Mudali Street, Royapuram, Chennai – 600

013 measuring an extent of 2565 sq.ft. which was purchased under Ex.A1 by P.E.Abdul Ahad, who is the father of the appellant/Fathima alias Mumtaz and the respondents and husband of the deceased appellant/Najimunissa. P.E.Abdul Ahad did not have any son to succeed his properties. There is no title disputes in respect of the property purchased by P.E.Abdul Ahad. According to the respondents, P.E.Abdul Ahad had left the suit property intestate. But according to the appellants, their father had three properties viz., Door No.109, New No.34, Thoppai Mudali street, Royapuram, Chennai-13; Door No.2/3 New No.25, Market Lane, Royapuram, Chennai 13 and a property at Thangal. Out of the said properties, he retained the property at Door No.109, New No.34, Thoppai Mudali Street, Royapuram for himself, his wife, his first daughter Fathima alias Mumtaz and the children of his deceased daughter Mahaboob Bi and insofar as the other two properties are concerned, the property at No.25, Market Lane Road, Royapuram was settled in favour of Basheerunnissa and the property at Thangal Village was settled in favour of the respondent A.Khairunnissa.

11. At the outset, it is to be seen whether the oral Hiba was proved



in the manner known to law. When Ex.B7-Hibba was taken up for consideration, the Courts below had found that Mr.P.E.Abdul Ahad had executed the same on 29.03.2008 by putting his signature in the said document. Whereas in Ex.B6, the revocation of settlement deed dated 12.07.2006, he has put up thumb impression, for which, the reason assigned by the appellant/ defendant is that due to his ill health, he was unable to sign and therefore, put up his left thumb impression, which clearly proves that the said P.E.Abdul Ahad was not able to affix his signature from the year 2006. Therefore, it raises a doubt as to how the signature in Ex.B7 found place in the year 2008 and no acceptable reason was given by the appellants to prove the same. Further, in Ex.B7-Hibba, the executor is Abdul Ahad, the stamp vendor name is K.Vimala and the serial number of the stamp vendor is 4990 dated 28.03.2008 but under the Right to Information Act, sought for by the respondent/plaintiff, the District Registrar, as per Ex.A9 had stated that the said stamp paper was issued in the name of Magesh Transport. Therefore, it creates a doubt that the stamp paper on which Hibba was written appears to be a fabricated document, after the death of the said P.E.Abdul Ahad. Further, on comparing the signatures also, it was found that there is difference in the manner and style of putting his signature. Further, the appellant also had



not examined the attesting witnesses to prove the genuineness of Hibba-Ex.B7. Therefore, it is clearly proved that the oral hibba was not independently proved and the same cannot be considered. Further, before the appellate Court, in order to set right the lacunea in proving the Hibba-Ex.B7, the appellant had filed the petition to examine the alleged Hibba witnesses under Order 41 Rule 27 of C.P.C., which cannot be allowed at the appellate stage, for the reason that the appellant cannot fill up the lacunae to his whims and fancies and try to create new evidence which is not admissible in law and appellant had also not properly explained the reason for the delay and had successfully dragged on the proceedings for more than a decade. Further, the appellant had not stated that the trial court had refused to admit the examination of witness inspite of her efforts. Thus, there is no reason assigned by the appellant to allow the petition seeking the relief of examining of witness and marking the additional document at the appellate stage.

12. Insofar as the question of law, whether the predeceased daughter and the daughter on whom the property had been settled are necessary party to the suit is concerned, the said P.E. Abdul Ahad had settled the property situated at No.25, Market Lane, Royapuram and 3



shops in favour of his wife, Najimunnissa, his second daughter E.A.Basheerunnisa and her four minor children of Basheerunnisa. The settlement was made in the way that after the settlor's life time, his wife and second daughter shall enjoy the said property till their life time and after their life time, the children of Basheerunnisa shall have the rights to enjoy the aforesaid property. The said P.E.Abdul Ahad, after settling the property to his wife and the second daughter had retained the property at Door No.109, New No.34, Thoppai Mudali Street, Royapuram and died intestate and the third daughter E.A.Mahoob Bi predeceased the said P.E.Abdul Ahad on 30.10.2007 and hence, she do not have any claim over the suit schedule property. Therefore, the second daughter and third daughter, namely E.A.Basheerunnisa Bi and E.A.Mohoob Bi respectively have not been added as party in the suit. Further, before the Courts below this issue has not been raised by the appellant. Moreover, in a suit for partition, the appellant/defendant also can take out a petition to implead the legal heirs, but they failed to do so. Therefore, the said ground cannot be accepted and the non-joinder of necessary parties is not fatal to the case of the respondent/plaintiff. The substantial questions of law are answered against the appellant.



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13. In view of the reasons stated above, the civil revision petition is dismissed and the second appeal is also dismissed confirming the judgment and decree passed by the learned XIII Assistant City Civil Judge, Chennai, in O.S.No.2371 of 2010 dated 20.12.2013. No costs.

08.11.2022

Index :yes/No
Speaking /Non speaking order
vsi

To

1. XIX Additional Judge, City Civil Court at Chennai.
2. XIII Asst.Judge, City Civil Court at Chennai



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CRP.No.2043 of 2018 & S.A.No.442 of 2018

J.NISHA BANU, J.

vsi

PRE-DELIVERY JUDGMENT IN
C.R.P.No.2043 of 2018
and
Second Appeal No.442 of 2018

08.11.2022