



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 31.03.2022

Delivered on : 20.04.2022

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THE HONOURABLE MR. JUSTICE S.S.SUNDAR

S.A.No.230/2017 & CMP.No.5520/2017

Sukriya Mustafa

...Appellant/Appellant/Plaintiff

Versus

1.Hajira Kabir

2.Sulaiman Kabir

3.Shabnam Jameel

...Respondents/Respondents/Defendants

Prayer:- Second Appeal filed under Section 100 of CPC against the judgment and decree in AS.No.25/2015 on the file of the learned XVIII Additional Judge, City Civil Court, Chennai dated 11.08.2016 in confirming the judgment and decree in OS.No.12890/2009 on the file of the learned II Assistant Judge, City Civil Court, Chennai dated 25.09.2014.

For Appellant :Mrs.V.Srimathi for  
Mr.V.Raghavachari

For Respondents :Mr.T.Murugamanickam  
Senior Counsel for  
Mr.D.Abdulla

JUDGMENT

- (1) The appellant is the plaintiff in the suit in OS.No.12890/2009 on the file of the learned II Assistant Judge, City Civil Court, Chennai.
- (2) The parties are close relatives and the appellant/plaintiff is the daughter of late Thiru.S.M.Sulaiman. The 1<sup>st</sup> respondent in the Second Appeal is the wife of one Thiru. Humayun Kabir, who is the brother of the plaintiff. Respondents 2 and 3 are the son and daughter of the 1<sup>st</sup> respondent who are born through the brother of the plaintiff, Humayun Kabir.
- (3) The appellant filed the suit in OS.No.12890/2009 for partition of the plaintiff's / appellant's 1/6<sup>th</sup> share in



the suit properties and for consequential injunction restraining the defendants from in any manner alienating or encumbering the suit property.

(4) The suit property is described as a house and building in Plot No.1200 in 'Z' Block, 6<sup>th</sup> Avenue, 14<sup>th</sup> Street, Anna Nagar, comprised in S.No.127 in Villivakkam Village. The extent of the plot is 5475 sq.ft.

(5) The case of the plaintiff in the plaint is that the suit property originally belonged to her father late Sri.S.M.Sulaiman, who had purchased the same under the Registered Sale Deed vide Document No.366/1985. It is admitted by the plaintiff that her father had settled the suit property in favour of her brother by name S.Humayun Kabir under a registered Settlement Deed dated 22.01.1992. It is also admitted by the plaintiff in the plaint that her brother Humayun Kabir was physically handicapped and hence, her father had settled the property in favour of her brother. However, it is stated that the settlement was on condition that Humayun Kabir should take care of his mother, the 4<sup>th</sup> defendant in the suit. It is admitted by both parties that the brother of the plaintiff, Humayun Kabir died on 28.01.2001, leaving behind defendants 1 to 4 as his legal heirs. It is the further case of the plaintiff that the 4<sup>th</sup> defendant, namely, the mother of the plaintiff, was entitled to 1/6<sup>th</sup> share in the suit property as a heir of plaintiff's brother and that the 4<sup>th</sup> defendant had executed a Settlement Deed in favour of the plaintiff on 23.03.2007 in respect of her 1/6<sup>th</sup> undivided share. Stating that the defendants are trying to alienate the suit properties suppressing the right of the plaintiff under the Settlement Deed executed by the 4<sup>th</sup> defendant, the suit was filed for partition of appellant's/plaintiff's 1/6<sup>th</sup> share in the suit property and for consequential reliefs.

(6) The suit was contested by the defendants by filing a written statement, specifically denying the Settlement Deed stated to have been executed by the mother/4<sup>th</sup> defendant in favour of the plaintiff. It is the case of the respondents that the suit property was settled in favour of Humayun Kabir by his father absolutely and the gift was unconditional. The case of the plaintiff that a specific condition was made or expected at the time of settlement, was specifically denied in the written statement. It is also the specific case of the defendants



- (7) In the written statement of the defendants 1 to 3, they have referred to the hip fracture suffered by the 4<sup>th</sup> defendant and the efforts taken by them to bring the 4<sup>th</sup> defendant from Batlagundu to Chennai for treatment and about how the plaintiff could secure the Settlement Deed in March 2007 after knowing the oral Hiba in the year 2002. It is also the specific case of the defendants 1 to 3 that the plaintiff or the 4<sup>th</sup> defendant never exercised any right of ownership in respect of the alleged 1/6<sup>th</sup> undivided share. It is contended that the Settlement Deed executed in favour of the plaintiff is not valid in view of the oral Hiba by which the 4<sup>th</sup> defendant had already conveyed her right in favour of defendants 1 to 3.
- (8) It is pertinent to mention that the 4<sup>th</sup> defendant was alive when the suit was filed. She filed a written statement supporting the case of the plaintiff and disputing the oral Hiba pleaded by defendants 1 to 3.
- (9) An additional written statement was filed by defendants 1 to 3 clarifying the manner in which the oral Hiba was executed on 30.01.2002 in the presence of three witnesses and how the declaration of oral Hiba was reduced by a written document dated 07.02.2002. In the additional written statement, it is further stated that after the oral Hiba as confirmed by the document dated 07.02.2002,



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the 1<sup>st</sup> defendant constructed a commercial complex in the suit property investing more than Rs.16 lakhs for the constructed. It is also stated that the 4<sup>th</sup> defendant visited the suit property frequently and that the plaintiff along with her family members attended the opening ceremony of the commercial complex constructed by defendants 1 to 3 on 21.05.2006. It is also stated that the plaintiff and her mother/4<sup>th</sup> defendant are estopped from denying the absolute title of the defendants 1 to 3 particularly when huge investment was made for putting up additional construction by defendants 1 to 3 to the knowledge and acknowledgment of the plaintiff and the 4<sup>th</sup> defendant.

- (10) The Trial Court, framed a specific issues on the basis of the pleadings. After considering the facts admitted and the evidence in detail, the Trial Court held that oral Hiba followed by the document - Ex.B4 dated 07.02.2002 is proved by defendants 1 to 3. The Trial Court also held that the plaintiff has not even examined any witness to prove the Settlement Deed stated to have been executed by the 4<sup>th</sup> defendant in favour of the plaintiff on 23.03.2007 under Ex.A15. The Trial Court further held that the 4<sup>th</sup> defendant who had already conveyed her right under the oral Hiba, as reflected in Ex.B4, has no right to execute a subsequent Settlement Deed [Ex.A15] dated 23.03.2007. In view of the findings of the Trial Court with regard to the proof of oral Hiba and the acceptance of the oral Hiba by the defendants 1 to 3, the Trial Court dismissed the suit finding all issues against the plaintiff. Aggrieved by the judgment and decree of the Trial Court, the plaintiff preferred an appeal in AS.No.25/2015 before the learned XVIII Additional Judge, City Civil Court, Chennai.
- (11) The Lower Appellate Court without framing points for consideration, dealt with the issues separately and held that the appellant has failed to prove the Settlement Deed in Ex.A15 to claim any right. The Lower Appellate Court found that the oral Hiba given on 30.01.2002 is not proved by examining DW3 and DW4 as they have witnessed only the subsequent declaration of oral Hiba by the document under Ex.B4. The Lower Appellate Court dismissed the appeal mainly on the ground that the appellant who has come forward with the suit on the basis of the alleged Settlement Deed dated 23.03.2007 has failed to prove the Settlement Deed and therefore, she is not entitled to any relief in the suit. Aggrieved by the concurrent judgments



and findings of the Courts below, the present Second Appeal has been preferred by the appellant / plaintiff.

(12) In the Memorandum of Grounds, the appellant has raised the following substantial questions of law:-

- (a) Whether the Lower Appellate Court was right in dismissing the suit on the ground that the signature of the 4<sup>th</sup> defendant in the written statement was not proved when until the life time of the 4<sup>th</sup> defendant the respondents were not questioned the same?
- (b) Whether the Courts below were right in not following the ratio laid down by the Apex Court in [i]2009 [6] SCC 160; [2] 2016 [4] SCC 549 ; and [iii] 2009 [12] SCC 101. And are not the judgments contrary to the same liable to be set aside?
- (c) Whether the Lower Appellate Court is right in dismissing the suit, when the appellant is claiming under a registered Settlement Deed and it carries a presumption of genuineness?
- (d) Whether Courts below right in casting the onus of proof on the appellant to prove the genuinity of a registered instrument, when the respondents claim that the deed is a sham and nominal?

(13) The Second Appeal was admitted by this Court on 17.04.2017 on the following substantial questions of law:-

- [a] Whether the Lower Appellate Court is right in dismissing the suit, when the appellant is claiming under a registered Settlement Deed and it carries a presumption of genuineness?
- [b] Whether Courts below right in casting the onus of proof on the appellant to prove the genuinity of a registered instrument, when the respondents claim that the deed is a sham and nominal?

(14) The learned counsel for the appellant submitted that the Courts below have failed to follow the ratio laid down by the Hon'ble Supreme Court in several precedents. Relying upon the written statement filed by the 4<sup>th</sup> defendant in the suit, the learned counsel for the appellant submitted that the Courts below ought to have considered the



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specific averments in the written statement of the 4<sup>th</sup> defendant, specifically denying the oral Hiba stated to have been declared by her under Ex.B4. It was argued that the stand taken by the 4<sup>th</sup> defendant has not been properly appreciated by the Courts below while dealing with the genuineness of the document and the proof of oral Hiba pleaded by the respondents. The learned counsel further argued mainly on the proof of Settlement Deed executed by the 4<sup>th</sup> defendant / mother of the appellant under Ex.A15. Referring to the findings of the Courts below, the learned counsel submitted that the findings of the Courts below are perverse as the Courts below were misled by the signature of the 4<sup>th</sup> defendant as ''K.A.ஜமீலா'' in stead of ''S.ஜமீலா''. Learned counsel for the appellant then submitted that the registered Settlement Deed under Ex.A14 is amply proved by the appellant and the findings of the Courts below without considering the material evidence are not sustainable.

(15) Per contra, Mr.T.Murugamanickam, learned Senior counsel appearing for the respondents referred to the findings of the Courts below apart from reading the relevant portions of the evidence of all the witnesses to support the judgments and decrees of the Courts below. He would submit that the Settlement Deed under Ex.A15 [certified copy of which is marked as Ex.A3] is not proved by examining at least one of the attesting witness as required under Section 68 of the Evidence Act. Referring to the findings of the Lower Appellate Court regarding proof of oral Hiba, the learned Senior counsel referred to the pleadings and the documents to establish the sequence of events and submitted that the oral Hiba is supported by the evidence of Dws.1 to 4 apart from the documents and the facts admitted by the appellant herself as PW1.

(16) After going through the entire records and the submissions of the learned counsels appearing on either side, this Court finds that there is no issue on the following facts:-

- (a) There is no dispute with regard to the relationship between the parties.
- (b) The suit property absolutely belonged to the father of the appellant by name Thiru Sulaiman.
- (c) The father of the appellant executed a registered Settlement Deed dated 22.01.1992 in favour of his only son Humayun Kabir conveying his absolute right



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in favour of his son and the Gift Deed is unconditional.

- (d) Sulaiman died on 12.07.1996 and his son Humayun Kabir died on 28.01.2001. Since Humayun Kabir died before the death of his mother, the suit property devolves on defendants 1 to 4 and the mother, the 4<sup>th</sup> defendant had 1/6<sup>th</sup> share.

(17) From the admitted facts, it is seen that the issue to be decided is whether the oral Hiba as disclosed under Ex.B4 dated 07.02.2002 is valid and proved in accordance with law?

(18) Assuming that the oral Hiba is invalid, this Court has to see further whether the appellant has proved the subsequent Settlement Deed stated to have been executed by the 4<sup>th</sup> defendant in favour of the appellant under Ex.A15? If the oral Hiba is proved, it can be safely concluded that the appellant will not get any right under the subsequent Settlement Deed as the 4<sup>th</sup> defendant would have no interest in the suit property after the oral Hiba.

(19) By various precedents, the oral Gift as contemplated under Section 147 of the Mohammedan Law is valid and the requirement of a registered instrument under the Transfer of Property Act is not necessary to constitute a valid gift. Section 129 of the Transfer of Property Act has been interpreted that the provisions of Transfer of Property Act, would not affect any oral Hiba permissible under Mohammedan Law. Therefore, it can be safely concluded that the provisions of the Transfer of Property Act, 1882, had no application to a gift governed by Mohammedan Law. However, the Mohammedan Law prescribes how a valid Gift can be made. Section 147 of the Mohammedan Law validates oral gift. But to recognise any Gift Deed as valid, one has to satisfy the following three ingredients:-

- i. There must be a declaration of gift by the donor ;
- ii. The gift should be accepted expressly or impliedly by or on behalf the donee ; and
- iii. There must be delivery of possession by the donor to the donee.

(20) The registration of Gift as contemplated under the Transfer of Property Act is not necessary for creation of a valid gift under the Mohammedan Law. However, unless the three ingredients are proved, a gift under the Mohammedan Law is not valid, even if a Deed of Gift is executed by a



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registered instrument. Since a gift as contemplated under Mohammedan Law is not required to be in writing, the Mohammedan Law does not envisages registration of gift. Sections 147, 148 and 149 of Mohammedan Law have been considered in several precedents and the Hon'ble Supreme Court and this Court has reiterated the position that a gift under the Mohammedan Law need not satisfy the requirements of the Transfer of Property Act. However, the three ingredients, as stated above, should be proved.

- (21) Ex.B4 is a document by which the 4<sup>th</sup> defendant had declared the oral Hiba in the presence of two witnesses. The document-Ex.B4 does not refer to the date 30.01.2002 nor indicate the oral Hiba made by the 4<sup>th</sup> defendant on 30.01.2002. However, as declared by the 4<sup>th</sup> defendant in the presence of witnesses on 07.02.2002, this Court is satisfied that the findings of the Trial Court on this issue that the respondents have proved the oral Hiba under the document-Ex.B4 dated 07.02.2002 is acceptable. The Trial Court had gone through the entire evidence and found that the oral evidence of DW3 and DW4 would clearly indicate that the oral Hiba is proved. It is seen that the document - Ex.B4 is signed by the 4<sup>th</sup> defendant in the presence of two witnesses. Both the witnesses were examined as DW3 and DW4.
- (22) From the evidence of DW3, it is seen that DW3 is a Veterinary Doctor retired as the Director of Clinics, Veterinary University. Even though he admitted that he had no acquaintance with the 4<sup>th</sup> defendant, in the cross examination the said witness has categorically stated that he met the 4<sup>th</sup> defendant on the death anniversary of Humayun Kabir and signed the document-Ex.B4 as a witness. He has also deposed as to the presence of DW4 at the time of the 4<sup>th</sup> defendant signing the document-Ex.B4.
- (23) DW4 is again a respectable witness who retired as an Administrative Officer in the Agriculture Department. He has stated that he knew the family members of Sulaiman, his wife and his handicapped son Humayun Kabir for several years. It is his evidence that the first death anniversary of Humayun Kabir was conducted at the house of the 1<sup>st</sup> defendant and that the 4<sup>th</sup> defendant signed Ex.B4 in his presence. It is specifically stated by him that the 4<sup>th</sup> defendant signed the document knowing very well that she was documenting the oral gift/Hiba in writing under Ex.B4 and that he signed as a witness as a family friend.



The evidence of DWs.3 and 4 is sufficient to prove the declaration of oral gift by the 4<sup>th</sup> defendant under Ex.B4.

- (24) In the additional written statement filed by the 1<sup>st</sup> defendant, a specific averment was made to the effect that the appellant along with her family members attended the opening ceremony of the commercial complex constructed by defendants 1 to 3 which took place on 21.05.2006. From this, the respondents also contended that the appellant/plaintiff was fully aware that the 4<sup>th</sup> defendant had effected the oral hiba in favour of defendants 2 and 3 and that the said Hiba was accepted and acted upon by taking delivery. The appellant/plaintiff admitted during cross examination that she participated in the opening ceremony of the commercial complex put up by the defendants 1 to 3.
- (25) From the overall evidence, the Trial Court came to the conclusion that the oral gift pleaded by the respondents is proved in the manner known to law as the evidence of DW3 and DW4 is not assailed by any other independent witness. Though the learned counsel for the appellant submitted that there are some infirmities with regard to the oral Hiba pleaded by the defendants none of the witnesses examined by the respondents who would vouch to the oral Hiba is controverted. Hence, this Court is not in a position to appreciate the contention of the appellant in view of the overall evidence and the material circumstances pointed out by the Trial Court. The learned counsel for the appellant also pointed out by relying upon the written statement that the Courts below have failed to consider the stand taken by the 4<sup>th</sup> defendant herself in the written statement.
- (26) The Trial Court, after elaborately dealing with the oral evidence of witnesses on both sides, held that the appellant / plaintiff has failed to prove that the written statement was signed by the 4<sup>th</sup> defendant after knowing the contents thereof. The 4<sup>th</sup> defendant died during pendency of the suit. In the oral Hiba, the 4<sup>th</sup> defendant has signed as ''S.ஜயிலா''. She has signed as a witness in the original Settlement Deed executed by Sulaiman in favour of Humayun Kabir as ''S.ஜயிலா''. However, she has signed the written statement as ''K.A.ஜயிலா''. The appellant has not examined any independent witness to prove that the 4<sup>th</sup> defendant has signed the written statement. When it is proved that the 4<sup>th</sup> defendant used to sign as ''S.ஜயிலா'' in all the earlier



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documents, it is not explained why and how she started signing as 'K.A.ஜயலலிதா' in Ex.A15 and in the written statement. When the signature of the 4<sup>th</sup> defendant is proved by reliable evidence, the written statement denying Ex.B4 does not help the appellant. In the present case, the document Ex.B4 is proved to be the document containing the signature of the 4<sup>th</sup> defendant. Therefore, much weight cannot be given to the fact that the 4<sup>th</sup> defendant had signed the written statement disputing the oral Hiba.

- (27) Since the 4<sup>th</sup> defendant had dealt with the property by executing a Settlement Deed in favour of the appellant much later, her plea contrary to the document-Ex.B4, cannot be believed inasmuch as the execution of the document - Ex.B4 is proved in accordance with law and the legal implications thereof should follow.
- (28) As held by the Trial Court and the Lower Appellate Court, the appellant/plaintiff has miserably failed to prove the Settlement Deed under Ex.A15 [certified copy of which is marked as Ex.A3]. Having regard to the facts admitted, this Court is also of the view that the oral Hiba by the 4<sup>th</sup> defendant is quite natural and it is proved in accordance with law by not only by examining the witnesses DW3 and DW4, but also by drawing the attention of the Trial Court to various circumstances and the evidence of DW1. When the oral Hiba as declared by the 4<sup>th</sup> defendant in Ex.B4 is accepted as valid, the consequences that would follow is that the Settlement Deed relied upon by the appellant/plaintiff is invalid as the settlor had no title after the conveyance of the property in favour of respondents 2 and 3 / defendants 2 and 3 by way of an oral Hiba, the declaration of which is found in Ex.B4.
- (29) In view of the conclusions reached above, this Court is unable to appreciate any of the substantial questions of law raised in the Memorandum of Grounds. The Courts below have specifically held that the Settlement Deed relied upon by the appellant/plaintiff is not proved. There are two aspects. The Settlement Deed is also a Mohammedan gift and it should be proved by establishing the three ingredients which are necessary to prove a valid gift. In the instant case, the possession was with the respondents when the document in Ex.A15 was executed. The appellant / plaintiff who admits that there are constructions in the suit property and additional constructions were made by the respondents immediately after the oral Hiba and long



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before the document-Ex.A15, the appellant/plaintiff cannot claim that she was put in possession after acceptance of the Gift Deed. At least, there must be a reference to the constructive possession of the 4<sup>th</sup> defendant at the time of execution of Ex.A15. In the absence of any specific plea or material evidence, this Court has no reason to interfere with the concurrent findings of the Courts below with regard to the genuineness of Settlement Deed stated to have been executed by the 4<sup>th</sup> defendant in favour of the appellant/plaintiff under Ex.A15.

- (30) The learned Senior counsel appearing for the respondents referred to several features and made his submissions by comparing the signatures found in the document Ex.A3 [certified copy of Ex.A15], which is the copy of the registered Settlement Deed and the signatures in various documents. Though elaborate submissions made by the learned Senior counsel for the respondents is convincing, it is not necessary for this Court to deal with every aspects on the discrepancies in signatures found in the document in view of the concurrent findings of the Courts below.
- (31) When the document Ex.A3 was executed by the 4<sup>th</sup> defendant, the appellant/plaintiff and the 4<sup>th</sup> defendant was aware about the existing building and the additional construction put up by the respondents. The additional constructions were done in the year 2005 and the commercial building has come into existence in the suit property. It is admitted by the plaintiff that the commercial building had been let out to several persons and that the 1<sup>st</sup> defendant is collecting rent from the tenants. When that is the factual position when the Settlement Deed came into existence in the year 2007, at least there must be reference to the arrangement the 4<sup>th</sup> defendant had with the other defendants when they put up the additional construction and how and in what manner the appellant/plaintiff would enjoy the property so as to infer how possession was delivered. However, the document under Ex.A3 was executed by the 4<sup>th</sup> defendant in respect of her 1/6<sup>th</sup> share in the suit property as if there is no encumbrance. The contents of the document also gives an indication that she should secure possession on he own. The recital 'இனிமுதற்கொண்டு நீயே கைப்பற்றிக்கொண்டு' does not indicate handing over possession under the document.



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(32) The learned counsel for the appellant has not elaborated the judgments of the Hon'ble Supreme Court referred to in the 2<sup>nd</sup> question of law. This Court is unable to consider the question of law without an effort by the learned counsel for the appellant to elaborate as to how the judgments of the Courts below are vitiated in the light of those judgments referred to in the Memorandum of Grounds.

(33) The Courts below have concurrently held that the Settlement Deed is not proved in the manner known to law and therefore, there is no question of validating the document by proving its genuineness. The 3<sup>rd</sup> question of law does not carry any much weight having regard to the specific findings of the Courts below that the Settlement Deed in favour of the appellant is neither proved nor shown to have been acted upon. The Mohammedan Law does not recognise the gift as valid merely by the registration of the document unless the three ingredients are proved. As observed earlier, this Court is unable to accept the validity of the Settlement Deed under Ex.A3 in the absence of any proof as to how the gift was accepted and acted upon and possession of undivided share in the entire property was taken by the appellant/plaintiff.

(34) In view of the conclusions of this Court based on the specific pleadings, evidence and findings of the Courts below, the Second Appeal is devoid of any merit and hence, it is dismissed. Since the parties are relatives, there shall be no order as to cost. Consequently, connected miscellaneous petition is closed.

s/d-

Assistant Registrar

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Sub-Assistant Registrar

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To

1.The XVIII Additional Judge,  
City Civil Court, Chennai.

2.The II Assistant Judge,  
City Civil Court, Chennai.



3.The Section Officer  
VR Section, High Court  
Madras.

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+1 CC to Mr.V.Raghavachari, Advocate sr 26651  
+2 Ccs to Mr.D.Abdulla, Advocate sr 26696.

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SP(12/05/2022)