



A.S(MD)No.25 of 2012

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 13.07.2022

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S(MD)No.25 of 2012

and

M.P(MD)No.1 of 2012

1) Subaidha Beevi

2) Makkim

3) Sahar Banu

... Appellants/Plaintiffs

VS.

1) S.M.Ansari (Died)

2) Fathimuthu

3) Mariammal

4) Kathijammal

5) Mahmoodha

... Respondents/Defendants

(The respondents 2 to 5/legal heirs of deceased 1st respondent, are already on record and they are recorded vide order dated 20.06.2022)

Appeal Suit filed under Section 96 of the Code of Civil Procedure, against the judgment and decree dated 11.11.2011 made in O.S.No.92 of 2010 on the file of the Additional District Session Court No.I, Tirunelveli.



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For Appellants

: Mrs.S.Meenakshi Sundaram, Senior Counsel
for Mr.R.Manimaran

For Respondents

: Mr.H.Arumugam

JUDGMENT

The appellants as plaintiffs filed O.S.No.92 of 2010 on the file of the Additional District Session Court No.I, Tirunelveli, against the respondents/defendants for partition and separate possession of the plaintiffs' 1/5th equal share in the suit properties by metes and bounds. After trial, the trial Court dismissed the suit with costs. Aggrieved by the said judgment and decree, the plaintiffs as appellants have filed this appeal.

2. Brief facts in the plaint are as follows:-

The suit property originally belonged to one Meera Sahib. He had executed a registered settlement deed in favour of his daughter Tmt.Fathimuthammal on 07.09.1946. The plaintiffs and the 1st defendant are the legal heirs of the said Fathimuthammal who died on 18.04.1987. After her death, the plaintiffs and the 1st defendant were in



common possession and enjoyment of the suit properties. Though the tax receipt and the electricity service connection for the suit properties stand in the name of Meera Sahib, the plaintiffs are paying the tax and electricity charges. The plaintiffs have 1/5 equal share and the 1st defendant is having 2/5 share in the suit properties as per the Mohammadan Law. Since there was no chance for common enjoyment of the suit properties, in the first week of January 2010, the plaintiffs claimed their share in the properties. Though the 1st defendant initially agreed for partition, later he refused. Suppressing these facts, he executed a registered settlement deed settling the suit properties in favour of his daughters who are defendants 2 to 5 on 24.03.2010. According to the plaintiffs, the 1st defendant has no right to execute such settlement deed in respect of the entire suit properties. Hence, the suit.

3. Brief averments in the written statement are as follows:-

The suit properties originally belonged to one Meera Sahib. He never executed a registered settlement deed in favour of his daughter Tmt.Fathimuthammal on 07.09.1946 as alleged by the plaintiffs. The defendants admitted that the plaintiffs and the 1st defendant are the legal



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heirs of the deceased Fathimuthammal. They denied the allegation in the plaint that after her death, the plaintiffs and the 1st defendant were in common possession and enjoyment of the suit properties. The defendants also denied the allegation that when the plaintiffs demanded partition, the 1st defendant agreed but later he executed a settlement deed in favour of his daughters. The valuation of suit property under Section 37(2) of the Tamilnadu Court Fees and Suits Valuation Act, is erroneous. The 1st defendant settled the suit properties in favour of defendants 2 to 5 by way of settlement deed dated 24.03.2010, as such, it was not under the joint possession of the plaintiffs. The 1st defendant further averred that the suit properties are belonged to his mother Fathimuthamal. His father had no permanent job and income. Earlier, only through the income from the agricultural land belonging to Fathimuthamal, family members were eking out their livelihood. Thereafter, the 1st defendant was working as Bus Travels Agent and only from his income, the family members were eking-out their livelihood. By using his salary from the said work, by selling some of the properties of Fathimuthamal and by personally getting loan, the 1st defendant performed marriages of the appellants. Since the 1st defendant took care



of Fathimuthamal with love and affection and considering the hardship faced by the 1st defendant for the family, on the next day of Ramjan in 1985, the said Fathimuthamal gave oral gift(hiba) in respect of the suit properties in the presence of the witnesses namely, Salavutheen, Manickam, Beevi and Lakshmi and right from that date, the 1st defendant is in possession of the suit properties in his individual capacity and he executed a settlement deed dated 24.03.2010 in favour of the respondents 2 to 5. Suppressing these facts, the plaintiffs field the above suit with unclean hands only with an intention to cause hardship to the respondents. Thus, the suit is liable to be dismissed.

4. Based on the pleadings, the trial Court framed the following issues:-

1. Whether the plaintiffs are entitled to get 1/5 shares partition by metes and bounds?
2. Whether D2 to D5 are in exclusive possession and enjoyment as per the settlement deed dated 24.03.2010?
3. Whether the alleged oral gift to the 1st defendant is true?
4. To what relief?



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5. In order to substantiate the claim, on the side of the plaintiffs, two witnesses were examined as PW1 and PW2 and 4 documents were marked as Exs.A1 to A4. On the side of the defendants, 3 witnesses were examined as DW1 to DW3 and 3 documents were marked as Exs.B1 to B3.

6. The trial Court considering the pleadings, oral and documentary evidence, dismissed the suit with costs. Challenging the judgment and decree passed by the trial Court, the plaintiffs have filed this appeal.

7. The learned counsel for the appellants would submit that the suit properties originally belonged to one Meera Sahib who executed the settlement deed dated 07.09.1946 settling the suit properties in favour of his daughter Fathimuthamal. After her death, the appellants and the 1st respondent who are the legal heirs of Fathimuthamal, inherited the suit properties and were in common possession and enjoyment of the same. Though the tax receipts and the electricity service connection still stand in the name of their maternal grandfather Meera Sahib, the



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appellants are paying the tax and electricity charges. As per the Mohammadan Law, male member and female member will get share in the properties in the ratio of 2:1. Therefore, the appellants are entitled to each $\frac{1}{5}$ share and the 1st respondent is entitled to $\frac{2}{5}$ share. Since there was no chance of common enjoyment, in January 2010, the appellants claimed their share in the suit properties, but the 1st respondent initially agreed, later refused for partition. Hence, the suit was filed.

8. The learned counsel would further submit that the appellants' mother Fathimuthammal never gave any exclusive right to the 1st respondent over the suit properties by way of oral gift(hiba) and there is no specific date and place of such oral gift, as such, the basic ingredients of hiba have not been established by the 1st respondent. The trial Court failed to appreciate that the appellants and the 1st respondent are the legal heirs of Fathimuthammal who died intestate and therefore, the appellants and the 1st respondent are entitled to each $\frac{1}{5}$ share and $\frac{2}{5}$ share respectively and the respondents 2 to 5 are not entitled to any share. At best, even by way of settlement, the respondents 2 to 5 would



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be entitled to 2/5 share of the 1st respondent and not the entire suit properties. The settlor cannot have a right to settle the entire suit properties and therefore, the respondents 2 to 5 may not have better title than the 1st respondent and even assuming that the suit properties are individual properties of the 1st respondent, the respondents failed to establish why the tax receipts and electricity service connection stand in the name of the original owner, Meera Sahib. Even though the female members after marriage, were out of possession of the suit properties, as per the Mohammadan Law, until it is divided they are also the common owners and there is a constructive possession. Therefore, unless their possession is excluded by any legal documents or any lawful method, their possession is deemed to be a joint possession. Unfortunately, the trial Court failed to appreciate the said proposition and erroneously held that the appellants are out of possession. Therefore, the appellants ought to have paid court fee under Section 37(1) of the Tamilnadu Court Fees and Suits Valuation Act and paying court fees under Section 37(2) is not valid. Once it is not denied that the appellants are also daughters of Fathimuthammal, unless Fathimuthammal is excluded, the appellants are legally entitled to inherit



her properties equally 1/5 share each as legal heirs of their mother Fathimuthammal. Thus, the judgment and decree passed by the trial Court is liable to be set aside.

9. The learned counsel for the respondents would submit that Fathimuthammal was the absolute owner of the suit properties pursuant to the settlement deed dated 07.09.1946 executed by Meera Sahib and even after that settlement, Fathimuthammal did not change the name of Meera Sahib in the tax receipt and electricity service connection. Further, the certified copy of the settlement deed dated 07.09.1946 has been marked as Ex.A1 and that has not been specifically challenged. In order to substantiate the oral gift(hiba), the 1st respondent examined two witnesses namely, DW2 and DW3 who have clearly spoken about the oral gift(hiba), whereas, the appellants' witnesses have not specifically denied about the alleged oral gift(hiba). The 1st respondent by his own income maintained the family and performed the marriages of the appellants and other family functions and formalities and he only look after his mother Fathimuthammal and was continuously residing in the suit properties along with his mother and took care of her entire hospitalities.



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Therefore, out of love and affection, Fathimuthammal gave the suit properties by way of oral gift(hiba). During and after the life time of Fathimuthammal, the 1st respondent was residing in the suit properties as absolute owner based on the oral gift(hiba) and subsequently, the 1st respondent also put up additional construction in the suit properties. According to the respondents, after the death of Fathimuthammal, the appellants never came to the suit properties or resided there, as such, they are not in possession of the suit properties for more than 12 years and therefore, the court fee paid under Section 37(2) is not valid and further the appellants have not challenged the oral gift(hiba) given by Fathimuthammal in favour of the 1st respondent and the subsequent settlement deed dated 24.03.2010 executed by the 1st respondent in favour of the respondents 2 to 5. Therefore, the trial Court rightly appreciated the oral and documentary evidence and dismissed the suit which does not require interference by this Court.

10. Heard both sides and perused the records.



11. Admittedly, the suit properties originally belonged to Meera Sahib who is none other than the maternal grandfather of the appellants and the 1st respondent. It is not disputed that the said Meera Sahib executed the settlement deed dated 07.09.1946 in favour of his daughter Fathimuthammal. It is also not in dispute that the appellants and the 1st respondent are the legal heirs of Fathimuthammal and the respondents 2 to 5 are grand-daughters of Fathimuthammal. According to the appellants, all the parties derived title from Fathimuthammal who died intestate and therefore, as legal heirs, the appellants are each entitled to 1/5 share and the 1st respondent is entitled to 2/5 share as per the Mohammadan Law. When the appellants demanded partition, the 1st respondent though initially accepted the same, later refused for partition. Hence, they filed the suit. As per the defence taken by the 1st respondent, during her life, Fathimuthammal settled the suit properties in favour of her son/1st respondent by way of oral gift(hiba).

12. Now the question to be decided is as to whether Fathimuthammal died intestate or during her life time, she gifted the suit properties to her son/1st respondent by way of oral gift(hiba). While



the appellant stated that Fathimuthammal died intestate, the 1st respondent stated that during her life time, she settled the suit properties in his favour. So, it is the duty of the 1st respondent to substantiate his claim that Fathimuthammal settled the suit properties in his favour by way of oral gift(hiba), for which, the 1st respondent examined himself as DW1 and examined two more witnesses as DW2 and DW3.

13. As per the Mohammadan Law, oral gift(hiba) is permissible. A person who claims title by settlement or oral gift(hiba) has to establish three essential ingredients of a gift under the Mohammadan Law which are (i) declaration of the gift by the donor; (ii) acceptance of the gift by the donee and (iii) delivery of possession. The rules of the Mohammadan Law do not make writing essential to the validity of a gift or oral gift fulfilling all the three essentials make the gift complete and irrevocable.

14. In this case, DW2 and DW3, who are the witnesses to the oral gift(hiba), have clearly stated that in the year 1985, the next day to Ramjan, Fathimuthammal gave the suit properties to the 1st respondent



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by way of oral gift(hiba) in the presence of the witnesses namely, Salavutheen/DW3, Manickam/DW2, Beevi and Lakshmi and the 1st respondent accepted such oral gift and had taken delivery of possession of the suit properties. The appellants have not denied or disputed the possession of the 1st respondent over the suit properties. Even in the settlement deed dated 24.03.2010 executed by the 1st respondent in favour of the respondents 2 to 5, the 1st respondent has clearly stated that he got the suit properties from his mother by way of oral gift(hiba). Pursuant to such settlement, the respondents 2 to 5 are in possession of the suit properties which has not been denied by the appellants.

15. PW1 clearly admitted that after the death of her mother Fathimuthammal, till the execution of the settlement deed dated 24.03.2010, the appellants had not gone to the suit properties and therefore, it is clear that even for more than 12 years, the 1st respondent was enjoying the suit properties as absolute owner. The 1st respondent has stated that he has made certain improvements in the suit properties which was not disputed by the appellants and the appellants have not stated that the 1st respondent never resided in the suit properties along



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with Fathimuthammal. The 1st respondent has stated that he sold some of the properties of Fathimuthammal and by using that money and his own income, he performed the marriages of the appellants which was also not disputed by the appellants. The appellants have also not stated that they performed their marriages on their own income and neither their mother Fathimuthammal nor brother/1st respondent contributed anything to their marriages. Therefore, when the sole male son who also having independent source of income, along with his mother, performed the marriages of his sisters and also took care of his mother and satisfied her wish and will and also he actively conducted the family functions, the said Fathimuthammal out of love and affection, gave the suit properties by way of oral gift(hiba), thereby, the 1st respondent became the exclusive and absolute owner of the suit properties. Merely because, the tax receipts and electricity service connection stand in the name of Meera Sahib, it does not mean that Fathimuthammal had not declared hiba and the 1st respondent had not accepted the hiba given by Fathimuthammal and taken delivery of possession of the suit properties. Thus, this Court finds that the 1st respondent proved the essentials ingredients of hiba by examining himself as DW1 and witnesses to hiba as DW2 and DW3, as



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such, he proved the oral gift(hiba) made in 1985 and therefore, he is the absolute owner of the suit properties.

16. As far as the payment of court fee, it is the admission of PW1 that after the death of her mother Fathimuthammal, till the execution of the settlement deed dated 24.03.2010, they had not gone to the suit properties and since there was no chance of common enjoyment, the appellants sought for partition. Therefore, the appellants ought to have paid court fee under Section 37(1) of the Tamilnadu Court Fees and Suits Valuation Act and paying court fees under Section 37(2) is not valid. Though the 1st respondent pursuant to the oral gift(hiba) in 1985 was enjoying the suit properties till the execution of settlement deed by him in favour of his daughters in 2010, i.e., enjoying the suit properties more than the statutory period of 12 years as exclusive owner with the knowledge of the appellants and without their interference, he has neither claimed ouster nor adverse possession. Even otherwise, it is the admission of PW1 that after the death of her mother Fathimuthammal, till the execution of the settlement deed dated 24.03.2010, the appellants had not gone to the suit properties and they were out of



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possession. Therefore, on the basis of the said admission of PW1 itself, the 1st respondent is entitled to title to the suit properties by ouster. The trial Court rightly appreciated the oral and documentary evidence and has come to the conclusion that the 1st respondent is having absolute title over the suit properties and the appellants are not entitled to any share and accordingly dismissed the suit for partition.

17. The appellate Court being a fact finding Court, it has to re-appreciate the entire pleadings, oral and documentary evidence. On a careful perusal of the entire pleadings, oral and documentary evidence and also the judgment of the trial Court, this Court does not find any perversity or good reason to interfere with the said judgment.

18. In view of the above, the Appeal Suit is liable to be dismissed and accordingly dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes / No
Internet : Yes

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To

The Additional District Sessions Judge,
Additional District Sessions Court No.I,
Tirunelveli.



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P.VELMURUGAN, J.

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JUDGMENT MADE IN
A.S(MD)No.25 of 2012
DATED : 13.07.2022