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S.A.No.814 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 28.11.2023

CORAM :

THE HONOURABLE Mr. JUSTICE C.KUMARAPPAN

S.A.No.814 of 2007
and M.P.No.1 of 2007

Mumtaz

...Appellant

Vs.

1.Bulkis Bi,
2.Syed Abdyl Kalam,
3.Syed Pervas (died),
4.Syed Sallem,
5.Syed Affath,
6.Nazreem,
7.Syed Abdul Afzal.

...Respondents

(RR 1, 2, 4 to 7 brought on record as Legal Heirs of the deceased third respondent viz.Syed Pervas vide Court order dated 30.07.2021 made in M.P.No.1 of 2007).

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree, dated 12.04.2007, made in A.S.No.74 of 2006, on the file of the Principal Subordinate Judge, Tiruvannamalai, reversing the Judgment and Decree, dated 19.06.2006, in O.S.No.172 of 2004, on the file of the Additional District Munsif, Tiruvannamalai.



WEB COPY



S.A.No.814 of 2007

For Appellant

: Mr.K.Krishnan
for Mr.T.R.Rajaraman.

For Respondents 1, 2 & 4 to 7 : Mr.Sriram
for M/s.K.Govi Ganesan

J U D G M E N T

The instant Second Appeal has been filed at the instance of the plaintiff. The respondents are the defendants before the Trial Court.

2. For the sake of convenience, the parties will be referred to according to their litigative status as before the Trial Court.

The brief facts which give rise to the Second Appeal are as follows:

3. According to the plaintiff, she is the legally wedded wife of one Syed Shadullah. The plaintiff states that the marriage between herself and her husband Syed Shadullah was solemnized according to the Muslim rites and customs on 30.04.1990. It is the further submission of the plaintiff that she was originally a Hindu by birth, but converted herself to Muslim religion and changed her name as Mumtaz. It is the



S.A.No.814 of 2007

submission of the plaintiff that after getting married with her husband, her husband orally gifted the suit property by way of “HIBA” to her in January 2001. The oral gift was duly accepted by the plaintiff and she took possession of the suit property on the date of the gift itself. In pursuance of the gift, she mortgaged the suit property to one Syed Gaffer Shaib and subsequently, discharged the same in the year 2002. While so, after the demise of Syed Shadullah on 07.10.2003, the first defendant, being the first wife of the deceased Syed Shadullah, interfered with the possession of the suit property. Hence, the plaintiff came forward with the suit for permanent injunction.

4. The said suit was resisted by the defendants by contending that the plaintiff was not at all the wife of Syed Shadullah and that the first defendant's husband Syed Shadullah did not gift any property to the plaintiff. It is the further submission of the defendants that with the help of one Zahir Hussain, the plaintiff has created certain documents and that the plaintiff has no right or title over the suit property. Hence, they prayed to dismiss the suit.

Evidence and documents:



S.A.No.814 of 2007

5. Before the Trial Court, on behalf of the plaintiff, the plaintiff

examined herself as P.W.1 and two more witnesses viz., Mr.Zahir Hussain and Mr.Krishnan were examined as P.W.2 and P.W.3, respectively, and five documents were marked as Exs.A1 to A5. On behalf of the defendants, the first defendant examined herself as D.W.1 and no documents were marked.

Finding of the Courts below:

6. After considering the evidence on either side and materials on record, the Trial Court decreed the suit. Aggrieved by the same, the defendants approached the First Appellate Court by way of a first appeal. The First Appellate Court, while re-appreciating the evidence, arrived at a conclusion that the plaintiff has not established the oral gift and thereby allowed the first appeal. Aggrieved by the same, the plaintiff is now before this Court by way of this Second Appeal.

Substantial questions of law:

7. At the time of admission of this Second Appeal, this Court formulated the following substantial questions of law:



S.A.No.814 of 2007

“1.The plaintiff’s possession is admitted even by the defendant coupled with the fact the Revenue records support the same. Still, is the Subordinate Judge right in dismissing the suit?

2.When the possession of the suit property by the plaintiff and also showing the plaintiff as one of the heirs of the deceased is admitted by the defendants, is the Subordinate Judge right in dismissing the suit, especially, when there is impediment in executing oral gift in Mohameddan Law?”

Submissions on both sides:

8. The learned counsel for the appellant would contend that in spite of the fact that the marriage of the plaintiff has categorically spoken by P.W.2/Zahir Hussain and P.W.3/Krishnan, the First Appellate Court wrongly found that the marriage of the plaintiff with Syed Shadullah was not proved. The learned counsel for the appellant would further contend that though there is evidence to show that the plaintiff and her husband Syed Shadullah lived in one house, the First Appellate Court, without considering any materials on record, has wrongly found that the plaintiff has not proved the oral gift. It was further contended by the learned counsel for the appellant that the First Appellate Court did not take into



consideration of the house tax receipt and other materials on record, to prove the plaintiff's possession. It is the further submission of the learned counsel for the appellant that when the plaintiff has established the possession over the property, naturally, the case of the plaintiff in respect of the oral gift is bound to be accepted. Hence, she prayed to allow this Second Appeal.

9. Per contra, the learned counsel for the respondents would object the said contention and would invite the attention of this Court, about the discrepancy about the date of oral gift between the pleadings and evidence. Hence, prayed to dismiss this Second Appeal.

10. I have given my anxious consideration to the submissions made on both sides.

Analysis of the submissions made by both sides:

11. The points for consideration in the instant Second Appeal are as follows:

(i) Whether there is any oral gift as pleaded by the plaintiff?



WEB COPY



S.A.No.814 of 2007

(ii) Whether only after such oral gift has been proved, the plaintiff can get the relief of injunction?

12. In this regard, the learned counsel for the respondents would invite the attention of this Court, in respect of the finding of fact recorded by the First Appellate Court. Wherein, the First Appellate Court has found the discrepancy in respect of 'HIBA' between the plaintiff's pleadings as well as the admission during her cross-examination. The First Appellate Court found that in the pleadings, the plaintiff has contended that Syed Shadullah has orally gifted the property in the year 2001. However, during her cross-examination, she stated that such oral gift was given immediately on the next day of her marriage. In this regard, the First Appellate Court found that according to the plaintiff, the marriage took place on 30.04.1990. If that being so, the gift would have been on 01.05.1990, thereby the case set out by the plaintiff in the plaint is contrary to the oral evidence. As a consequence, the First Appellate Court disbelieved the case of the plaintiff in respect of oral gift.



S.A.No.814 of 2007

13. Apart from that, the First Appellate Court has gone into another aspect viz., house tax receipt and found that though according to the plaintiff, the gift was in the year 1990, the house tax receipt and other documents came into existence only after 2003. Therefore, as rightly found by the First Appellate Court, the case put forth by the plaintiff in respect of the gift is to be disbelieved. Thus, the very finding recorded by the First Appellate Court is based on material and cogent evidence.

14. Therefore, this Court cannot find any ground to deviate from the said finding. Accordingly, this Court could not find any merit in this Second Appeal. Thus, the substantial questions of law are answered in favour of the respondents.

15. In the result, this Second Appeal stands dismissed by confirming the judgment and decree dated 12.04.2007 made in A.S.No.74 of 2006, on the file of the Principal Subordinate Court, Tiruvannamalai. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

28.11.2023



S.A.No.814 of 2007

Internet : Yes/No

Index: Yes/No

Speaking order/Non-speaking order

apd

To

- 1.The Principal Subordinate Judge, Tiruvannamalai,
- 2.The Additional District Munsif, Tiruvannamalai,
- 3.The Section Officer, V.R.Section, High Court, Madras.

C.KUMARAPPAN,J.

apd

S.A.No.814 of 2007
and M.P.No.1 of 2007



WEB COPY



S.A.No.814 of 2007

28.11.2023