



S.A(MD)No.563 of 2023

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

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| RESERVED ON   | 06.11.2023 |
| PRONOUNCED ON | 22.11.2023 |

**CORAM**

**THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN**

S.A(MD)No.563 of 2023

1.Noorjahan  
2.Yasmin ... Appellants/Respondents 1 & 2/Plaintiffs  
3.Mustaffa Kamal(Died) ... 3<sup>rd</sup> Appellant/3<sup>rd</sup> Respondent/1<sup>st</sup> defendant  
4.Ahamed Kani  
5.Ismail Meeral  
6.Abitha Begam  
7.Hameetha Banu ... Appellants 4 to 7/Respondents 4 to 7/  
Legal Heirs of 1<sup>st</sup> defendant

vs.

1.Fathimuthu(died)  
2.Mohamed Kanifa  
3.Jahir Hussain  
4.Nagoor  
5.Mahumutha ... Respondents 1 to 5/Appellants/Defendants 2 to 6

(Memo dated 11.08.2023 in USR.No.27064 is recorded as 1<sup>st</sup> respondent died and R2 to R5, who are already on record, are recorded as Lrs of the deceased R1 vide Court Order dated 04.10.2023 made in S.A(MD)No.563 of 2023 by GCSJ)

PRAYER:- Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.No.101 of 2017 on the file of the Additional District Judge(FTC), Tenkasi, dated 16.11.2022 reversing



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the judgment and decree passed in O.S.No.112 of 2011 on the file of the Principal Subordinate Court, Tenkasi, dated 10.03.2017.

For Appellants :Mr.R.R.Kannan

For R-2 to R-5 :Mr.H.Lakshmi Shankar for  
Mr.R.Jenifer Bibin

### **JUDGMENT**

This second appeal is directed against the judgment and decree passed in A.S.No.101 of 2017 on the file of the Additional District Judge(FTC), Tenkasi, dated 16.11.2022, reversing the judgment and decree passed in O.S.No.112 of 2011 on the file of the Principal Subordinate Court, Tenkasi, dated 10.03.2017.

2. The appellants 1 and 2 filed the suit for partition claiming 2/6<sup>th</sup> share in the suit property. The suit property is a house building bearing Old Door No.41, New Door No.143, East Pillaiyar Kovil Street, Senkottai Town, Sengottai.

3. The case of the appellants is that the suit property belonged to their mother Ismail Beevi by purchase. Ismail Beevi has three sons namely (1) Mohamed Mustaffa, (2) Mustaffa Kamal, and (3) Mohamed Usen and three daughters namely (1) Noorjahan, (2) Yasmin and (3) Parisal. Mohammed Usen and Parisal pre-deceased Ismail Beevi. Ismail



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Beevi died in 1993 without making any family arrangement in respect of the suit property. First son Mohammed Mustaffa died and therefore, his wife and children were impleaded as legal representatives as D-2 to D-6. Plaintiffs are entitled to  $1/6^{\text{th}}$  share each in the suit property. First defendant is entitled to  $2/6^{\text{th}}$  share in the suit property. Defendants 2 to 6 are jointly entitled to  $2/6^{\text{th}}$  share in the suit property. Plaintiffs sent legal notice, dated 29.03.2011, seeking partition. Despite receiving notice, defendants did not come forward to effect any partition. Defendants 2 to 6 sent reply notice dated 05.04.2011. The contents in the reply notice of defendants 2 to 6 are denied as false. When the defendants did not come forward to effect the partition, this suit is filed.

4. Second and fourth defendants filed written statements, which were adopted by other defendants denying the right to claim partition by the plaintiffs. It is the case of the defendants that the suit property originally stood as "Fertiliser Pit" and "Karai Veedu". Second defendant and other defendants alone have been living in the suit property. First plaintiff got married 40 years back and she is living in Chennai. Second plaintiff got married in 1977 and she is living with her husband. Plaintiffs' mother borrowed a sum of Rs.2,000/- and made alteration in the suit property. To meet the marriage expenses of Parisal Beevi, the property belonged to family had been mortgaged in 1964. Further, at the



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time of the marriage of the first plaintiff, at the request of the mother of the plaintiffs, lands belonged to the defendants were sold in 1969 and the marriage was conducted.

5. It is the further case of the defendants that plaintiffs' parents are liable to pay Rs.17,000/- to the second defendant's husband. Second defendant's husband alone had repaid the loan amount obtained by parents by pledging his jewels. On this account, parents of the plaintiffs are liable to pay Rs.17,000/- to the second defendant's husband. At the time of marriage of the second plaintiff, she was provided with 20 kalanji of gold jewels and Rs.7,000/- in cash. Towards this expenditure, parents of the plaintiffs are liable to pay Rs.21,000/- to the second defendant's husband. In 1982, the second defendant's husband gave Rs.3,000/- to the parents of the plaintiffs. The second defendant's husband had contributed to the family expenses on various occasions and therefore, the mother had orally gifted the suit property to the second defendant's husband in June, 1982. Thereafter, the second defendant's husband altered the building in the suit property from shop to house by spending Rs.20,000/-; by paying money to the tenants and enjoying the suit property for more than 28 years. Thereafter, he also constructed a room in the first floor by spending Rs.3,00,000/-. Thus, the suit property is in exclusive possession and enjoyment of the second defendant's husband



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and then, defendant's 2 to 6. Plaintiffs have never claimed any right in the suit property. On the other hand, the second defendant's husband and defendant's 2 to 6 have been enjoying the suit properties and acquired title by adverse possession.

6. During the course of trial, on the side of the plaintiffs, the first plaintiff examined herself as P.W.1, Exs.A1 to A3 were marked. On the side of the defendants, D.W.1 was examined and Exs.B1 to B13 were marked.

7. On the basis of oral and documentary evidence, the trial Court found that the oral gift alleged by defendants 2 to 6, is not proved and granted the decree for partition by decreeing the suit.

8. In appeal filed against this judgment by defendants 2 to 6 in A.S.No.101 of 2017, the First Appellate Court, on re-appreciation of evidence, held that oral gift alleged by defendants 2 to 6, was proved and thus, dismissed the suit.

9. In the said circumstances, the appellants have filed this second appeal.



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10. This Court framed the following substantial questions of law

for consideration in this second appeal:

*“a) Whether the finding of the First Appellate Court that the oral hiba in respect of the suit property in favour of the second defendant's husband Mohamed Mustaffa was proved, when the trial Court had decided on a proper appreciation of evidence that the oral hiba was not proved, is correct?; and*

*b) Whether the First Appellate Court has considered the oral and documentary evidence in a proper perspective and decided the appeal?.*

11. The learned counsel for the appellants submitted that the trial Court on consideration of oral and documentary evidence, especially, Exs.B5 and B6 documents and finding that there is no mention about oral gift in Ex.B5 and that ingredients of oral gift namely, (1) offer; (2) acceptance; and (3) Delivery of possession, are not properly proved, found that the oral gift was not proved. This finding was reversed by the First Appellate Court stating that the second defendant's husband, in Ex.B6 reply, had specifically stated that the suit property was given to him as oral gift and this claim was not denied by mother. It is not correct. Oral gift has to be proved by establishing that (i) there was a declaration of gift by donor; (ii) acceptance of the gift by the donee; and (iii) Delivery of



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possession of the subject matter of the gift from the donar to donee.

These ingredients had not been proved by defendants 2 to 6. As the legal heirs of the deceased Ismail Beevi, the plaintiffs are entitled for share 2/6<sup>th</sup> share in the suit property. Merely because the plaintiffs/appellants are not in physical possession of the suit property, they cannot be denied the relief of partition, for the reason that the property is in possession of other co-owner. Therefore, possession of defendants 2 to 6 is as good as possession of the plaintiffs.

12. In reply, learned counsel for respondents/defendants 2 to 6 submitted that even when the mother was alive, she sent Ex.B5 notice seeking to vacate the suit property by second defendant's husband. In his Ex.B6 reply, it is stated that taking into consideration his contributions towards the welfare of the family, at the time of marriage of his sisters, the suit property was gifted to him by his mother in June, 1982. After receiving Ex.B6-reply, mother had not taken any legal steps either denying the oral gift alleged in Ex.B6 or for recovery of her property. Defendants 2 to 6 produced oral and documentary evidence to show that the suit property was improved by the first defendant. Construction had been made and they are in absolute possession and enjoyment of the property, even prior to oral gift in June 1982. Ex.B6 reply was given on 15.3.1989 and no legal proceeding was initiated either by mother or by



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other sisters. Thus, the suit property is barred by limitation. In the said circumstances, he seeks to confirm the judgment of the First Appellate Court and for the dismissal of this second appeal.

13. I have considered the rival submissions and perused the records.

14. There is no dispute with regard to the relationship between the parties and that, the suit property belonged to mother Ismail Beevi. In the absence of the alleged oral gift, there is no doubt that the plaintiffs are entitled for partition in the suit property. Therefore, the prime question that has to be considered is that,

*“Whether the oral gift pleaded by defendants 2 to 6 is proved?”*

15. The plaintiffs produced Ex.A1- sale deed in favour of their mother. There is no dispute with regard to this document. Pre-suit notice, reply given by defendants 2 to 6, are produced as Exs.A2 and A3. Defendants have produced Exs.B1 to B13 documents. Out of these documents, Exs.B5 and B6 are important documents.



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16. Ex.B5 - is the notice sent by plaintiffs mother Ismail Beevi and her husband Mohammed Haniffa to the second defendant's husband Mohammed Mustaffa. It is alleged in this notice that the suit property belonged to them. They are living in House No.6-4-6 and that was sold to Shajahan and Laila Beevi. Therefore, they required them to vacate the property. In the said circumstances, they required Mohammed Mutaffa, who is living in their house (suit property) with their permission, to vacate and hand over possession on or before 1<sup>st</sup> April, 1989. This notice was, dated 04.03.1989.

17. Second defendant's husband Mohammed Mustaffa sent Ex.B6 reply, wherein he stated that he paid Rs.2,000/- for repairing work of the house in Door No.6-4-6 to Ismail Beevi. The landed properties belonged to the family was mortgaged to meet the marriage expenses of Parisal. To meet the marriage expenses of Noorjahan, the family property was sold in 1969. A sum of Rs.17,000/- is due as his share. Mohammed Hanifa had pledged the jewels of Parisal Beevi and that was redeemed by the second defendant's husband by using his jewels, a sum of Rs.7,000/- is due to him in this regard. At the time of marriage of Yasmin, he parted with 20 kalanji of jewels and Rs.7,000/-. He also paid Rs.3,000/- in 1982. Taking all these facts into consideration and out of love and affection, he claimed that the suit property was orally gifted to him in June, 1982.



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Thereafter, he made improvements in the building.

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18. As rightly pointed out by the learned counsel for defendants 2 to 6, after the receipt of this Ex.B6-reply notice, mother Ismail Beevi had not sent any rejoinder, denying the oral gift alleged in Ex.B6- reply notice. She had also not taken any legal proceedings. It is not in dispute that defendants 2 to 6 and second defendant's husband have been living in the suit property even before issuance of Ex.B5 notice. Second defendant's husband specifically alleged that the suit property was given to him orally as a gift by the mother Ismail Beevi and that was not denied by the mother. Therefore, the presumption that can be drawn in this case is that the suit property was given to the second defendant's husband as oral gift and that was the reason why the mother had neither denied the claim of oral gift nor initiated legal action against Mohemmed Mustaffa.

19. Exs.B8 to 13 are produced to show the possession and enjoyment of the suit property by the defendants. The evidence of P.W.1 confirms that defendants 2 to 6 are alone residing in the suit property. She also admitted that her brother had constructed the first floor building in the suit property. This evidence shows that Mohammed Mustaffa had invested money for the construction of the first floor in the building. It appears that no opposition was made at the time of construction of the



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building. It again confirms that the plaintiffs had never objected the enjoyment of the suit properties by second defendant's husband and then by defendants 2 to 6 from 1982 till the date of filing of the suit.

20. It is the submission of the learned counsel for the appellants that the sale deed in the name of mother Ismail Beevi was produced only by the plaintiffs and not by the defendants. If really there was some oral gift, mother would have handed over the original sale deed to the second defendant's husband and therefore, the oral gift alleged by defendants 2 to 6 is doubtful.

21. It is true that the original sale deed is not produced by the defendants 2 to 6, but it was produced by the plaintiffs. P.W.1 in her evidence stated that it was given to her by her mother. Merely because the original sale deed was not given to the second defendant's husband, we cannot jump to the conclusion that oral gift alleged by defendants 2 to 6 is not true. Proper person to deny the oral gift is the mother Ismail Beevi. Despite receipt of Ex.B6-reply notice, claiming the oral gift by mother, she has not denied it by sending rejoinder or by initiating any legal proceedings. Therefore, this submission of the learned counsel for the appellants cannot be taken forward for entertaining a suspicion with regard to oral gift alleged by defendants



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2 to 6. Failure to give response to Ex.B6-reply notice clearly proves that the oral gift alleged in Ex.B6 in favour of the second defendant's husband is true and the suit property is enjoyed by 2<sup>nd</sup> defendant's husband and now by defendants 2 to 6, in pursuance of the oral gift.

22. With regard to the submission of the learned counsel for the respondents that the suit is barred by limitation, this Court is not inclined to accept this submission for the reason that the sisters have filed the suit for partition claiming that they are in joint possession as co-owners. Therefore, the submission that the suit is barred by limitation especially when there is no specific plea made in the written statement, cannot be accepted.

23. On the basis of analysis of the oral and documentary evidence, I find that the First Appellate Court on re-appreciation of evidence, correctly found that the oral gift alleged by defendants 2 to 6, is proved and negated the prayer seeking partition by the plaintiffs. There is no valid reason to interfere with the judgment of the First Appellate Court.

24. In this view of the matter, this Court answers the substantial questions of law that the First Appellate Court on proper re-appreciation



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of evidence, correctly found that the oral gift alleged by defendants 2 to 6 was proved and rightly allowed the appeal by dismissing the suit for partition.

25. Thus, this second appeal is dismissed and the judgment made in A.S.No.101 of 2017 on the file of the Additional District Judge(FTC), Tenkasi, dated 16.11.2022, reversing the judgment and decree passed in O.S.No.112 of 2011 on the file of the Principal Subordinate Court, Tenkasi, dated 10.03.2017, is confirmed. No Costs.

**23.11.2023**

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Index:Yes/No

NCC:Yes/No

To,

1.The Additional District Judge(FTC),  
Tenkasi.

2.The Principal Subordinate Court,  
Tenkasi

3.The Section Officer,  
Vernacular Section,  
Madurai Bench of Madras High Court, Madurai.



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**G.CHANDRASEKHARAN, J.**

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