

**IN THE HIGH COURT FOR THE STATE OF TELANGANA
AT HYDERABAD**

WEDNESDAY, THE FOURTH DAY OF JANUARY
TWO THOUSAND AND TWENTY THREE

**PRESENT
THE HONOURABLE SRI JUSTICE SAMBASIVA RAO NAIDU**

C.C.C.A. NO: 282 OF 2018

Appeal under Section 96 of CPC against the Judgment and decree dated 12/04/2018 made in OS No.617 of 2013 on the file of the Court of the Additional Judge -cum- VI Senior Civil Judge, City Civil Court, Hyderabad.

Between:

Abdul Sohail @ Amjad, S/o. Late Md. Abdul Jabbar Khan,
...**APPELLANT/ DEFENDANT NO.2**

AND

1. Shakira Begum, W/o. L.Md. Abdul Jaweed
....**Respondent/ Plaintiff**
2. Shaheen Begum, W/o. Syed Nisar Ahmed,
...**RESPONDENT/ DEFENDANT NO.1**

IA NO: 1 OF 2018

Petition under Section 151 of the CPC praying that in the circumstances stated in the affidavit filed therewith, the High Court may be pleased to suspend the operation of the Judgment and decree passed in O.S.No.617/2013 dated.12/04/2018 on the file of the Additional Judge- cum -VI Senior Civil Judge at Hyderabad pending disposal of the CCCA.

For the Appellant : SRI A.M.QURESHI, Advocate

For the Respondent No.1 : SRI MOHD OSMAN SHAHEED, Advocate

For the Respondent No.2 : SRI MD.FASEEHUDDIN, Advocate

The Court delivered the following : JUDGMENT

HONOURABLE SRI JUSTICE SAMBASIVA RAO NAIDU

C.C.C.A.NO.282 of 2018

JUDGMENT :

The appellant herein is defendant No.2 in O.S.No.617 of 2013 on the file of Addl. Judge cum VI Senior Civil Judge, Hyderabad, the first respondent is plaintiff and second respondent is first defendant in the said suit. Being aggrieved by the Judgment and Decree dated 12-04-2018 in O.S.No.617 of 2013 by which the trial Court passed a decree in favour of the respondent No.1/plaintiff, the present appeal has been preferred by the defendant No.2. The parties will be referred to as they are arrayed in the plaint.

2. The plaintiff has filed O.S.No.617 of 2013 for partition of suit schedule property and for allotment of 1/4th share each to plaintiff and defendant No.1 and for allotment of half share to the defendant No.2. The plaintiff has claimed in the suit that the defendant No.1 is her elder sister and defendant No.2 is their brother. The suit schedule property is self acquired property of their father by name Mohammed Abdul Jabbar Khan and during his life time, he has constructed a building over the property. The father of plaintiff died intestate during 2005, the mother of the

plaintiff also died on 10-05-2007 leaving the plaintiff and defendants No.1 and 2 as her legal heirs. The suit schedule properties stood in the name of their father. Defendant No.2 was collecting rents from the tenants of the premises, defendants No.1 and 2 are in occupation of part of the property whereas, the plaintiff is residing with her husband. The plaintiff has claimed that there was no partition between the parties and as per Muslim Law, she and defendant No.1 are entitled to $1/4^{\text{th}}$ share each and defendant No.2 is entitled to half share in the properties and when she demanded partition and for allotment of her share, the defendant No.2 postponed the issue, thereby, she filed the suit and sought for a decree for partition. She has also sought for allotment of $1/4^{\text{th}}$ share in the rents collected by her brother.

3. The defendant No.1 filed a written statement admitting the claim of plaintiff, whereas, defendant No.2 by filing a separate written statement has claimed that his father is not the owner of the property and his mother acquired the property with the funds derived from presentations made to her from her parents side. According to the defendant No.2, the property was acquired by his mother on 09-03-1988 and since then she was in possession of the property. During her life time, she made an oral gift i.e., 'HIBA' of the said property in favour of the defendant No.2 on 10-02-2000

and since then he has been in continuous possession of the property with ownership rights including collection of rents. The defendant No.2 has claimed that defendant No.1 along with her husband resided in a portion of the house for sometime but it was only a permissive possession. The defendant No.2 further averred that his mother has executed a memorandum of agreement confirming the oral gift on 02-06-2000. Therefore, according to defendant No.2, he has got absolute right on the suit property and plaintiff, defendant No.1 are not entitled to any share thereby, he sought for dismissal of the suit.

4. On the basis of the above rival contentions, the trial Court has framed the following issues :

1. Whether the plaintiff is entitled to seek partition of the suit property as prayed for?
2. Whether the suit is not properly valued and paid deficit Court fee ?
3. To what relief?

5. During the trial, the plaintiff has been examined as PW.1, and she has marked Exs.A1 to A8. D1 and D2 are examined as DW's.1 and 2 respectively. D2 has marked the alleged memorandum of gift as Ex.B1.

6. The trial Court having considered the oral and documentary evidence of both parties, believed the claim of

plaintiff and passed decree allotting $1/4^{th}$ share each in the plaint schedule property in favour of plaintiff and defendant No.1 and allotted half share in favour of defendant No.2. The trial Court also held that the plaintiff and defendant No.1 are entitled to $1/4^{th}$ share each in the rents collected by defendant No.2 from the tenants of the property.

7. Having not satisfied with the above findings, the defendant No.2 has filed the present appeal on the following grounds :

The Judgment of the trial Court is contrary to law and findings of the Court that suit schedule property is liable for partition is contrary to the oral and documentary evidence. The findings of the trial Court against Ex.B1 is against the principles of Mohammedan Law. The trial Court committed an error by finding that the defendant No.2 was minor at the time of Ex.B1 gift, and there is no prohibition in the Mohammedan Law for gift in favour of a minor. Since the plaintiff is disputing the gift, the trial Court ought not to have observed that the defendant No.2 shall prove the gift and burden shall be on the plaintiff to disprove the gift. The finding of the trial Court about the collection of rent of the suit house by defendant No.2 is not based on any evidence.

8. Heard both parties.

9. The following points arose for consideration in this appeal :

1. Whether there was a valid gift of suit schedule property by the original owner in favour of defendant No.2?
2. Whether the plaintiff and defendant No.1 are entitled to share in the suit house and also in the rents of the portions leased out?

10. There is no dispute about the relationship between the parties. As per the plaint averments after the amendment made by the plaintiff, it is very clear that the suit schedule property was originally acquired by the mother of the defendant No.2 as well as plaintiff and defendant No.1. The plaintiff filed the suit for partition and for allotment of 1/4th share in her favour. While filing the suit, she has claimed that the suit schedule property was acquired by her father, but later admitted the contention of the defendant No.2 namely the property was acquired by their mother by name Azeemunnissa. Plaintiff has claimed that she has got 1/4th share of the property by virtue of Mohammadian Law. She has claimed that there was no partition between the children of Azeemunnissa. The defendant No.1 did not dispute the claims. However, the defendant No.2 herein has claimed absolute right on the property on the basis of oral gift (HIBA) said to have been made by his

mother and he has also claimed that his mother had executed a memorandum of agreement regarding the oral gift vide Ex.B1.

11. The defendant No.2 has claimed that his mother who was absolute owner of the suit property, gifted the same in his favour by way of an oral gift. He has contended that the said oral gift was confirmed under Ex.B1. In view of this specific contention, the burden of proving the oral gift and execution of Ex.B1 is heavily on the defendant No.2. As could be seen from the Judgment under appeal, both parties relied on a Judgment between **Hafeeza Bibi and Ors Vs. Shaikh Farid (dead)**¹, wherein three essentials of a gift under Mohammadian Law were laid down. In order to establish such oral gift, there must be proof about declaration of gift by the donar, there must be acceptance of gift by the donee and delivery of possession. Reliance was also placed on another Judgment between **Rasheeda Khatoon Vs. Ashiq Ali**².

12. The plaintiff while filing the suit has claimed right on the suit property by saying that after the death of original owner, plaintiff and defendant No.1 being daughters have got 1/4th share. Whereas, the plaintiff has claimed absolute right on the basis of

¹ AIR 2011 SC 1695

² 2014 AIR SC W 6261

HIBA and confirmation of said oral gift under Ex.B1. Therefore, it is for him to prove the alleged oral gift and memorandum of gift. He cannot shift the burden to the plaintiff.

13. As could be seen from the evidence placed before the Court, both the plaintiff and defendant No.2 have deposed on the same lines of pleadings i.e., plaint and written statement filed by defendant No.1.

14. The defendant No.2 has been examined as DW.2. He has also deposed on the same lines of his written statement and contended that he has got absolute right on the suit property by virtue of HIBA and Ex.B1.

15. The trial Court analysed the oral and documentary evidence in detail. As per the evidence of DW.2, the property was purchased by his mother under a notary document and that he has obtained a loan on the said property from one Narsing Yadav by keeping the original document with him. Except the oral evidence of DW.2, there is no other document or evidence to believe the alleged gift by his mother. According to the evidence of DW.2 itself, no relative of the parties was present at the time of alleged oral gift or at the time of execution of Ex.B1. The defendant No.2 failed to prove the execution of Ex.B1 and there is no evidence to believe the alleged HIBA by his mother. Even though there are

two persons shown as witnesses of Ex.B1, none of them are examined by the appellant. The contention of DW.2 that he got loan by simply depositing the notary document obtained by his mother without filing the memorandum of gift vide Ex.B1 is also doubtful. Therefore, in view of the uncorroborated evidence of DW.2 and Ex.B1 which is not proved by any acceptable evidence, it cannot be considered that there was an oral gift and in pursuance of the gift, DW.2 got absolute rights on the property.

16. There is no dispute about lease of other portions of the house and there is evidence on record to believe that the defendant No.2 has been collecting rents of the other portions. In the absence of any such oral gift, all the children are entitled to the share in the rents.

17. The defendant No.2 is not able to prove the alleged HIBA and confirmation of the gift under Ex.B1. Therefore, being children of original owner, the plaintiff and both defendants are having right on the property. The defendant No.2 being son, he is entitled to $\frac{1}{2}$ share in the house and plaintiff and defendant No.1 have got $\frac{1}{4}^{\text{th}}$ share each. They are entitled to the proportionate rents also. Therefore, the trial Court rightly granted decree in favour of the respondent/plaintiff and the same cannot be set aside.

18. In the result, the appeal is dismissed with costs.

Consequently, Miscellaneous applications if any, are closed.

MEMORANDUM OF COSTS

Costs of Respondent Nos.1 and 2

	Rs.	Ps.
Stamps on each Vakalatnama Rs.105 X 2	210	00
Advocate's fee		
Fees Certificate not filed	0	00
	<u>210</u>	<u>00</u>

Costs to be paid by the Appellant/ Defendant No.2 to the Respondent No.1/ Plaintiff Rs.105/- (Rupees one hundred and five only) and to the Respondent No.2/ Defendant No.1 Rs.105/- (Rupees one hundred and five only)

Sd/-B.S.CHIRANJEEVI
JOINT REGISTRAR

//TRUE COPY//

SECTION OFFICER

To

1. The Additional Judge –VI Senior Civil Judge, City Civil Court, Hyderabad. (with records)
2. One CC to Sri Abdul Mueeth Qureshi, Advocate [OPUC]
3. One CC to Sri Mohd. Osman Shaheed, Advocate [OPUC]
4. One CC to Sri Md. Faseehuddin, Advocate [OPUC]
5. Two CD Copies

Kj.

File

HIGH COURT

DATED:04/01/2023



JUDGMENT

CCCA.No.282 of 2018

DISMISSING CCCA WITH COSTS.

⑦
7/2/23
HVT

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AT HYDERABAD

WEDNESDAY, THE FOURTH DAY OF JANUARY
TWO THOUSAND AND TWENTY THREE

PRESENT
THE HONOURABLE SRI JUSTICE SAMBASIVA RAO NAIDU

C.C.C.A. NO: 282 OF 2018

Between:

Abdul Sohail @ Amjad, S/o. Late Md. Abdul Jabbar Khan,

...APPELLANT/ DEFENDANT NO.2

AND

1. Shakira Begum, W/o. LMd. Abdul Jaweed

....Respondent/ Plaintiff

2. Shaheen Begum, W/o. Syed Nisar Ahmed,

...RESPONDENT/ DEFENDANT NO.1

Appeal under Section 96 of CPC against the Judgment and decree of the Court of the Additional Judge –cum- VI Senior Civil Judge, City Civil Court, Hyderabad made in OS No.617 of 2013 dated 12/04/2018.

ORDER: This appeal coming on for hearing and upon perusing the grounds of appeal, the Judgment and decree of the Lower Court and the material papers in the suit and upon hearing the arguments of Sri A.M.Qureshi, Advocate for the Appellant and of Sri Mohd. Osman Shaheed, Advocate for the Respondent No.1 and Sri Md.Faseehuddin, Advocate for the Respondent No.2.

This Court doth Order and decree that the decree of the Lower Court be and hereby is confirmed and this City Civil Court Appeal is dismissed; and

That the appellant/ defendant No.2 be and hereby is paid to the Respondent No.1/ Plaintiff Rs.105/- (rupees one hundred and five only) and to Respondent No.2/ Defendant No.1 Rs.105/- (Rupees one hundred and five only)

Sd/-B.S.CHIRANJEEVI
JOINT REGISTRAR

//TRUE COPY//

SECTION OFFICER

To

1. The Additional Judge –VI Senior Civil Judge, City Civil Court, Hyderabad.
2. Two CD Copies

Kj.

Hv4

HIGH COURT

DATED:04/01/2023

DECREE

CCCA.No.282 of 2018

DISMISSING CCCA WITH COSTS.

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7/2/23
Hvz