



S.A.No.1649 of 2001

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Received on :19.12.2023

Pronounced on : 22.02.2024

CORAM :

THE HONOURABLE Mr. JUSTICE C.KUMARAPPAN

S.A.No.1649 of 2001

and

C.M.P(MD)Nos.17539 of 2001, 1620 and 16928 of 2003

- 1.Syed Johran Beevi
- 2.Boyjiya Begum
- 3.Mujuboor Rahman
- 4.Ummal Hasanth Begum

...Defendants/Respondents/
Appellants

Vs.

Mohammed Rafi

...Plaintiff/Appellant/
Respondent

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 02.08.2001 made in A.S.No.172 of 2000 on the file of the Principal District Court, Nagapattinam, reversing the judgment and decree dated 18.10.2000, made in O.S.No.122 of 1996 on the file of the Additional Subordinate Court, Nagapattinam.



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For Appellants : M/s.Srinath Sridevan, Sr. Advocate
for Mr.T.Girish
For Respondent : M/s.K.M.Subramaniam
for Mr.M.Govindarajau

J U D G M E N T

The instant second appeal has been filed at the instance of the defendants. The respondent herein is the plaintiff before the trial Court.

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

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

3.1. The suit property originally belonged to one Kathif Noohu Sharif Shaib. He has two wives, by name, Haboob Ammal and Jameela Beevi. Haboob Ammal died leaving two sons by name Sulthan Abdul Kader and Mohammed Ali. The elder son Mohammed Ali died, on 27.10.1987 leaving behind his wife Syed Joharan Beevi, as the first defendant. Their children are arrayed as defendants 2 to 4 before the trial Court. The second wife viz.,



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Jameela Beevi also died on 14.04.1984 leaving behind her only son, by name, Ameer Hamsa Sahib. The said Ameer Hamsa Sahib also died on 17.06.1989 leaving behind his wife, by name, Subaitha Ammal. The suit property, under the family arrangements, was allotted to Jameela Beevi, who was the second wife of the original owner Kathif Noohu Sharif Sahib. After the demise of Jameela Beevi, her property devolved to her son Ameer Hamsa Sahib. The said Ameer Hamsa Sahib died on 17.06.1989. Prior to that Mohammed Ali, died on 27.10.1987. Hence 3/4th share of Ameer Hamsa Sahib was devolved to Sulthan Abdul Kader, who is the consanguine brother, and the remaining 1/4th share was devolved upon Subaitha Ammal viz., the wife of Mr.Ameer Hamsa Sahib.

3.2.While so, there was a partition between Subaitha Ammal and Sulthan Abdul Kader, vide partition deed dated 16.10.1990. By virtue of the said partition deed, the entire suit property allotted to the plaintiff's father Sulthan Abdul Kader. It is the submission of the plaintiff that his father Sulthan Abdul Kader has executed a registered settlement deed in his favour on 27.12.1990 and thereby, he became the absolute owner of the property. Whereas, the defendants set up title to the suit property by contending that the



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said Jameela Beevi has gifted the suit property to Mohammed Ali on 30.06.1983 and that, Ameer Hamsa Sahib has executed a gift deed in favour of the defendants 2 to 4 on 10.05.1988. Since the defendants independently set up title upon the suit property, the plaintiff was constrained to file the suit for the relief of declaration and for recovery of possession.

3.3. The said suit was resisted by the defendants by contending that the said Jameela Beevi has executed a gift deed in respect of 1/3rd share of the suit property in favour of the defendants 2 to 4's father Mohammed ali, and that Ameer Hamsa Sahib has executed a gift deed of 2/3rd share to the defendants 2 to 4 by virtue of another settlement deed, dated 10.05.1988. Therefore, it is the submission of the defendants that the suit property becomes the absolute property of the defendants and the plaintiff cannot have any right over the same. It was also contended by the defendants that since the defendants got title over the suit property, the rent control petition and rent control appeal filed by the plaintiff was dismissed. Further, the defendants submit that they also perfected title by way of adverse possession. Hence, they prayed to dismiss the suit.

Evidence and Documents:



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4. Before the Trial Court, on the side of the plaintiff, two witnesses were examined as P.W.1 and P.W.2 and 19 documents were marked as Exs.A1 to A19. On behalf of the defendants, two witnesses were examined as D.W.1 and D.W.2 and 15 documents were marked as Exs.B1 to B15.

Finding of both the Courts below

5. The trial Court, after having considered the oral and documentary evidence and the submissions on either side, has found that the alleged gift deeds, dated 30.06.1983 and 10.05.1988, have not been proved. But still the suit was dismissed with the finding that the defendants have got 1/3rd share in the suit property. Being not satisfied with the order of the trial Court, the plaintiff preferred the first appeal. The first appellate Court, on re-appreciation of evidence, has reversed the finding and arrived at a conclusion that Ex.B.1-gift deed has not been proved and that, the another gift deed, dated 10.05.1988 is inadmissible, as the same was not registered under the Registration Act. It was also the finding of the first appellate Court that without any material, the trial Court has wrongly arrived at a conclusion that the defendants have got 1/3rd share in the suit property. Aggrieved with the finding of the first appellate



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Court, the defendants are before this Court by way of this second appeal.

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Substantial questions of law:

6. At the time of admission, this Court has formulated the following substantial questions of law:

“Whether under Hanafi Law of Succession, a consanguine brother's son is not a residuary along with the another consanguine brother or the properties?”

Submissions on either side:

7. The learned Senior Counsel appearing on behalf of the defendants/appellants would strenuously contented that the finding of the first appellate Court that Ex.B.3-gift deed is not a valid on the ground of non-registration, is contrary to the provision of Section 129 of the Transfer of Property Act, in which, invoking the provision of the Transfer of Property Act, was prohibited to the Mahomedan law. It was also contended by the learned Senior Counsel for the defendants that the first appellate Court, without recording any finding as to the absence of material ingredients of declaration of gift by donor, acceptance of gift by donee and delivery of possession, still has



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disbelieved the case of the defendants. The learned counsel would also further contend that since because there is a recital about Ex.B.1 and Ex.B.3 that the same are Will, such nomenclature will not preclude to consider the document based upon its contents. The learned Senior Counsel would further contend that the first appellate Court on wrong understanding of law, and also on account of non-registration of gift deeds, has wrongly reversed the finding and has not at all considered Ex.B.3, which is contrary to Section 129 of the Transfer of Property Act. The learned Senior Counsel eventually concluded his argument by contending that even though there is no pleading as to the entitlement to the defendants under Muslims Law as a son's of the consanguine brother, they being the consanguine brother's son, by operation of law they are entitled for share. Hence, the learned Senior Counsel prayed to allow this second appeal.

8. Per contra, the learned counsel appearing for the respondent/plaintiff would contend that Ex.B.1 and Ex.B.3 gift deed are fabricated documents, which factum could be effectively vindicated through the absence of pleading in the counter statement filed before the Rent Control Court. The learned counsel would also further contend that Ex.B.1-gift deed,



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dated 30.06.1983, does not contain the signature of the settlor - Jameela Beevi and even according to the defendants, the said gift deed was signed by one Ameer Hamsa Sahib, as a power of attorney. Therefore, the learned counsel contended that in the absence of production of the alleged power of attorney executed by Jameela Beevi in favour of Ameer Hamsa Sahib, such transaction is highly suspicious. The learned counsel for the respondent/plaintiff also contended that both the documents Ex.B1 and Ex.B3 are highly suspicious and the same have not been proved in the manner known to law. Hence, the learned counsel for the respondent/plaintiff prayed to dismiss the second appeal by confirming the order of the first appellate Court.

9. I have given my anxious consideration on the submissions made by either side.

10. The gravamen of the submission of the learned Senior Counsel is on two folds. The first is by virtue of Ex.B.1 and Ex.B.3 gift deeds, they became the absolute owner of the suit property. The second fold of their argument is that since the defendants 2 to 4 being the sons of consanguine brother, are



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entitled to have a share in the suit property as residuary.

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11. Let us consider the submission one after another.

12. While considering the arguments put forth by the learned Senior Counsel in respect of Ex.B.1 and Ex.B.3 gift deeds, it is their submission that by examining the attestor, Ex.B.1 and Ex.B.3 gift deeds have been proved in the manner known to law. However, both the Courts below disbelieved to Ex.B.1 and Ex.B.3 gift deeds and recorded the finding that, Ex.B.1 and Ex.B.3 gift deeds, will in no way confer any title or right to the defendants.

13. In order to find out the validity, executability and reliability of Ex.B.1 deed, this Court deems it appropriate to consider Ex.B.2, which is the Will executed by one Mohammed Ali, who is the husband of the first defendant and father of the defendants 2 to 4. Both, in the pleadings through the written statement, and in the recitals of Ex.B.2 Will, there is a reference that the said Jameela Beevi has executed a Will in favour of Mohammed Ali towards 1/3rd share. Though the nomenclature of Will has been referred, what is available



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before the Court is Ex.B.1-gift deed. Therefore, the trial Court disbelieved the case put forth by the defendants. This Court finds no fault in the findings given by the trial Court as well as by the first appellate Court. Because, while closely reading Ex.B.2, this Court infers that the defendants and his father Mohammed Ali knew about the difference between the “Gift Deed” and “Will”. Therefore, the reference of Will in their pleadings and in Ex.B.2-Will of Mohammed Ali assumes much significance. To put it in other words, according to the defendants, they derived title only through the Will, whereas such Will is not before this Court.

14. At this juncture, the learned Senior Counsel for the respondent/plaintiff would bring to the knowledge of this Court in respect of the counter statement filed before the Rent Control proceedings, which was marked as Ex.A.6. Wherein the defendants did not mention as to the date of alleged gift. This would inexorably project the case that the documents - Ex.B.1 and Ex.B.3 are fabricated and afterthought. As a matter of fact, the earliest opportunity for the defendants to introduce their title towards the property through the alleged gift given by the said Jameela Beevi and her son Ameer Hamsa Sahib, was during filing the counter statement-Ex.A.6 before the rent



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control proceedings. The same was initiated in the year 1995, which is almost 7 years after the alleged Ex.B.1 and Ex.B.3. But in Ex.A.6-Counter Statement, there was only a reference about the mere gift without any specific details more particularly date of the gift. Therefore, the finding recorded by the first appellate Court as well as the trial Court that Ex.B.1 and Ex.B.3 could not be believed, is well merited and well considered.

15.Since because Muslim Law permits the oral gift and the provision under Section 129 of the Transfer of Property Act, has no application to the Mohammadan, it does not mean that the Court has to accept their *ipse dixit* without substantiating their grounds through acceptable evidence. In this regard, it is useful to refer to the judgment of the Hon'ble Supreme Court in ***Maqbool Alam Khan-Vs-Mst Khodaija and Others***, reported in ***AIR 1996 SC 1194***, and the relevant portion is extracted hereunder:

“4.The appellant must, therefore, establish his title to the land. He claims that after the preliminary decree Najma orally gave him her entire movable and immovable properties including the tenure, and she died after making over possession of the same. She died leaving her father and mother as her heirs. Both her parents filed petitions in Title Suit No. 127 of 1939 supporting the oral gift



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of the suit land. This circumstance favours the case of oral gift. The appellant examined himself as a witness in this, case. He said that the gift was made on February 10, 1943 in the presence of his parents. His mother was alive, but she was not examined as a witness. The date of the gift was not mentioned in the plaint or in any earlier document; I it was disclosed for the first time in the witness-box, and even then, it was not made clear how he remembered the date in the absence of any record. In the petition filed by him on April 10, 1943 in Title Suit No. 127 of 1939 he had made a different case and had stated that the gift was made a few months before her death on February 26, 1943. His case now is that Najma made a gift of her entire movable and immovable properties. This case was not made in the petitions filed in Title Suit No. 127 of 1939. The particulars of the other properties are not disclosed, nor is it shown that he ever took possession of those properties. In the plaint, he made the case that Najma died after making over possession of the tenure to him. This statement is, untrue, because Najma had been dispossessed of the tenure in August 1942 and was not in possession of it at the time of the alleged gift. Considering all the circumstances, the High Court held, and, in our opinion, rightly that the appellant failed to prove the alleged oral gift.”

(emphasis supplied by this Court)

16. Apart from that, while looking at Ex.B.1, it is mentioned that 2/7th



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share was gifted to Mohammed Ali. Whereas, the pleading of the defendants says that 1/3rd share was gifted by Ameer Hamsa Sahib to Mohammed Ali, which is contrary to Ex.B.1. Thus rule of prudence is also against the defendants. Therefore, this Court also concurs with the findings of both the Courts below and holds that Ex.B.1 gift has not been proved in the manner known to law.

17. Coming to the another gift deed – Ex.B.3, as rightly contended by the learned Senior Counsel for the defendants, the trial Court has totally ignored the consideration of the document on the sole ground as it was not registered. In this regard, the learned Senior Counsel has relied upon **Section 129** of the **Transfer of Property Act**, and also the judgment of the Hon'ble Supreme Court in *Hafeeza Bibi-Vs-Shaik Farid*, reported in *AIR 2011 SC 1695* as well as the judgment in *Rasheedha Khatoon-Vs-Ashiq Ali*, in *2014(10) SCC 459*. In the above precedent, the mandate of Section 129 of the Transfer of Property Act has been reiterated. To put it in other words, the principles enunciated in the above precedents have been stated and restated in many of the precedents. Therefore, this Court absolutely has no grievance to accept the contention put forth by the



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learned Senior Counsel appearing on behalf of the defendants that the rigour of the Transfer of Property Act is not applicable to the gift under the Muslim Law.

Though the gift is written, under Muslim, the same does not require any registration. Therefore, the finding recorded by the first appellate Court that Ex.B.3 gift deed cannot be relied on the ground of non-registration is against law and could not be countenanced, albeit this Court accepts the ultimate finding of disbelieving Ex.B.3, but however on a different grounds.

18. In Ex.B.3 there is a reference about the gift of 5/7th share to the defendants 2 to 4. But, according to Ex.B.1, Jameela Beevi, gifted her 2/7th share to the father of the defendants 2 to 4 viz., Mohammed Ali. As already observed, the defendants had an opportunity to introduce their gift deed to the rival claimants as early as on 1995, through the rent control proceeding. But, the defendants did not mention about the date of gift deed in the counter statement which caused a serious apprehension about the existence of the said document during 1983 and 1988. That is why, there is a contradiction between Ex.B.2 about the share of Jameela Beevi with that of Ex.B.1 and Ex.B.3. In Ex.B.2 and in the pleading what is mentioned that the said Jameela Beevi had 1/3rd shares. However, in Ex.B.1 and Ex.B.3, contrary to Ex.B.2, there is a reference to the



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effect that the said Jameela Beevi had 2/7th share and Ameer Hamsa Sahib has 5/7th share, which would cause suspicious over the existence of the alleged gift.

Therefore, this Court though rejects the finding of the first appellate Court that Ex.B.3 is inadmissible on account of non-registration, still holds that Ex.B.3 cannot be given effect to as the same has not been proved in a manner known to law, and due to contradiction of the share between the pleadings and Ex.B.3, as well as the contradiction between Ex.B.2 Will executed by Mohammed Ali and Ex.B.3 gift alleged to have been executed by Ameer Hamsa Sahib. Though the defendants' case is rest upon the alleged gift deed, the same has not withstood for the legal scrutiny. Hence, this Court holds that Ex.B1 and Ex.B.3 are not binding upon the plaintiff.

19. The next line of submission is about claiming share upon the suit property by the defendants 2 to 4 being the son of consanguine brothers. The learned counsel appearing on behalf of the defendants would fairly submit that there are no pleadings in this regard. However, the learned Senior Counsel would submit that since the ground urged is a legal ground, it can be raised at the second appeal stage. However, this Court regrets to agree with the submission made by the learned Senior Counsel, as what is essential under



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Section 100 of C.P.C., is not the question of law, but it should be the substantial question of law. But even for that there must be a foundation by way of pleadings and the question should emerge from the findings of fact arrived at by Court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. It is pertinent to mention here that even though it is a question of law, the parties have no right to raise such question at the second appeal stage. In this regard, it is useful to refer to the judgment of the Hon'ble Supreme Court in ***Kshitish Chandra Purkait-Vs-Santhosh Kumar Purkait and Others***, reported in (1997) 5 SCC 438 and in ***Hero Vinoth (Minor)-Vs-Seshammal***, reported in (2006)5 SCC 545. The relevant paragraphs are extracted hereunder:

“20.The question of law raised will not be considered as a substantial question of law, if it stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court. Where the facts required for a point of law have not been pleaded, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of facts, the documentary evidence or the meaning of entries and the contents of the documents cannot be held to be raising a substantial question of law. But where it is found



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that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. This Court in Reserve Bank of India v. Ramkrishna Govind Morey [(1976) 1 SCC 803] held that whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference. (See Kondiba Dagadu Kadam v. Savitribai Sopan Gujar [(1999) 3 SCC 722] .)

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23.*To be “substantial” a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law “involving in the case” there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts*



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and circumstance of each case whether a question of law is a substantial one and involved in the case or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (See Santosh Hazari v. Purushottam Tiwari [(2001) 3 SCC 179] .)

(emphasis supplied by this Court)

Therefore, the second submission of the learned Senior Counsel would also fail.

20. Therefore, in view of the above detailed discussion, all the substantial questions of law are answered in favour of the respondents. Hence, the Second Appeal stands dismissed, by confirming the judgment passed in A.S.No.172 of 2000 by the Principal District Court, Nagapattinam. There is no order as to cost. Consequently, connected miscellaneous petitions are closed.

22.02.2024

NCC:Yes/No

Index:Yes/No

Internet:Yes/No

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To

- 1.The Principal District Court,
Nagapattinam.
- 2.The Additional Subordinate Court,
Nagapattinam.
- 3.The Section Officer,
Vernacular Records,
Madras High Court,
Madras.



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C.KUMARAPPAN.,J

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