



A.S.(MD)No.111 of 2013

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 08.08.2024

CORAM:

THE HONOURABLE **MR.JUSTICE P.VELMURUGAN**

AND

THE HONOURABLE **MR.JUSTICE K.K.RAMAKRISHNAN**

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and

M.P.(MD)No.1 of 2013

1.H.Abdul Gani (died)

2.Afsari Begum

3.Rabia Jahani Farzana

4.Fathima Haseen Raihana

... Appellants

A2 to A4 are brought on record as LR's., of the deceased sole appellant vide Court order dated 23.01.2024 made in C.M.P.(MD)Nos.9100 and 9115 of 2023 in A.S.(MD)No.111 of 2013)

Vs.

1.Venmathi Aachi

2.Mujahith Ahamed

3.Mustari Jan

4.Madhina Begum

Salima Bibi (died)

5.Shamina Begum

6.Khursheed Jan

...Respondents

PRAYER: Appeal Suit filed under Section 96 of C.P.C., praying to set aside the order dated 28.03.2013 in O.S.No.155 of 2010 on the file of the II Additional District and Sessions Court, Tiruchirappalli.



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For Appellants : Mr.V.George Raja
For R1 & R5 : Dispensed With
For R2, R3 & R6 : No Appearance
For R4 : Mr.T.Lajapathi Roy,
Senior Counsel,
for Mr.S.Rajasekar

JUDGMENT

(Judgment of the Court was delivered by *P.VELMURUGAN, J.*)

This Appeal Suit is filed against the decree and judgment dated 28.03.2013 made in O.S.No.155 of 2010 on the file of II Additional District and Sessions Court, Tiruchirappalli.

2.The brief case of the plaintiff reads as follows:-

(i)The suit property originally belonged to the father of the plaintiff's mother, namely, B.Kader Moideen, who died in the month of May, 1961 and his wife Ameer Bi died on 23.09.1963 and his son, namely, Jainulabudeen died on 16.01.1991. After their death, the suit property devolved upon his daughter Jamila Bi / mother of the plaintiff and his son's wife Salima Bibi, who is arrayed as 5th defendant in this suit in 2/3:1/3 ratio according to Islamic Law of Succession. The mother of the plaintiff Jamila Bi filed a suit in O.S.No.778 of 1991 for partition against the 5th defendant on the file of the learned II Additional Sub Judge, Tiruchirappalli. During the pendency of the suit, the 5th



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defendant sold and alienated the entire suit property, including 2/3rd share of the said Jamila Bi to the 1st defendant, by way of sale deed dated 12.02.1992.

Therefore, the mother of the plaintiff impleaded the 1st defendant in the suit in O.S.No.778 of 1991 as the 2nd defendant.

(ii)The trial Court rejected the sale deed dated 12.02.1992 as a sham and ignominious document and decreed the suit in O.S.No.778 of 1991 in favour of the mother of the plaintiff. Aggrieved by the same, the 1st defendant filed an appeal in A.S.No.221 of 1997 and the same was dismissed by the learned Principal District Judge, Tiruchirappalli. Thereafter, the mother of the plaintiff applied for final decree in I.A.No.103 of 2001 on 23.11.1999 and the suit was transferred to the learned Principal District Munsif, Tiruchirappalli on 29.05.2006 to draw up final decree. Therefore, the original suit in O.S.No.778 of 1991 was renumbered as O.S.No.1905 of 2006 on the file of the learned Principal District Munsif, Tiruchirappalli and the same is pending for final decree.

(iii)In the meantime, the mother of the plaintiff Jamila Bi died on 10.11.2002 and the 5th defendant Salima Bibi also died without leaving any legal heirs behind her to inherit her 1/3rd share of the suit property. Subsequent



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to the death of the mother of the plaintiff, her 2/3rd share devolves on her legal heirs and 1/3rd share of Salima Bibi is in reversion to them. They inherit their shares in definite fraction and they are all entitled to claim for partition as co-owners and separate possession of their respective shares.

(iv)According to the Islamic Law, a right of preemption is created and any sale transaction could be effected only between the co-sharers of the suit property and not with any strangers. Therefore, the suit property is divisible only among the legal heirs of Jamila Bi and Salima Bibi. Therefore, since the plaintiff is the eldest son to his mother Jamila Bi, he filed an impleading petition and other her two legal heirs were also impleaded. The 6th defendant Shamina Begum impleaded herself deceitfully as the 3rd respondent in the said final decree proceedings, claiming 1/3rd share of the 5th defendant Salima Bibi.

(v)The 1st defendant colluded with other two legal heirs of Jamila Bi and the 4th defendant and by way of fabric and false hiba statement and affidavits, resold the total extension of the suit property to a stranger, namely, Madhina Begum / 4th defendant by virtue of a registered sale deed on 25.02.2010. Therefore, seeking to set aside the said sale deed dated 25.02.2010, the plaintiff filed the present suit.



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3.The defendants 2 and 3 filed their written statement, stating that

(i)Admittedly, Jamila Bi was entitled to $2/3^{\text{rd}}$ share and Salima Bibi was entitled to $1/3^{\text{rd}}$ share in the suit property and the said Jamila Bi filed a suit for partition of her $2/3^{\text{rd}}$ share in the suit property in O.S.No.778 of 1991. During the pendency of the said suit, Salima Bibi sold the entire suit property to the 1st defendant herein, but not for lower price as alleged in the plaint. The 1st defendant also added as the 2nd defendant in the said suit and the same was decreed in favour of Jamila Bi. On appeal, it was also confirmed in favour of Jamila Bi, but it is false to say that the sale in favour of the 1st defendant was rejected as a sham and ignominious document. It was held that since Salima Bibi was entitled to $1/3^{\text{rd}}$ share, by getting a sale from her, the 1st defendant was entitled to $1/3^{\text{rd}}$ share and Jamila Bi was entitled to $2/3^{\text{rd}}$ share. In appeal, the 1st defendant contended that she was entitled not for $1/3^{\text{rd}}$ share alone, but for the entire property, which was rejected by the appellate Court, holding that Jamila Bi was entitled to $2/3^{\text{rd}}$ share and Salima Bibi was entitled to $1/3^{\text{rd}}$ share in the suit property.

(ii)Since the plaintiff and the 7th defendant hardly visited their mother Jamila Bi in her old age and the defendants 2 and 3 were rendering all help and



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service to Jamila Bi, she gave the suit property to the defendants 2 and 3 by Hiba(gift) at about 05.00 p.m., on 11.12.1999 at her residence No.43, Vellimal Street, Tiruchirappalli in the presence of one M.Sher Alikhan and Usman of Mappillai Naikkan Tank Street, Tiruchirappalli. Jamila Bi declared before the donees and the above two witnesses that she is gifting her 2/3rd share in the house site at Singarathope bearing Door Nos.65, 66 to her 2nd son, namely, Mujayith Ahamed and her last daughter, namely, Mustharijan.

(iii)Since the partition proceedings were pending before the Court, she said that she is giving symbolical delivery of possession of the property and that the defendants 2 and 3 have to continue the Court proceedings and get the benefits of the decree. Jamila Bi / donor gave a sworn statement on 16.12.1999, acknowledging the Hiba to the defendants 2 and 3 by signing the said affidavit in the presence of Dasthagir, Advocate and Notary Public, Tiruchirappalli and the same was attested by the said Notary Public. The defendants 2 and 3 / donees accepted the gift and as directed by Jamila Bi / donor, the defendants 2 and 3 / donees filed an application in the suit to grant leave to them to continue the proceedings in the final decree and the same was allowed. Thus, all the three essential requisites for Hiba were duly complied with.



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(iv) Pending the final decree application, the 1st defendant accepted and declared that she is entitled to the right and possession of only to 1/3rd share and that the defendants 2 and 3 are entitled to the right and possession of other 2/3rd share in the suit property. For consideration received, the defendants 1 to 3 have sold and delivered possession of their respective shares to the 4th defendant by a registered sale deed dated 25.02.2010.

(v) The Hiba effected by Jamila Bi on 11.12.1999 in favour of the defendants 2 and 3 is true and valid and was affirmed by Jamila Bi by her affidavit dated 16.12.1999. The conduct of the plaintiff by keeping quiet for the past 12 years without questioning about the Hiba or taking any steps for the past ten years in impleading himself as party to the final decree proceedings filed by Jamila Bi and allowing the defendants 2 and 3 to continue the same, would go to show that the plaintiff, knowing about the truth and validity of the Hiba, does not wish to dispute it.

4. The 4th defendant also filed written statement, reiterating the statements made by the defendants 2 and 3.



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5.Before the trial Court, the plaintiff had examined himself as P.W.1 and marked 26 documents as Ex.A.1 to A.26. On the side of the defendants, four witnesses were examined as D.W.1 to D.W.4 and three documents were marked as Ex.B.1 to B.3.

6.The trial Court, upon consideration of the oral and documentary evidence, dismissed the suit filed by the plaintiff, holding that the plaintiff is not entitled to any relief as prayed for in the suit.

7.Aggrieved by the same, the plaintiff has filed this appeal.

8.The learned counsel appearing for the appellant would submit that the sale deed dated 25.02.2010, which was marked as Ex.A.1 in the suit, is not binding the share of the appellant. The appellant is entitled to the preliminary decree for partition in respect of the appellant's share in the suit property. The alleged oral gift pleaded by the respondents 2 and 3 is not true and further, not proved in the manner known to law. The alleged confirmation deed of Jamila Bi is not true and the same cannot be relied upon to prove the alleged oral gift. The alleged oral gift is not valid by delivery of possession. Therefore, it is



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invalid under Mahomedan Law. To prove the alleged oral gift on the side of the respondents 2 and 3, one Sher Alikhan was examined as D.W.2, whose evidence is unreliable and he stated in the cross-examination that he is not the witness to the alleged oral gift. The evidence of D.W.2 was completely changed during the cross-examination.

9.He would further submit that the burden of proof is on the respondents 2 and 3 to prove the alleged oral gift, but they miserably failed to prove the same. There is no necessity to give oral gift by Jamila Bi and therefore, the same is highly unnatural. The alleged symbolical delivery of the property is also not true and further, the symbolical delivery is not valid under Mahomedan Law. The alleged oral gift was not referred to in the sale deed dated 25.02.2010. However, the said position has not been considered by the trial Court. Further, recitals, as to the consideration in the alleged sale deed, are also not true and the same was not proved in the manner known to law. Even as per the alleged confirmation deed of Jamila Bi, the possession either actual or constructive was not delivered on the alleged date of oral gift. In the alleged confirmation of the oral gift, it is specifically stated that the possession will be taken in future.



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10.He would further submit that there was no application filed during the lifetime of Jamila Bi in a final decree proceedings about the alleged oral gift by Jamila Bi, which clearly shows that there is no oral gift. Further, there is no reason given by the respondents 2 and 3 as to why Jamila Bi excluded the appellant and therefore, either the sale deed executed by the respondents 2 and 3 in favour of 4th respondent or the alleged gift said to have been executed by Jamila Bi in favour of the respondents 2 and 3 are valid. Since the delivery of possession was not established and even assuming that Jamila Bi gave her property to the respondents 2 and 3 by way of oral hiba, the same is not valid in the absence of proof of delivery of possession. However, the trial Court failed to consider the factual as well as the legal position. Therefore, the judgment and decree passed by the trial Court, which is impugned herein, is liable to be set aside and the appeal is to be allowed.

11.The learned Senior Counsel appearing for the 4th respondent would submit that admittedly, the suit property originally belonged to the maternal grandfather of the appellant and therefore, the mother of the appellant got 2/3rd share and the aunt of the appellant got 1/3rd share. Since the mother of the appellant's right was denied, she filed a suit for partition of her 2/3rd share in the suit property in O.S.No.778 of 1991 on the file of the Sub Court, Trichy.



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Pending the suit, Salima Bibi sold the entire suit property to the 1st respondent herein, the 1st respondent was also impleaded as the 2nd defendant in the said suit, where preliminary decree was passed for 2/3rd share of the mother of the appellant on 27.07.1997. Challenging the same, the 2nd defendant filed an appeal before the District Munsif Court, Trichy in A.S.No.221 of 1997, which was dismissed on 05.10.1998, confirming the preliminary decree passed by the trial Court. However, the sale made by Salima Bibi of her 1/3rd share was confirmed by the trial Court as well as the appellate Court. Therefore, the 1st respondent is entitled to 1/3rd share and the mother of the appellant Jamila Bi is entitled to 2/3rd share.

12.He would further submit that the mother of the appellant filed an application in I.A.No.103 of 2001 for passing final decree in O.S.No.778 of 1991 and pending the application, the mother of the appellant Jamila Bi gave the suit property to the respondents 2 and 3 by way of oral Hiba on 11.12.1999 in the presence of one Sheir Ali Khan and Usman of Mappillai Naikkan Tank Street, Tiruchirappalli. The said Hiba is valid. Since the final decree proceedings were pending before the Court, she had stated that she is giving symbolical delivery of possession of the property and the respondents 2 and 3 are to continue the Court proceedings and get the benefits of the decree and she



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also confirmed the said Hiba in sworn statement on 16.12.1999, acknowledging the Hiba to the respondents 2 and 3 and signed the said confirmation deed before the Notary Public. The respondents 2 and 3 also accepted the Hiba and as directed by the donor / Jamila Bi / mother of the appellant, the respondents 2 and 3 filed an application in the final decree proceedings to grant leave to continue the proceedings by impleading them as supplemental petitioners the same was allowed 13.08.2003. Based on that, they proceeded with the final decree proceedings.

13.He would further submit that the application filed by the appellant in I.A.No.412 of 2010 to implead him as a party to the final decree proceedings was dismissed by the District Munsif Court, Trichy and 1st respondent also declared that she is entitled to the right and possession of only 1/3rd share and the respondents 2 and 3 herein are entitled to the right and possession of 2/3rd share in the suit property and all the three sold the entire property to the 4th respondent under a registered sale deed dated 25.02.2010 for sale consideration of Rs.23 lakhs.

14.He would further submit that the said Hiba dated 11.12.1999 executed by Jamila Bi in favour of the respondents 2 and 3 is true and valid



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and the same was confirmed by Jamila Bi through her confirmation deed dated 16.12.1999, which is also valid under Mohamedan Law and the appellant, till the lifetime of Jamila Bi, did not question the same. Further, pursuant to the sale deed dated 25.02.2010, the 4th respondent took the possession of the property and the appellant is out of possession and the appellant miserably failed to prove his case. Therefore, the trial Court rightly dismissed the suit and there is no merit in this appeal and therefore, the same is liable to be dismissed, he contended.

15.Heard the learned counsel for the appellant and the learned Senior Counsel for the 4th respondent and perused the materials available on record carefully.

16.Based on the pleadings, oral and documentary evidence and the submissions made by both sides, the following points arise for consideration:-

“(i) Whether the respondents 2 and 3 have proved the alleged oral Hiba dated 11.02.1999 and the confirmation deed of the Hiba dated 16.12.1999 and the same are valid? ;



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(ii) Whether the sale deed dated 25.02.2010 executed by

the respondents 1 to 3 in favour of the 4th respondent is true and

valid and it will bind the share of the appellant or not?; and

(iii) Whether the appellant is entitled to get a preliminary

decree as sought for in the suit?."

17.As far as the first point is concerned, admittedly, the suit property originally belonged to the maternal grandfather of the appellant, namely, B.Kader Moideen, who died in the month of May, 1961 and his wife Ameer Bi died on 23.09.1963 and his son, namely, Jainulabudeen died on 16.01.1991. After their death, his daughter Jamila Bi / mother of the appellant got 2/3rd share of the suit property and his son's wife Salima Bibi got 1/3rd share of the suit property. The mother of the appellant filed a suit for partition of her 2/3rd share in the suit property in O.S.No.778 of 1991 on the file of the Sub Court, Trichy. Pending the suit, since Salima Bibi sold the entire suit property to the 1st respondent herein, the 1st respondent was impleaded as the 2nd defendant in the said suit. The same was decreed in favour of Jamila Bi and preliminary decree was passed for 2/3rd share of Jamila Bi on 27.07.1997. On appeal in A.S.No.221 of 1997 filed by the 1st respondent, the appellate Court dismissed



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the same on 05.10.1998, confirming the preliminary decree passed by the trial Court and also the sale made by Salima Bibi of her 1/3rd share. Thereafter, Jamila Bi filed an application in I.A.No.103 of 2001 for passing final decree in O.S.No.778 of 1991.

18.It is the case of the respondents 2 and 3 that pending the final decree proceedings, their mother / Jamila Bi gave the suit property to them by way of oral Hiba on 11.12.1999 in the presence of one Sheir Ali Khan and Usman of Mappillai Naikkan Tank Street, Tiruchirappalli. She had also stated that she is giving symbolical delivery of possession of the property and the respondents 2 and 3 are to continue the Court proceedings and get the benefits of the decree. She also confirmed the same in her sworn statement on 16.12.1999, acknowledging the alleged Hiba to the respondents 2 and 3 and signed the said confirmation deed before the Notary Public, which was marked as Ex.A.16. In order to substantiate their case, the respondents examined the said Sher Ali Khan as D.W.2.

19.Though the learned counsel appearing for the appellant vehemently contended that the oral Hiba was not true and there was no necessity to give the entire suit property by way of oral Hiba, only to two of her



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legal heirs ie., the respondents 2 and 3, excluding other two legal heirs, for which, in Ex.A.16, Jamila Bi had assigned reasons. Though the appellant denied execution of Ex.A.16, in his evidence and cross-examination as P.W.1, he has admitted the signature found in Ex.A.16 as that of her mother Jamila Bi, however, denied only the contents therein. In this regard, even in the confirmation deed itself, it is stated that the oral Hiba was given in the presence of two witnesses.

20.Though the learned counsel for the appellant vehemently contended that D.W.2 has not attested in Ex.A.16, there is no legal requirement to attest Ex.A.16, since Ex.A.16 is neither a gift deed under Section 123 of the Transfer of Property Act nor the mortgage deed nor the Will under Section 63 of Indian Succession Act. However, under Mahomedan Law, oral Hiba is permissible.

21.It is to be noted that since the appellant disputed the oral Hiba, it is the duty of the respondents 2 and 3 to prove the alleged Hiba, since they are claiming right and title through the alleged oral Hiba said to have been executed by their mother and also denying the rights of the appellant.



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22. According to Section 149 of Mahomedan Law, it is essential to the validity of a gift that there should be (1) a declaration of gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee. If these conditions are complied with, the gift is valid.

23. In view of the above, this Court finds that the evidence of D.W.2 is cogent and there is no reason to discard the evidence of D.W.2. The Mahomedan Law recognizes the oral Hiba and the respondents 2 and 3 have proved the same. Therefore, the first point is answered.

24. As far as the second point is concerned, since the respondents 2 and 3 got 2/3rd share of their mother through the oral Hiba and the 1st respondent also purchased the 1/3rd share of Salima Bibi, which was also confirmed by the trial Court in the suit filed by Jamila Bi as well as the first Appellate Court and they are all party to the final decree proceedings in the said suit, they entered into a compromise and jointly executed the sale deed dated 25.02.2010 to the 4th respondent, which is marked as Ex.A.1. Therefore, the sale deed, dated 25.02.2010, executed by the respondents 1 to 3 in favour of the 4th respondent is valid. Accordingly, the 2nd point is answered.



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25.As far as the 3rd point is concerned, the appellant has no right by birth under Mahomedan Law and he is claiming right only through his mother. However, during the life time of her mother, she gifted her share to the respondents 2 and 3 through oral Hiba and the same is also proved and the sale deed dated 25.02.2010 is also proved. Pursuant to the sale deed dated 25.02.2010, the respondents 1 to 3 handed over the possession to the 4th respondent and now, the 4th respondent is in possession and the appellant is out of possession at the time of filing the suit. Therefore, the appellant is not entitled to any relief as sought for in the suit. Accordingly, the 3rd point is also answered.

26.In the result, this Appeal Suit is dismissed by confirming the decree and judgment passed by the trial Court, which is impugned herein. No costs. Consequently, connected miscellaneous petition is closed.

[P.V, J.] & [K.K.R.K., J.]
08.08.2024

NCC : Yes / No
Index : Yes/No
Internet : Yes/No

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To

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1. The 2nd Additional District and Sessions Court,
Trichirappalli.
2. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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