

THE HON'BLE SRI JUSTICE A.VENKATESHWARA REDDY
CITY CIVIL COURT APPEAL NO.8 OF 2003

JUDGMENT:

The unsuccessful plaintiffs in O.S.No.599 of 1991, on the file of the learned VI Senior Civil Judge, City Civil Courts, Hyderabad have filed this appeal suit assailing the judgment and decree dated 29.07.2002.

2. The plaintiffs have filed the Original Suit in O.S.No.599 of 1991 for partition and separate possession of their 1/4th share in the house bearing No.3-6-560/2, admeasuring 310 Sq.Yards, situated at Himayathnagar, Hyderabad within the prescribed boundaries as mentioned in the schedule of property (hereinafter referred as "suit schedule property"). Originally the sole plaintiff has filed the suit against the defendant Nos.1 to 3 but in view of her death plaintiff Nos.2 and 3 were impleaded as her legal heirs. Similarly, in view of death of defendant No.2 his legal representatives were brought on record as defendant Nos.4 to 10 and in view of death of defendant No.3 her legal representatives were brought on record as defendant Nos.11 to 19. Defendant Nos.3, 5 and 7 have filed separate

written statements. Defendant Nos.4, 6 and 8 to 10 have adopted the written statement filed by defendant No.7. Though defendant No.1 has filed the written statement, she was set ex-parte and the written statement filed by her was not considered by the Court below. The trial Court, after full length of trial, on appreciation of oral and documentary evidence, dismissed the suit holding that the plaintiffs are not entitled for partition and separate possession of their alleged 1/4th share in the suit schedule property. Feeling aggrieved by the judgment and decree impugned, this appeal is filed.

Pleadings of plaint and written statements :

3. Brief averments of the plaint are that late Azeemuinnissa Begum was the original owner of the house bearing No.3-6-560, admeasuring 450 Sq.Yards, situated at Himayathnagar, Hyderabad, she died in the year 1973. After her death, plaintiff No.1, husband of defendant No.1 viz. Syed Abdul Ghani and the defendant No.2 have become her legal heirs and the property was devolved upon them. There was a partition among them on 18.05.1980 and in the said partition the house bearing No.3-6-560/1,

admeasuring 140 Sq.Yards, which is forming part of house bearing No.3-6-560, was allotted to defendant No.2. The remaining part of the house bearing No.3-6-560/2 admeasuring 310 Sq.Yards (suit schedule property) was allotted to the share of husband of defendant No.1 and that he has paid an amount of Rs.7,000/- to the plaintiff No.1 towards her share. Defendant No.2 has sold away the property allotted to his share to one Syed Abdul Hafeez under registered sale deed dated 25.06.1981. Husband of defendant No.1 died issueless on 18.01.1982 leaving behind the defendant No.1, the deceased 1st plaintiff and defendant No.2 and his legal heirs and successors to his estate. As per Muslim Personal Law the deceased 1st plaintiff the husband of 1st defendant and defendant No.2 being Sunni Sect Muslims are entitled to 1/4th share each in the schedule of property. Ever since the death of husband of defendant No.1 the suit schedule property is in the joint possession. While so, in the first week of July, 1991 some strangers came to the suit schedule property for purchase of the same from first defendant, by that time she has already sold portion of the same to the defendant

No.3. Thereafter, on 10.07.1991 the deceased plaintiff No.1 has approached defendant No.1 for partition and separate possession but she refused the same at the instance of defendant No.3, hence, the suit.

4. Main averments of the written statement filed by defendant No.3 are that defendant No.1 is her daughter, after the death of late Azeemunnissa Begum in the year 1973 there was a partition among her daughter and two sons i.e. husband of defendant No.1 and defendant No.2. In the said partition suit schedule property fell to the share of husband of defendant No.1. During his life time, late Syed Abdul Ghani, husband of defendant No.1 orally gifted suit schedule property in favour of his wife on 05.12.1980 and to that effect on 14.11.1981 he made a declaration admitting the factum of oral gift. As such, from 05.12.1980 onwards the first defendant has become the absolute owner of suit schedule property and she has been paying the Municipal Tax. Defendant No.1 has also sold an extent of 147.55 Sq.Yards out of suit schedule property in favour of defendant No.3 through registered sale deed dated 30.08.1985 and she has constructed a double

storied house with municipal No.3-6-560/2/B. Late Syed Abdul Ghani, the husband of defendant No.1 was never in possession of the suit schedule property till his death as the same was gifted by him to his wife the defendant No.1 on 05.12.1980. The claim set up by the plaintiff for partition alleging that the plaintiff, defendant Nos.1 and 2 were in joint possession of the suit schedule property is not correct, there is no cause of action for filing the suit.

5. In brief, the main averments of the written statement filed by defendant No.5 are that he is supporting the case set up by the defendant No.3. This defendant No.5 is one of the sons of defendant No.2 and when he was aged about six months old he was taken in adoption by defendant No.1 and her husband since they have no issues. It is further averred that the suit schedule property was never in joint possession of plaintiff, defendant Nos.1 and 2 at any given time.

6. The main averments of the written statement filed by defendant No.7 are that defendant Nos.4 and 6 to

10 are entitled for their share in the suit schedule property being the legal heirs of deceased 2nd defendant.

Issues and evidence:

7. On the basis of the above pleadings, the trial Court has framed the following issues:

(1) Whether the plaintiffs are entitled to decree for partition and separate possession of their 1/4th share in the schedule property?

(2) Whether the oral gift dated 05.12.1980 in favour of defendant No.1 as alleged by defendant No.3 is true and valid and binding?

(3) To what relief?

Additional issue:

Whether the Court fee paid by the deceased 1st plaintiff is sufficient?

8. During trial, on behalf of plaintiffs, the plaintiff No.2 is examined as PW1 and another independent witness is examined as PW2. Exs.A1, A1(a) to A1(d) are marked in the cross-examination of PW1. On behalf of contesting defendants the defendant No.7 is examined as DW1 and since this witness failed to turn up for further chief-

examination it is eschewed from consideration. Defendant No.1 is examined as DW2. Defendant No.3 is examined as DW3. General Power of Attorney Holder of defendant Nos.14 and 15 is examined as DW4. Exs.B1 to B26 documents are marked.

9. The trial Court upon consideration of the entire evidence available on record, dismissed the suit of the plaintiffs holding that the plaintiffs are not entitled for partition of suit schedule property and allotment of 1/4th share as claimed by them.

10. Feeling aggrieved by the said judgment and decree of the trial Court, the present appeal is filed.

11. Heard learned counsel for the appellants and respondents. The submissions made on either side have received due consideration of this Court.

12. In the light of rival contentions, evidence available on record, the following points would arise for consideration:

Points:

(i) Whether the plaintiffs are entitled for partition and separate possession of their 1/4th share in the suit schedule property as alleged by them?

(ii) Whether the husband of defendant No.1 has orally gifted her the suit schedule property on 05.12.1980 as alleged by her?

(iii) Whether the judgment and decree impugned is sustainable?

(iv) To what relief?

Point Nos.(i) to (iv):

To avoid repetition and for the sake of brevity, all the point Nos.(i) to (iv) are answered together as under:

13. The plaintiff No.1 has filed the Original Suit for partition and claiming 1/4th share in the suit schedule property. During pendency of the suit, sole plaintiff died and her legal representatives are brought on record as plaintiff Nos.2 and 3. To substantiate their case, on behalf of plaintiffs, the 2nd plaintiff himself got examined as PW1 and he has spoken through in his entire evidence in support of the plaint averments. Be it stated that though the plaintiffs have claimed that subsequent to death of

husband of defendant No.1 the suit schedule property was in the joint possession and enjoyment of plaintiffs, defendant Nos.1 and 2, in the entire evidence no such document is filed in support of their claim of joint possession.

14. Admittedly, the suit schedule property originally belonged to late Azeemunnissa Begum, mother of plaintiff No.1, defendant No.2 and the husband of defendant No.1 and she died in the year 1973, after her death, there was a partition among her legal heirs stated above and in the said partition defendant No.2 was allotted house bearing No.3-6-560/1 admeasuring 140 Sq.Yards and he has sold it away to one Syed Abdul Hafeez under registered sale deed dated 25.06.1981. Similarly, the suit schedule house was allotted to the share of husband of defendant No.1 with an obligation that he has to pay an amount of Rs.7,000/- to the plaintiff and the said amount was paid by the husband of defendant No.1 to the plaintiff during his lifetime.

15. It is the case of the plaintiffs that the husband of defendant No.1 died intestate and as per Muslim Law, plaintiff, defendant No.2 and defendant No.1, who is the widow of late Syed Abdul Ghani are entitled for 1/4th share each. Be it stated that neither the oral evidence of PW1 nor the evidence of PW2 independent witness inspires any confidence on this aspect and none of the documents filed by the plaintiffs have any relevancy or bearing over the claim of the plaintiffs in respect of suit schedule property. Ex.A1 is the General Power of Attorney dated 23.06.1994. Exs.A1(a) and A1(b) are the signatures of Saleem on Ex.A1. Whereas, Exs.A1(c) and A1(d) are the signatures of defendant No.2 on Ex.A1.

16. The defendant No.1 has filed the written statement but it was not taken into consideration. Defendant Nos.3 and 5 have filed separate written statements. The specific defence set up by them is that during the lifetime of the husband of defendant No.1 on 05.12.1980 he has orally gifted the suit schedule property in favour of defendant No.1 and subsequently on 14.11.1981 he made a declaration admitting the gift. The

gift made by her husband was accepted by defendant No.1 and her name is recorded in the municipal records as owner, mutation was effected and she had been paying the Property Tax even during the lifetime of her husband. Though defendant Nos.3 and 5 have taken such a specific plea in their written statements, the plaintiff did not chose to file any re-joinder refuting the contentions raised by defendant Nos.3 and 5 as to the oral gift executed by the husband of defendant No.1 in her favour.

17. Defendant No.1 is the daughter of defendant No.3, she has sold an extent of 147.55 Sq.Yards of land out of the suit schedule property in favour of defendant No.3, in turn has obtained permission from Municipality, built house bearing No.3-6-560/B and she is living in the said house.

18. On behalf of defendants, as stated above, defendant No.7 is examined as DW1 but her evidence in chief-examination was deferred, she did not venture to enter into the witness box for continuation of chief-examination and her evidence was not tested with cross-

examination and hence, it is eschewed from consideration. Thus, absolutely there is no evidence on behalf of defendant No.7 and the other defendants i.e. defendant Nos.4, 6 and 8 to 10, who adopted her written statement. None of these defendants have entered into witness box to speak the contents of written statement filed by defendant No.7 and adopted by them on oath and thereby avoided cross-examination by the other side. This by itself is sufficient to draw an adverse inference against these defendant Nos.4 and 6 to 10 holding that the case set up by them in their written statement is not correct **(Vidhyadhar Vs. Manikrao and another¹)**.

19. Defendant No.1 herself got examined as DW2, she has stated that during the lifetime of her husband there was a partition among her husband, defendant No.2 and plaintiff No.1 on 18.05.1980 and in the said partition, the suit schedule property has fallen to the share of her husband, whereas, house bearing No.3-6-560/1, admeasuring 140 Sq.Yards has fallen to the share of defendant No.2. DW2 further stated that her husband has

¹ AIR 1999 SC 1441

orally gifted the suit schedule property in her favour on 05.12.1980, it was accepted by her and thereafter mutation was also effected in the municipal records during lifetime of her husband. As such, she is the absolute owner and exclusive possessor of suit schedule property. DW2 further stated that she has also executed a registered sale deed in favour of her mother defendant No.3 in respect of land admeasuring 147.55 Sq.Yards out of suit schedule property and her mother has obtained permission from GHMC, built house bearing No.3-6-560/2/B and she is in exclusive possession and enjoyment of the same.

20. DW2 further stated that either during the lifetime of her husband or after his death, at no point of time, none of the plaintiffs and defendants were in joint possession of suit schedule property, they are nothing to do with the same in view of the partition on 18.05.1980 among the heirs of late Ajeemuinnissa Begum.

21. The 5th defendant himself got examined as DW3. He has supported the evidence of DW2 on all material particulars. Though he was examined at length,

nothing is elicited to discredit or disbelieve his evidence in chief-examination. DW4 is the General Power of Attorney Holder of defendant Nos.14 and 15. Defendant No.3 has filed written statement. Defendant Nos.11 to 19 are legal heirs of defendant No.3. No separate written statement is filed by the legal heirs of defendant No.3. There is no conflict of interest among defendant Nos.1, 3 and 5.

22. As per the oral evidence of DWs.2 and 3, defendant No.3 has started construction of the house and completed it in the year 1986, nobody including the plaintiff have raised any objection at that time. Therefore, the allegation of the plaintiffs that somebody started moving in the suit schedule property in the year 1991 and when the plaintiffs requested defendant No.1 for partition, she has refused on 10.07.1991 is not correct as such the plaintiffs have failed to establish the cause of action for filing the suit. Equally, the plaintiffs have also failed to establish their joint possession over the suit schedule property after demise of husband of 1st defendant and their right for partition of the same.

23. Coming to the defence set up by the defendant Nos.3 and 5 and the evidence of 1st defendant as DW2, that during the life time of her husband, he has orally gifted the suit schedule property in favour of DW2. As stated above, despite specific plea in the written statement of defendant Nos.3 and 5, the plaintiffs did not choose to file any rejoinder. DWs.2 to 4 in one voice consistently spoken about the said oral gift by the husband of defendant No.1 in her favour. That apart, PW1 has categorically admitted that he had knowledge of sale of the portion of suit schedule property by defendant No.1 in favour of defendant No.3 and that he had not raised any objection. The said sale transaction has taken place in the year 1986 and the construction was also completed, different house number was allotted. As per the recitals of Ex.B18 sale deed executed by defendant No.1 in favour of defendant No.3 there is a recital as to oral gift. Therefore, viewed from any angle, the evidence on behalf of defendants appears to be more reliable, genuine and acceptable on comparison with the oral evidence of PWs.1 and 2. In that view of the matter, I am inclined to rely upon the evidence of DWs.2 to

4 and the contents of Exs.B1 to B26 as to the oral gift of suit schedule property in favour of defendant No.1 by her husband and the exclusive possession of the same by defendant No.1 and the defendant No.1 executing the sale deed in favour of defendant No.3 in respect of land admeasuring 147.55 Sq.Yards and defendant No.3 making construction of house in the said land way back in the year 1986 itself on obtaining required permissions from the Municipal Authorities.

24. As per the evidence of DWs.2 to 4 in the presence of witnesses the husband of defendant No.1 has orally gifted the suit schedule house and handed over the possession on 05.12.1980, ever since then she has been in exclusive possession and enjoyment of the same. Though DWs.2 to 4 were cross-examined at length, nothing is elicited in favour of the plaintiffs' case, their testimony remained consistent throughout the cross-examination as to oral Hiba by the husband of defendant No.1 in her favour in respect of the suit schedule property.

25. The Hon'ble Supreme Court in **D.N. Joshi (dead) through Legal Representatives and others v. D.C. Harris and another**² while referring to its earlier judgment in **Hafeeza Bibi v. Farid**³, has dealt with the three essential aspects for a valid gift deed in respect of immovable property under Mohammadan Law. They are (1) declaration of the gift by the donor; (2) acceptance of the gift by the donee; and (3) delivery of possession.

26. Reverting back to the facts of the case on hand, though the written statement filed by defendant No.1 was not taken into consideration by the Court below, as she was set ex-parte, she herself got examined as DW2, her evidence is supported by the evidence of DWs.3 and 4 and the contents of Exs.B1 to B25, which are Property Tax receipts, original mutation letter, permission for construction of the house in favour of defendant No.3, original sale deed executed in her favour and the Assessment Register for the years 1984 to 1991. This evidence clinches the issue and it is sufficient to hold that there was a partition among the legal heirs of late

² (2017) 12 SCC 624

³ (2011) 5 SCC 654

Azeemuinnissa Begum on 18.05.1980 and in the said partition suit schedule property has fallen to the share of husband of defendant No.1, he has orally gifted the same in her favour on 05.12.1980, she has accepted the same, mutation was effected in the municipal records even during the lifetime of her husband and thereafter she has also executed a sale deed to the extent of 147.55 Sq.Yards of land out of the suit schedule property in favour of defendant No.3, who obtained permission and constructed house bearing No.3-6-560/2/B and living therein.

27. Be it stated that the evidence of PW1 itself is sufficient to hold that the plaintiffs were aware of sale of portion of suit schedule property under Ex.B18 by defendant No.1 in favour of defendant No.3 and construction of house by defendant No.3 in the said land. If really there was no such oral gift and when the 1st defendant has executed sale deed in favour of her mother as in Ex.B18 in the year 1985 itself and she constructed a house by taking permission from the Municipal Authorities as in Ex.B20 the plaintiffs must have agitated claiming their right in the year 1985-86 itself but the plaintiff No.1

and her children remained silent till 1991 and the suit is filed showing the cause of action as 10.07.1991 by paying fixed Court fee, which is not correct and the plaintiffs have no right or interest whatever manner over the suit schedule property and it is not liable for partition.

28. Therefore, for all the reasons stated above on an overall consideration of the entire oral and documentary evidence discussed above, I do not find any infirmity in the findings recorded by the trial Court on all the issues, the judgment impugned does not warrant any interference by this Court and it is sustained. Accordingly, point Nos.(i) to (iv) are answered in favour of the contesting defendants and against the plaintiffs holding that the plaintiffs are not entitled for partition and separate possession of their alleged 1/4th share in the suit schedule property.

29. In the result, this appeal is dismissed confirming the impugned judgment and decree dated 29.07.2002 in O.S.No.599 of 1991, on the file of the learned VI Senior Civil Judge, City Civil Courts, Hyderabad in its entirety.

However, in the circumstances of the case, there shall be no order as to the costs. As a sequel, miscellaneous applications, if any pending, shall stands closed.

A.VENKATESWHARA REDDY, J

Dated : 30-11-2022

Abb