
(2002) 03 MAD CK 0125

In the Madras High Court

Case No : Letters Patent Appeal No. 209 of 1999

N.A. Abdul Rahim and Razia Begam

APPELLANT

Vs

A.M.K. Mariam Bibi, S.M. Mumtaz Begum, S.M. Junaitha
Begum and Tamil Nadu Wakf Board

RESPONDENT

Date of Decision : 06-03-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : (2002) 2 LW 642 : (2002) 1 MLJ 836

Hon'ble Judges : S. Jagadeesan, J;P.D. Dinakaran, J

Bench : Division Bench

Advocate : K.Sarvabhauman, for D. Rajagopal, for the Appellant; Chitra
Sampath, for T.R. Rajaraman and Haja Naziruddin, for the Respondent

Final Decision : Dismissed

Judgement

P.D. Dinakaran, J.—Heard both sides.

2. The appeal is directed against the judgment and decree dated 24.6.1999 made in A.S.No.496 of 1985 on the file of this Court reversing the judgment and decree dated 10.7.1984 made in O.S.No.202 of 1977 on the file of the learned Subordinate Judge, Thanjavur.

3. For convenience, parties are arrayed as per their rank in the suit.

4.1. The plaintiffs 2 and 3 are grand daughters of the first plaintiff through her only daughter N.A.Ahamed Nachia, and defendants 1 and 3 in the suit are the sons of the first plaintiff; the second defendant being the daughter of the first defendant is the grand daughter of the first plaintiff; and the fourth defendant is the Tamil Nadu Wakf Board, a statutory body.

4.2. The plaintiffs laid the above suit for directions to (a) the defendants to deliver possession of the suit properties to the plaintiff within a date fixed by this Hon"ble Court, failing which putting plaintiffs in possession of the same by due

process of this Court; (b) the defendants to pay the suit property amount with future interest and costs; and (c) the defendants to pay future mesne profits from 1.9.1974 to 1.8.1977 at Rs.100/- per month which comes to Rs.3500/- with further interest.

4.3. The suit property consists three items, of which, item No.1 is the property located at Door No.73, West Street, Koothanallur Village, item No.2 is vacant land touching item No.1, and item No.3 is the property located at Door No.74, West Street, Koothanallur Village. They were originally Door Nos.69 and 70 of West Street.

4.4. According to the plaintiffs, these properties originally belonged to the first plaintiff's father A.M.Kader Mohaideen Rowther, who executed a settlement deed dated 7.8.1933, marked as Ex.A3, on behalf of the first plaintiff, as per which the suit properties were admittedly allotted to the first plaintiff.

4.5. The first plaintiff was married to one Abdul Majith Rowther who died on 19.11.1969 leaving his wife, namely the first plaintiff, with one daughter namely, N.A.Ahamed Nachia and three sons, namely, Abdul Wahab (first son, who is not a party), Abdul Razak (third defendant herein, died during the pendency of suit on 10.5.1984 whose L.R.s were not brought on record), and Abdul Rahim (first defendant herein), whose daughter, Razia Begam, is impleaded as second defendant in the suit.

4.6. The first plaintiff alleged that when her husband Abdul Majith Rowther became ill due to cancer, they left to Madras for treatment, and during that period, the first defendant took possession of the suit property, lifted all the furnitures and took away the title deeds of various properties that were kept in that house; and adding to that, when the first plaintiff and her husband returned after treatment, they were not permitted to enter into the house. Therefore, the first plaintiff and her husband had to reside with her daughter, namely N.A.Ahamed Nachia, who is nonetheless the mother of plaintiffs 2 and 3.

4.7. It is also alleged that when the first plaintiff attempted to take possession of the suit property, she was prevented by defendants 1 and 2 contending that Item No.1 of the suit property, namely Door No.73, was orally gifted to her daughter, namely the second defendant; and that Item No.3, namely Door No.74, was dedicated to the Wakf Board and the same was also included in Scheme Decree in O.S.No.176 of 1971 on the file of the Subordinate Judge, Thanjavur. While defendants 1 and 2 resisted the suit as above, the Wakf Board also claimed the right over Item No.3 of the suit property, namely Door No.74.

5.2. On behalf of the plaintiffs, 23 documents were marked as Exs.A1 to A23, of which, Ex.A3 is the settlement deed dated 7.8.1933 executed by the father of the first plaintiff, A.M.Kadar Mohideen Rowther in favour of the first plaintiff, settling the property in her favour; Ex.A4 to A7 are demand notices and Ex.A8 to A16 are receipts for the payment of property tax; Ex.A18 is the decree dated 26.3.1973 in O.S.No.93 of 1970 on the file of the Sub Court, Thanjavur, filed by

Abdul Razack, namely the third defendant against the first defendant and the Wakf Board for joint possession of the agricultural lands located at Arasur Village, Karanavur Vattam Vetta Thidal Village, Chittanakudi Vattam Village in Mannargudi Taluk, and for rendition of accounts of income from the agricultural lands from 16.11.1969, wherein the defendants 2 and 3 herein were declared as joint trustees and permitted to take joint possession of the suit properties; Ex.A19 is the written statement dated 19.3.1982 filed by the first defendant in O.S.No.101 of 1981 on the file of the Sub-Court, Thanjavur, filed by the third defendant herein and the first son of the first plaintiff, namely Abdul Wahab, who is not a party to the present suit.

6.1. The first plaintiff examined herself as PW1. Defendants 1 and 2 examined themselves as DW1 and DW5 respectively, apart from examining four more oral evidences DW2, DW3, DW4 and DW6, who were examined as independent witnesses to prove the oral gift of Door No.73 to the second defendant and to prove that Door No.74 is used for charitable and religious purposes.

6.2. On behalf of the defendants 41 documents were marked, namely Exs.B1 to B41, of which Ex.B1 is the settlement deed dated 23.11.1959 executed by the first plaintiff in favour of Milathur Rasul Musthafa Sal Trust; Ex.B2 is the Wakf agreement dated 19.2.1960 executed by first plaintiff in favour of Milathur Rasul Musthafa Sal Trust and its trustees; and Ex.B37 is the Scheme decree dated 30.3.1973 passed in O.S.No.176 of 1971 on the file of the Sub Court, Thanjavur.

7. The trial Court, after a careful evaluation of the oral and documentary evidence referred to above, accepted the case of the defendants that Door No.73 of the suit property was gifted to the second defendant and Door No.74 of the suit property was dedicated to the Wakf Board, as governed under the Scheme Decree dated 30.3.1973 in O.S.NO.176 of 1971 marked as Ex.B37 and dismissed the suit O.S.No.202 of 1977, by a decree and judgment dated 10.7.1984.

8.1. The unsuccessful plaintiffs in the suit preferred an appeal before this Court in A.S.No.496 of 1985 contending that the Door No.73 of the suit property was never gifted to the second defendant and therefore, defendants 1 and 2 are not entitled for the same; that the first plaintiff under Exs.B1 and B2, had only permitted the Wakf Board to use the premises at Door No.74 to prepare food and to conduct charity, but never dedicated or divested the same to the Wakf Board; that Ex.A18, namely the decree dated 26.3.1973 in O.S.No.93 of 1970 on the file of the Sub Court, Thanjavur, has no reference to the suit property and even though the first defendant has filed a written statement dated 16.1.1978 in O.S.No.202 of 1977 contending that he was entitled to be in possession of the property in Door No.73, the said pleading is not binding on the plaintiffs, as they were not parties in the said suit; and that the scheme decree dated 30.3.1973 in O.S.No.176 of 1971 on the file of Sub-Court, Thanjavur, marked as Ex.B37 is not binding on the plaintiff as they were not parties to the scheme suit, even though they are relevant and interested parties, as per Section 92 of the Code of Civil Procedure.

8.2. Per contra, the defendants reiterated their contentions supported with the findings of the trial court.

9.1. In the light of the rival contentions, the learned Single Judge in his judgment and decree dated 24.6.1999 decided on the following issues:

(i) Whether the property in Door No.73 was orally gifted to the second defendant as pleaded by the defendants 1 and 2?

(ii) Whether the property located in Door No.74 has been dedicated by the first plaintiff to the Wakf Board as contended by the defendants 1 and 4?

(iii) Whether the plaintiffs are entitled to recover the possession of the suit properties?

9.2. The learned Single Judge after elaborate discussions, rejected the case of defendants 1 and 2 that the property in Door No.73 was orally gifted to the first defendant and further held that the property located in Door No.74 was never dedicated to the Wakf Board as contended by defendants 1 and 4, holding that the Scheme decree dated 30.3.1973, marked as Ex.B37, is not binding on the plaintiffs for the reason that even though the plaintiffs were interested and necessary parties in a suit filed u/s 92 of the Code of Civil Procedure, they were not impleaded as party in O.S.No.176 of 1971; and consequently, allowed the appeal, set aside the judgment and decree dated 10.7.1984 in O.S.No.202 of 1977 and decreed the suit in favour of plaintiffs 2 and 3 as the first plaintiff, after transferring the suit properties in favour of the plaintiffs 2 and 3, died on 23.11.1996 during the pendency of the suit; and also held that the plaintiffs are entitled for mesne profits, the quantum of which will be decided in the execution proceedings. Hence the above Letters Patent Appeal has been preferred by the defendants.

10.1. Mr.K.Sarvabhauman, learned senior counsel for the defendants, contends that the oral gift is permissible under the Mohammedan Law. Since DW1 to DW6 speak about the oral gift of the property situated at Door No.73 in favour of the second defendant on 14.9.1973, the plaintiffs are not entitled for recovery of the same from the second defendant.

10.2. Mr.K.Sarvabhauman, learned senior counsel further contends that the property located at Door No.74 was dedicated to the Wakf Board, to prepare food and perform charity in the said property, and the same is supported by Ex.B1, namely settlement deed dated 23.11.1959, Ex.B2, namely Wakf Agreement dated 19.2.1960 and Ex.B37, namely Scheme Decree dated 30.3.1973. In this regard, the learned senior counsel places reliance on the decision of the Apex Court in The U.P. Sunni Central Board of Wakfs Vs. Mazhar Hasan and Others, , wherein it is held as follows:

"If a property is set apart for a definite purpose, such property would become "dedicated" for a purpose. It cannot be said that it is only in cases when an individual divests himself of the property and after declaration of trust it is

binding on the settlor with the object for which the property thereafter is to be held."

11.1. Per contra, Ms.Chitra Sampath, the learned counsel for plaintiffs 1 to 3, contends that the defendants have not proved their case of oral gift of the property located in Door No.73 in favour of the second defendant on 14.9.1973, by satisfactory evidence, whereas, the plaintiffs, by Exs.A8 to A16, receipts for payment of property tax by the first plaintiff, have proved that the property was never divested either on the second defendant or on the Wakf Board.

11.2. Ms.Chitra Sampath, also invited our attention to the recitals in Exs.B1 and B2, wherein it is stated that the first plaintiff required to prepare food and do charity at Door No.74, but never dedicated the entire property nor divested the same to the Wakf Board.

11.3. Ms.Chitra Sampath, further invited our attention to the fact that even though the plaintiffs were interested in the suit property, they were not impleaded as parties in the Scheme Suit in O.S.No.176 of 1971 on the file of the Sub-Court, Thanjavur, as required u/s 92 of the CPC and therefore, the decree made thereunder on 30.3.1973 is not binding on the plaintiffs.

12. We have given careful considerations to the submission of both sides.

13. The issues that arise for our consideration in the above appeal are:

(i)Whether defendants 1 and 2 / appellants herein have satisfactorily proved the oral gift of property located at Door No.73 in favour of the second defendant on 14.9.1973? and

(ii)Whether the property located at Door No.74 was dedicated by the first plaintiff in favour of the Wakf Board?

14.1. Issue No.1 - Whether the defendants 1 and 2 / appellants herein have satisfactorily proved the oral gift of property located at Door No.73 in favour of the second defendant on 14.9.1973?

14.2. It is well settled in law vide RATAN LAL Vs. MOHD. NABIUDDIN reported in AIR 1984 ANDHRA PRADESH 344, and Mahboob Sahab Vs. Syed Ismail and Others, , that as per Mohammedan Law, even though the gift could be made orally, there should be (i) a declaration of the gift by the donor; (ii) acceptance of the gift, express or implied, by or on behalf of the donee; and (iii)it must be followed by the delivery of possession of the subject of the gift by the donor to the donee. But, in the instant case, even though defendants 1 and 2 submitted that there was an oral declaration of the gift by the first plaintiff and the same was accepted by the donee, namely, the second defendant, the defendants have miserably failed to prove the delivery of possession of the property located in Door No.73 by the donor to the donee. However, the first plaintiff was able to satisfy that she continued to pay the property tax for the property located at Door No.73 to the local body. Hence, the oral gift of property located at Door

No.73 claimed by defendants 1 and 2 in favour of the second defendant cannot be accepted, as rightly held by the learned Single Judge.

14.3. Issue No.1 is answered accordingly.

15.1. Issue No.2 - Whether the property located at Door No.74 was dedicated by the first plaintiff in favour of the Wakf Board?

15.2. The recitals of Exs.B1 and B2 make it very clear that the first plaintiff never dedicated the property at door No.74 absolutely to the Wakf, nor the possession of the same was handed over to the Wakf Board absolutely. Therefore, the property located at Door No.74 cannot be said to have been dedicated by the first plaintiff to the Wakf Board.

15.3. Even though the Scheme decree dated 30.3.1973 in O.S.No.176 of 1971 refers that the property located in Door No.74 is meant for preparation of food and doing charity, it could, at the best, be held that the object of such purpose could not, at any event, be defeated nor interfered with, as such intention itself would not be sufficient to conclude that the property at Door No.74 was dedicated and divested in favour of the Wakf Board, as rightly held by the learned Single Judge.

15.4. That apart, it is not in dispute that the plaintiffs are not parties in Scheme Suit dated 30.3.1973 in O.S.No.176 of 1971 even though they should have been impleaded as parties as per Section 92 of the Code of Civil Procedure. Hence, the judgment and decree dated 30.3.1973 in O.S.No.176 of 1971, would not, in any event, be a conclusive proof that the first plaintiff had dedicated the property located at Door No.74 to the Wakf Board. Therefore, the ratio laid down by the Apex Court in U.P.SUNNI CENTRAL BOARD case referred supra, will not in any event improve the case of the defendants, as the first plaintiff vide Exs.B1 and B2 had never intended to dedicate the property entirely and absolutely to the Wakf Board, except for the limited purpose, namely to prepare food and to do charity, which definite purpose is even now not denied to be continued by the plaintiffs. In the scheme suit, title to the property was not an issue. Hence, we are in total agreement with the findings of the learned Single Judge that the first plaintiff had never dedicated or divested the property located at door No.74 to the Wakf board and therefore, she is entitled for recovery of possession of the same as well as mesne profits.

15.5. Issue No.2 is answered accordingly.

Hence, the appeal fails and therefore the same is dismissed. No costs. Consequently, connected C.M.P.No.19347 of 1999 is also dismissed.