

(1903) 10 MAD CK 0018
In the Madras High Court
Case No : Second Appeal No. 1643 of 1901

Pathammal

APPELLANT

Vs

Syed Kalai Ravuthar

RESPONDENT

Date of Decision : 30-10-1903

Acts Referred:

Evidence Act, 1872 — Section 92, 99

Citation : (1903) 10 MAD CK 0018

Hon'ble Judges : S. Subrahmania Ayyar, O.C.J.; Moore, J

Bench : Division Bench

Advocate : V. Krishnaswami Ayyar and A. Nilakanta Ayyar, for the Appellant;
P.R. Sundara Ayyar and K.N. Ayyar, for the Respondent

Final Decision : Dismissed

Judgement

1. The Plaintiff, who is the Defendant's daughter and a minor, sues through her mother as next friend to recover possession of the plaint-mentioned lands alleging that the properties were given in gift to her on the 16th September, 1888 by Usiyammal, the next friend's paternal aunt. The defence was that the property was purchased by the Defendant from the said Usiyammal, the sale deed, however, being executed in the name of the Plaintiff benami for him. The Subordinate Judge who tried the case in the first instance gave a decree in favour of the Plaintiff; but on appeal it was reversed, the District Judge being of opinion that the oral evidence adduced by the Plaintiff in support of the gift set up was inadmissible and that the purchase must be taken to have been by the Defendant.

2. We are unable to agree in the view taken by the District Judge as to the admissibility of the evidence. It is scarcely necessary to point out "that this question does not arise as between parties to an instrument or their privies-so as to bring it within the purview of Section 92 of the Indian Evidence Act; for though the Plaintiff and Defendant claim through one and the same person yet so far as the present matter is concerned they cannot be treated as parties

contracting with each other, or the oral evidence adduced treated as having been let in to vary the terms of any written agreement between them.

3. The District Judge was therefore in error in treating the case as one falling within the said Section 92. He has, however, in support of his view cited the case of Rahman v. Elahi Baksh ILR 28 Cal. 70. The report of the case is by no means clear and if the learned Judges intended to decide that Section 92 would govern cases like the present or that even otherwise evidence such as that in question would be inadmissible between parties in the position of the present Plaintiff and Defendant, we must with all deference say we cannot accept their conclusion, as both principle and the weight of authority are, in our opinion, clearly against such a view.

4. The learned Vakil for the Respondent drew our attention to Section 99 of the Evidence Act as supporting the above decision. We are unable to see any force in this argument. No doubt in Section 99 the word "varying" only is used while in Section 92 the words are "contradicting, varying, adding to or subtracting from." But it is difficult to see that ill using the expression "varying" only anything less could have been meant than what is conveyed by the several expressions in Section 92 and as every "contradicting," "adding to" or "subtracting from" would necessarily be a "varying" of the instrument, the legislature apparently use that expression as sufficient to convey all that is denoted "by the other different expressions occurring in the earlier section. Even otherwise, Section 99, being merely an enabling provision, could not be held to prohibit the reception of evidence as to a fact in issue or a relevant fact admissible independently thereof.

5. Clearly therefore the evidence adduced in support of the alleged gift should not have been ignored by the lower Appellate Court.

6. We must therefore call upon the District Judge to consider the whole evidence and submit revised findings on the questions raised.

7. The District Judge in due course returned a finding that Plaintiff was not the owner of the land sued for.

8. The case came on for final hearing, when the Court accepted the finding and dismissed the appeal.