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S.A.No.1130 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15.03.2023

Delivered on : 13.04.2023

CORAM

**THE HONOURABLE Mr. JUSTICE V. LAKSHMINARAYANAN**

**S.A.No.1130 of 2011**

**and**

**M.P.No.1 of 2011**

Rajalakshmi

...Appellant/Appellant/Plaintiff

Vs.

Elumalai

...Respondent/Respondent/Defendant

**PRAYER:** Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 28.04.2010 in A.S.No.12 of 2010 on the file of the learned Subordinate Judge, Madurantakam, confirming the Judgment and Decree dated 24.11.2009 in O.S.No.35 of 2006 on the file of the learned District Munsif, Madurantagam.

For Appellant : Mr.N.Nagusha

For Respondent : Mr.M.S.Subramanian



## **JUDGMENT**

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The plaintiff is the appellant. She filed the suit for declaration of her title over the suit property and for consequential injunction restraining the defendants, his men, agents, servants or any person claiming through him from interfering with the plaintiff's peaceful possession and enjoyment of the suit property.

2.This suit was taken on file by the learned District Munsif, Madurantagam, in O.S.No.35 of 2006. The allegation in the Plaint is that the suit schedule property originally belonged to one Krishnaswami Mudaliar. He had gifted the same on 05.03.1979 under Doc.No.321/1979 to the plaintiff and had also delivered possession of the same. The Settlement Deed was duly executed, attested and registered and acted upon. The plaintiff is currently residing in Cuddalore New Town since her husband had gone there for the purpose of his profession. The defendant is none else than the younger brother of her husband, i.e., her brother-in-law. According to the plaintiff, the defendant is leading a wayward life and is frequently attempting to



trespass into the property. Therefore, she issued a notice on 08.04.2005 which was responded to 19.04.2005. The plaintiff issued a rejoinder. Despite the issuance of notice on 17.12.2005, the defendant highhandedly entered into the property and cut the trees and took them away. Being left with no other alternative, she presented the abovesaid suit.

3. On entering appearance, the defendant filed a Written Statement denying the execution of the Gift Deed and claimed that the plaintiff is not the owner of the property and that she was never in possession of the same. He alleged that the Settlement Deed dated 05.03.1979 had been cancelled on 08.07.1987 and the revenue records still stood in the name of his father Krishnaswami Mudaliar. He further alleged that the said Krishnaswami Mudaliar filed O.S.No.310 of 1996, but due to his old age, he did not pursue the same and the suit had been dismissed for default. He specifically alleged that the plaintiff had entered into an Agreement of Sale with him on 12.07.1996 to sell the suit property for a sum of Rs.15,000/- and received an advance amount of Rs.8,100/- on the very day and had received the balance of Rs.6,900/- on 25.06.1988.



He stated that even in his reply notice, he had pleaded that the possession was with him and no rejoinder has been given to the same.

The defendant further pleaded that he is entitled to the benefit of Section 53A of the Transfer of Property Act and that the allegation that cut and removed the trees is false.

4. On these pleadings, the Trial Court had framed the following issues:

*“(1) Whether the plaintiff has right and title over the Plaintiff schedule property on the basis of Settlement Deed dated 05.03.1979?*

*(2) Whether Krishnaswami Mudaliar had right to revoke the Settlement Deed dated 05.03.1979?*

*(3) Is the Settlement Deed dated 05.03.1979 was not acted upon?*

*(4) Is the plaintiff entered into the Sale Agreement with defendant on 12.07.1996?*



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*(5)Is the defendant is in possession of the Plaintiff  
schedule property on the basis of Sale Agreement dated  
12.07.1996?*

*(6)Whether the plaintiff is entitled for the relief of  
declaration and consequential relief of permanent  
injunction?*

*(7)What are all the other reliefs and cost plaintiff is  
entitled for?"*

5.Before the trial Court, the plaintiff examined herself as PW1 and marked six documents. On the side of the defendant, two witnesses were examined one of whom is the defendant and the other was a scribe to the Settlement Agreement entered into between Krishnaswami Mudaliar and the plaintiff.

6.The trial Court came to a conclusion that the plaintiff had entered into a compromise with Krishnaswami Mudaliar and as per the agreement she had agreed to sell the property to the defendant and



further found that as the rejoinder notice to the reply notice of the plaintiff, under Ex.A.5, did not deny the Agreement of Sale it goes beyond doubt that the Agreement of Sale, filed under Ex.B.10 and Ex.B.11 were amply proved. On the issue of possession, the Court relied upon Ex.B.10 – Sale Agreement to hold that the possession was handed over and on the strength of Ex.B.10, the defendant was paying the kist for the periods 1999 – 2003 and 2007 – 2008. Finally, the Court held that as the Agreement of Sale was not rescinded, and possession having been handed over to the defendant, the plaintiff cannot claim any right, title or interest over the suit property. On that basis, the suit was dismissed.

7. Aggrieved by the said Judgment, the appellant filed A.S.No.12 of 2010 on the file of the learned Subordinate Judge, Madurantakam. The learned Subordinate Judge concurred with the findings of the trial Court and dismissed the appeal. Against these concurrent findings, the present Second Appeal has been presented.



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8.At the time of admission, the following Substantial Questions of Law were framed:

*"(1)Whether the Courts below are correct in holding that the appellant is not entitled for declaratory relief in view of Ex.B.10 - Agreement of Sale?*

*(2)When Section 54 of Transfer of Property Act specifically states that the Contract by itself will not create any interest on such property whether the Courts below are justified in negating the claim of the appellant?"*

9.Heard Mr.N.Nagusha, learned counsel apperaing for the appellant and Mr.M.S.Subramanian, learned counsel appearing for the respondent.

10.Mr.N.Nagusha, learned counsel appearing for the appellant would submit that the Sale Agreement has not been proved as required by law. According to him, the plaintiff denied the document and therefore, the burden lies on the plaintiff to prove the Sale Agreement



by examining the attesting witnesses. He would further submit that the document has not been properly stamped and that as per Section 17(1A) of the Registration Act, it has to be a registered document since the plea is that the possession has been handed over under the document. He submitted that there is no proof to prove the part performance of the Agreement under Section 53A of the Act. He further submitted that the finding that the Sale Agreement and the Compromise Deed had been attested by her husband Muthiah @ Muthu is of no consequence since the Settlement Deed itself records that the father Krishnaswamy Mudaliar executed the said deed in her favour, as the daughter-in-law, since Muthiah @ Muthu was leading a wayward life. He would further submit that the defendant had not examined Muthiah @ Muthu and requested the Court to compare the signatures in Ex.B.9 and Ex.B.10 to come to the conclusion, if the same had been executed by the appellant.

11.The learned counsel for the respondent would submit that the plaintiff is not entitled to plead about the lack of proof of Ex.B.10 because though he had specifically taken a stand even in the reply notice



and the rejoinder notice did not rebut the same. Carrying forward this argument, he would state that the plaintiff did not file any additional pleadings as required under Order 8 Rule 9 of the Code of Civil Procedure denying the facts pleaded in the Written Statement. Apart from this technical objection, he would argue that Ex.B.9 - Compromise Deed between Rajalakshmi and Krishnaswami Mudaliar was followed with the Agreement of Sale under Ex.B.10 and in order to prove the Agreement of Sale (Ex.B.10), he had examined the scribe. Though this scribe had been given specific details, the appellant did not choose to cross examine the scribe on these specific issue.

12.I have carefully considered the arguments of either side.

13. On the issue of inadequate stamp duty had been paid, no objection seems to have been taken at the time of the trial and therefore, it is not open to the appellant to raise that argument for the first time in appeal, especially, Second Appeal. Under Section 35 of the Act, objections should be taken as soon as the document is presented and



marked in evidence. An objection of inadequacy of stamp duty cannot be raised for the first time in the Second Appeal. This is clear from the perusal of Sections 35 and 36 of the Indian Stamp Act.

14. On the submissions that the document has not been registered and therefore, cannot be looked into for any purpose, especially, under Section 53A of the Transfer of Property Act, I am not in agreement with the submission of the learned counsel also. The amendment to the Registration Act making it mandatory for a document to be registered when it is an Agreement of Sale together with possession was incorporated in Section 17(1A) of the Act. This amendment came into force on 24.09.2001. The agreement in question was entered into on 12.07.1996. The amendment to the Registration Act was not and cannot be given retrospective operation. The Section itself reads that the Act came into force only on and from 24.09.2001. Therefore, the objection on non registration also fails. The argument on non examination of attesting witnesses as a matter of proof of Agreement of Sale is also not tenable, as an agreement of sale is not a document requiring proof of attestation as in the case of a settlement deed, mortgage or a Will.



15. The lack of cross examination of the scribe on crucial aspects is fatal to the case of the appellant. In **Muddasani Venkata Narsaiah (dead) through legal representatives v. Muddasani S. Arojana [(2016) 12 Supreme Court Cases 288]**, the Supreme Court at Paras 15 and 16 held as follows:

*"15. Moreover, there was no effective cross-examination made on the plaintiff's witnesses with respect to factum of execution of sale deed, PW.1 and PW-2 have not been cross examined as to factum of execution of sale deed. The cross-examination is a matter of substance not of procedure one is required to put one's own version in cross-examination of opponent. The effect of non cross-examination is that the statement of witness has not been disputed. The effect of not cross-examining the witnesses has been considered by this Court in Bhoju Mandal & Ors. v. Debnath Bhagat & Ors. AIR 1963 SC 1906. This Court repelled a submission on the ground that same was not put either to the witnesses or suggested before the courts*



*below. Party is required to put his version to the witness. If no such questions are put the court would presume that the witness account has been accepted as held in M/s. Chuni Lal Dwarka Nath v. Hartford Fire Insurance Co. Ltd. & Anr. [AIR 1958 Punjab 440].*

*16.In Maroti Bansi Teli v. Radhabai w/o Tukaram Kunbi & Ors. AIR 1945 Nagpur 60, it has been laid down that the matters sworn to by one party in the pleadings not challenged either in pleadings or cross-examination by other party must be accepted as fully established. The High Court of Calcutta in A.E.G. Carapiet v. A.Y. Derderian AIR 1961 Cal. 359 has laid down that the party is obliged to put his case in cross-examination of witnesses of opposite party. The rule of putting one's version in cross-examination is one of essential justice and not merely technical one. A Division Bench of Nagpur High Court in Kuwarlal Amritlal v. Rekhlal Koduram & Ors. AIR 1950 Nagpur 83 has laid down that when attestation is not*



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*specifically challenged and witness is not cross-examined regarding details of attestation, it is sufficient for him to say that the document was attested. If the other side wants to challenge that statement, it is their duty, quite apart from raising it in the pleadings, to cross-examine the witness along those lines. A Division Bench of Patna High Court in Karnidan Sarda & Anr. v. Sailaja Kanta Mitra AIR 1940 Patna 683 has laid down that it cannot be too strongly emphasized that the system of administration of justice allows of cross-examination of opposite party's witnesses for the purpose of testing their evidence, and it must be assumed that when the witnesses were not tested in that way, their evidence is to be ordinarily accepted. In the aforesaid circumstances, the High Court has gravely erred in law in reversing the findings of the first Appellate Court as to the factum of execution of the sale deed in favour of the plaintiff."*



16. As already premised, an Agreement of Sale is not a Mortgage Deed or a Settlement Deed or even a WILL for the purpose of having been proved by examining the attesting witnesses. When the law does not require proof of an Agreement of Sale of the examination of attesting witness, I do not want to impose such a condition on the respondent.

17. As to the merits of the claim that the document executed by Krishnaswami Mudaliar on 05.03.1979 states that Rrajalakshmi was being bestowed with the benefit of the property because her husband Muthiah @ Muthu was leading a wayward life and consequently, his endorsements in Ex.B.9 and Ex.B.10 should not be acted upon, I am not in agreement with the learned counsel. The document was executed on 05.03.1979 and Ex.B.9 and Ex.B.10 have come into force nearly after two decades in the year 1996. The fact that the plaintiff was residing with Muthiah @ Muthu is conceded by the plaintiff in her Plaint. She has stated as follows:

*"4.Now the plaintiff is residing at Kadalur New*

*Town at South Arcot District since her husband has gone*



*there to do his profession."*

This sentence itself is sufficient to show that the plaintiff was residing with her husband at Cuddalore. There is no plea in the Plaint that the plaintiff and her husband are in enimical terms. The other factor against the plaintiff is that she admits to Ex.B.9, the compromise between Krishnaswami Mudaliar and herself. Under Ex.B.9, it states that the plaintiff was attempting to alienate the property to the third parties. Therefore, the said Krishnaswami Mudaliar filed a suit as against the present plaintiff. The parties compromised the *lis* under Ex.B.9.

18.As per the compromise, the plaintiff agreed to alienate the suit schedule property in favour of the defendant for a sum of Rs.15,000/-. This document was executed on 11.07.1996. The scribe of this document and the scribe of Ex.B.10 - Agreement of Sale are one and the same person. The scribe, Mr. Ramachandiran, has been examined as DW2. He has categorically spoken that he is the scribe of both Ex.B.9 and Ex.B.10, he has spoken about the witnesses to the document and also to the fact that it was pursuant to Ex.B.9, that Ex.B.10 had come into force. Sadly for the plaintiff, despite the specific averments, apart



from general suggestions, there was no specific cross examination on these points.

19. It is settled position as stated supra, where there is no specific cross examination on the words deposed in the chief examination they are deemed to have been admitted.

20. An other important factor is to be seen that prior to the presentation of the Plaint, a notice was issued on 08.04.2005. On the receipt of the notice, the defendant had issued a reply wherein he has spoken about the Agreement of Sale. The plaintiff had issued a reply on 04.05.2005 after nearly a fortnight had expired but had not denied the claim of the Agreement of Sale dated 12.07.1996.

21. Here I have to deal with the argument of Mr.M.S.Subramanian that though the respondent had spoken about the Agreement of Sale in his Written statement, the lack of filing of a rejoinder statement should be taken against the plaintiff. I am not with the respondent in this argument. A rejoinder of the Written Statement is not mandatory. The



rejoinder is filed with the leave of the Court Under Order 8 Rule 9. The very fact that the leave of the Court is required implies, the party cannot file a rejoinder as a course and that on the failure to file under Order 8 Rule 9 does not mean the plaintiff loses her right to deny the Agreement. At the first available opportunity in the poof affidavit, the plaintiff has denied the agreement. Therefore, I will not hold the failure to file a rejoinder statement as to the fatal to the case of the plaintiff.

The relevant portions of Ex.B.9 are extracted hereunder:

"இந்த வழக்கு சொத்து விஷயமாக கிராம பஞ்சாயத்தார்களை வைத்து பேசிய பொழுது 2வது நபருக்கு 1வது நபரால் எழுதி வைக்கப்பட்ட சொத்து குடும்பத்தைச் சேராத அந்நிய நபரிடம் விற்பனைக்குப் போகக்கூடாது என்கிற எண்ணத்தோடுதான் இந்த வழக்கை 1வது நபர் 2வது நபரின் மீது தொடுத்துள்ளார் என்பதால் பஞ்சாயத்தார்களின் முடிவுப்படியும் நம் இருதரப்பினரின் ஏகோபித்த இசைவின்படியும் இன்றே இதில் கண்ட வழக்கில் காணப்பட்ட சொத்தை 1வது நபரின் இளைய குமாரர் ஏழுமலை என்பவருக்கு 2வது நபர் ரூபாய் 15,000/- இந்த



ரூபாய் பதினைந்தாயிரத்துக்கு விற்பனைக்குக்  
கொடுத்து விடுவதென்றும், பிறகு 2வது நபர் தாவா  
சொத்தில் எந்தவித உரிமையும் கொண்டாடக்கூடாது  
என்றும் ...."

This extract shows that under the compromise with Krishnaswami Mudaliar, the plaintiff had agreed that she would not alienate the property to any third party, but would alienate in favour of the defendant/respondent. On the very next day, Ex.B.10 has come into being.

22. The learned counsel would argue that the signature varies between Ex.B.10 and the endorsement made under Ex.B.11. On the request of the learned counsel for the appellant, I compared the signatures under Ex.B.1 with the signatures found under Ex.B.9. They seemed to be match. Apart from the signatures, the fact that Ex.B.9 has been admitted, the plaintiff cannot deny Ex.B.10 which had been executed on the very next day, pursuant to the aforesaid compromise. The cumulative of the aforesaid facts persuades me to hold that the Agreement under Ex.B.10 was, in fact, executed by the plaintiff in



favour of the defendant. The defendant had not denied the title on the basis of the cancellation of the Settlement Deed by Krishnaswami Mudaliar in favour of the plaintiff. The reason for cancellation of the Settlement Deed is set forth under Ex.B.9 wherein it has been stated that after the property had been settled in favour of the plaintiff, she attempted to alienate the property to the third parties. Therefore, Krishnaswami Mudaliar attempted to cancel the Settlement Deed.

23. A perusal of the Settlement Deed shows that on the date of the settlement itself, the title should transfer to the said Rajalakshmi. Therefore, any attempt to cancel the same will have to be ignored. Therefore, the plea that the defendant had denied the title of the plaintiff has to be read in the light of the cancellation of the Settlement Deed. Furthermore, an Agreement holder cannot deny the title of his vendor. The Written Statement states that the defendant had entered into an Agreement of Sale with the plaintiff which concedes to the fact that the defendant admits to the title of the plaintiff. It is trite that the admission cannot confer title but in this case, it is not disputed that Krishnaswami



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Mudaliar was the predecessor in title of the plaintiff and it was in the plaintiff that Ex.B.10 - Agreement was entered into.

24. When this was pointed out by Mr.M.S.Subramanian, learned counsel appearing for the respondent, he submits that he confines his submissions only to the issue of part performance and does not question the title of the plaintiff.

25. Now coming to the findings of the trial Court and the Lower Appellate Court that on account of Ex.B.10, the plaintiff has lost her title, does not hold water. An Agreement of Sale continues to be a Contract and does not confer any right in and over the immovable property. The declaration sought for by the plaintiff has to be granted. Consequently, these findings have to be vacated. Therefore, the plaintiff has to be declared as the owner of the property. However, she is not entitled to succeed with respect to possession because the statutory operation of Section 53A of the Transfer of Property Act kicks in. The defendant, having taken possession under Ex.B.10, is protected under



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53A of the Act. Therefore, the consequential relief is denied to the plaintiff.

In fine, the Second Appeal is partly allowed. The Judgment and Decree in O.S.No.35 of 2006 on the file of the learned District Munsif, Madurantagam, as confirmed in A.S.No.12 of 2010 on the file of the learned Subordinate Judge, Madurantakam is partly modified. The suit is decreed insofar as the title is concerned. The Substantial Question of Law No.1 is answered declaring the plaintiff to be the owner of the property and in respect to other reliefs, the suit shall stand dismissed. Considering the close relationship between the parties and as Ex.B.10 is the result of the compromise entered into between the family, I am not inclined to impose costs. Accordingly, this Second Appeal is partly allowed and the suit shall be decreed in the aforesaid terms. Consequently, connected Miscellaneous Petition is closed.

**13.04.2023**

Index : Yes/No  
Neutral Citation Case : Yes/No  
Speaking order / Non speaking order  
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To

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- 1.The Subordinate Judge,  
Madurantakam.
- 2.The District Munsif,  
Madurantagam.



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S.A.No.1130 of 2011

**V. LAKSHMINARAYANAN, J,**

mps

**Pre-delivery Judgment in**  
**S.A.No.1130 of 2011**  
**and**  
**M.P.No.1 of 2011**

**13.04.2023**