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S.A.No.391 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.07.2024

CORAM

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.391 of 2020

and

C.M.P.Nos.7650 & 7651 of 2020

Roja Beevi

.. Appellant

Vs.

1.Uthirapathy (Died)

2.Mohanambal

3.Mohanaraj

4.Manoranjitha

5.Jaganraj

6.Sunilraj

.. Respondents

(Sole Respondent died.
RR2 to 6 are brought
on record as LRs
of the deceased sole
respondent/Uthirapathy
vide Court order dated
01.02.2024 made in
C.M.P.Nos.1066, 1071
& 1072 of 2024 in



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S.A.No.391 of 2020 by
PBBJ)

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Prayer : This Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree passed in A.S.No.13 of 2018, dated 28.01.2020, on the file of the learned Subordinate Judge at Tiruvarur reversal of the judgment and decree passed in O.S.No.17 of 2016, dated 19.02.2018, on the file of the learned District Munsif at Tiruvarur.

For Appellant : Mr.N.Manokaran
for Mr.A.Damodaran

For Respondents : Mr.A.Arun Balan

R1 : Died (Steps taken)

JUDGMENT

The present Second Appeal arises out of the judgment and decree of the Court of the learned Subordinate Judge at Tiruvarur in A.S.No.13 of 2018, dated 28.01.2020, reversing the judgment and decree of the Court of the learned District Munsif at Tiruvarur in O.S.No.17 of 2016 dated 19.02.2018.

2. For the sake of convenience, the parties will be referred to as per their rank in the suit.



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3. The plaintiff is the appellant. She filed a suit for bare injunction restraining the defendants from interfering with her peaceful possession and enjoyment of the property.

4. According to her, the property belonged to one Abdul Jaleel who executed an oral hiba on 01.04.2015 in her favour. In confirmation of the said oral hiba, he executed a confirmatory affidavit on 18.04.2015. On the basis of the said hiba, she pleaded that she has become the owner of the property. She alleged that the 1st defendant is attempting to interfere with her possession without any right, title, or interest over the property. Therefore, she brought forth the suit for bare injunction on the basis of the hiba.

5. On service of summons, the 1st defendant entered appearance and filed a detailed written statement. According to him, the properties belonged to one Sheik Dawood under whom he became the cultivating tenant. He would further plead that the alleged hiba is not valid, and as he is in the possession of the property, the plaintiff is not entitled for any relief in the suit.



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6. Being a suit for injunction, the learned trial Judge framed only two issues, namely : -

“ (1) Whether the plaintiff is entitled to relief of permanent injunction as prayed for ?

(2) To what other reliefs, the plaintiff is entitled to ? ”

7. On framing of these issues, the parties went to trial.

8. On the side of the plaintiff, one Sahubudden/the father of the plaintiff entered into the witness box and was examined as P.W.1, and he marked Ex.A1 to Ex.A12. On the side of the defendants, the 1st defendant/Uthirapathy examined himself as D.W.1. He also examined 3 other witnesses as D.W.2 to D.W.4, who are the neighbouring occupants of the properties. He marked Ex.B1 to Ex.B8. During the course of trial, the Village Administrative Officer of the suit village was examined on behalf of the 1st defendant who marked a certificate, dated 25.03.1993, as Ex.X1, in order to point out that the 1st defendant is in occupation of the property.



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9. On the analysis of the oral and documentary evidence let in before him, the learned District Munsif came to the following conclusions :

- (a) the plaintiff has not proved the hiba;
- (b) the plaintiff had admitted that the 1st defendant is in possession of the property for 40 years by virtue of Ex.B1 which was marked in the cross examination; and
- (c) the 1st defendant did not prove that he is the cultivating tenant registered under the Tamil Nadu Cultivating Tenants Protection Act, 1955.

Therefore, the learned District Munsif came to the conclusion that as the defendant had not proved his case, the plaintiff is entitled to a decree for injunction.

10. Aggrieved by the same, a regular appeal was preferred by the 1st defendant before the learned Subordinate Judge at Tiruvarur. The learned Subordinate Judge received the appeal as A.S.No.13 of 2018. In and by way of a judgment, dated 28.01.2020, he came to the following conclusions :

- (1) The burden is on the plaintiff to prove that she is in the possession of the property and she having failed to do so, she is not entitled to rely upon the weakness of the case of the 1st defendant and obtain a decree.



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(2) The hiba, on the basis of which the plaintiff had claimed to be in possession, had not been proved.

(3) No document worth its name had been exhibited by the plaintiff in order to substantiate that she is in possession of the property.

On the basis of these findings, the learned Judge allowed the Appeal and dismissed the suit.

11. Aggrieved by the same, the present Second Appeal has been presented before this Court.

12. The Second Appeal was admitted on 17.07.2020 on the following substantial questions of law :

“ (i) Whether the lower Appellate Court was in error in holding the Oral Hiba as not genuine in the context of the fact that the Appellant/Plaintiff has clearly satisfied the conditions of the Oral Hiba in compliance with Section 149 of Mohamedan Law ?

(ii) Whether the registration of Hiba is exempted from the provisions of Section 123 and 129 of the Mohamaden Law, can the lower Appellate Court come to the conclusion that the Hiba is not valid in law ?



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(iii) Whether the lower Appellate Court was right in accepting D1, which had come into existence after the filing of the suit without advertg to the evidence of the plaintiff that it was obtained by coercion ? ”

13. On service of summons, Mr.A.Arun Babu has entered appearance on behalf of the respondents.

14. I heard Mr.N.Manokaran, for Mr.A.Damodaran, appearing on behalf of the appellant and Mr.A.Arun Babu, appearing on behalf of the respondents.

15. Mr.N.Manokaran would submit that there is no dispute that Sheik Dawood is the owner of the property and Abdul Jaleel had succeeded to the estate. He would submit from Paragraph No.3 of the plaint that his client had specifically averred that in terms of Islamic Law, Abdul Jaleel had gifted the property by way of an oral hiba in favour of the plaintiff. In confirmation of the said oral hiba, he had also executed a confirmatory deed on 18.04.2015, and since he had proved that Abdul Jaleel had gifted the property to his client, she is entitled for a decree of injunction.



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16. In order to substantiate her proof of possession, he would invite the attention of the Court to Ex.A1 to Ex.A3, namely the Chitta, Adangal and the kist receipts issued by the Revenue Department on 05.01.2016. He would state that though the original hiba had not been filed before the trial Court or the lower appellate Court, in order to assist this Court in rendering a fair judgment, he has taken out an application under Order XLI Rule 27 of the Code of Civil Procedure in C.M.P.No.7651 of 2020, and would plead that if those documents are received, then his case stands proved.

17. Per contra, Mr.A.Arun Babu would submit that by virtue of Ex.B1 marked during the cross examination of P.W.1, he had admitted to the possession of the defendant over the property for a period of 40 years prior to the year 2016. In other words, his plea is that he is in occupation of the property from the year 1980, and the test for the suit for injunction is that the plaintiff must prove that she is in lawful possession and occupation of the property on the date of presentation of the plaint, and since the plaintiff has failed to prove the same, he would plead that the injunction suit deserves dismissal.



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18. In addition, he would refer to the judgment of the Supreme Court in *Hafeeza Bibi and Others vs. Shaikh Farid (Dead) by LRs. and Others [(2011) 5 SCC 654]* to the effect that when the hiba had been denied by the 1st defendant, the burden lies on the plaintiff to prove the same and the plaintiff having miserably failed to prove the three essentials ingredients of the hiba, he would state that the question of probing further into the case of the plaintiff does not arise at all.

19. I have carefully considered the arguments on either side and I have carefully gone through the records.

20. Insofar as the submission of Mr.N.Manokaran that the oral hiba dated 01.04.2015 is genuine is concerned, I have to state that the plaintiff had not exhibited the original of the confirmatory hiba document before the Courts below. She had filed the அசல்/Original as plaint document No.1 but did not attempt to exhibit the said document during the course of trial. The fundamental principle of Islamic Law requires that in order to prove the oral hiba, a party relying upon the same has to prove the following :

(i) declaration of the gift by the donor,



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(ii) acceptance of the gift by the donee and

(iii) (i) and (ii) accompanied by delivery of possession of the property.

21. It is not necessary that, in all cases, the physical delivery of the property must be given. Islamic Law recognizes the fact that even if the property is in the occupation of a mortgagee or a lessee, a hiba for the said property can be executed by the original owner in favour of a donee. However, the aforestated three principles of declaration, acceptance and handing over of possession would have to be proved clearly and with acceptable evidence.

22. When the fulcrum of the plaint is based on the oral hiba and the confirmatory deed, the burden lies on the plaintiff to prove the same. Unfortunately for Mr.N.Manokaran, no person was examined by the plaintiff to substantiate the declaration of the gift by the donor, the consequential acceptance by the donee/Roja Beevi and handing over of possession by the alleged owner/Abdul Jaleel to the donee/Roja Beevi. Unless and until these essentials are proved, the Court cannot accept that an oral hiba had come into effect.



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23. It is here, I have to point out that the trial Court as well as the lower appellate Court have returned a concurrent finding that the plaintiff has not proved the oral hiba in this case. Therefore, when the foundation of the case of the plaintiff vanishes, the entire superstructure that was sought to be built by Mr.N.Manokaran is nothing but a castle in the air and would have to fall on the ground.

24. Dehors the oral hiba, the plaintiff has not proved her possession. Reliance made upon Ex.A1 to Ex.A3 also does not assist the case of the plaintiff. This is because, those documents had come into effect just before the presentation of the plaint on 11.01.2016. A careful perusal of Ex.A1 to Ex.A3 would show that they had been issued on 05.01.2016 and soon thereafter, the suit came to be presented.

25. Insofar as Ex.A9 is concerned, which is the Chitta issued by the Village Administrative Officer, that is also of the fasli year 1424 which corresponds to the gregorian year 2015. The Patta, on the basis of which these documents are issued, had not been produced before the Court. The



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other documents are the replies issued by the Co-operative Credit Society at Athikadai which can merely point out to the relationship of debtor/creditor between the plaintiff and the Society. Further, I am not satisfied with Ex.A4, Ex.A6, Ex.A7 and Ex.A8 as proofs to substantiate the possession of the plaintiff.

26. Insofar as the reliance plead by Mr.A.Arun Babu on Ex.X1, which is the certificate given by the Village Administrative Officer, I am of the view neither the standing orders of the Board of Revenue nor the Village Administrative Officer's Manual empower a menial officer of the Revenue Department like the Village Administrative Officer to issue certificates as who is in possession of the property. Such certificates may give a satisfaction for the party who received it from the Revenue Authority, but in a suit for injunction, something more have to be proved than mere filing of a certificate. Apart from that, the certificate is of the year 1993 and the suit is of the year 2016. The certificate given by the Village Administrative Officer has no evidential value, in my view, as it has been issued by an Officer who has no authority to issue the said certificate.



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27. Insofar as the two orders of this Court in W.P.No.30260 of 2015 and CrI.O.P.No.7115 of 2016 are concerned, they are the orders of this Court directing the District Collector to dispose of the representation for issuance of Patta and a direction for registration of First Information Report on the complaint given by the plaintiff on 08.02.2016. They are not useful to prove possession.

28. As pointed out above, as the Patta for the suit property has not been produced by the plaintiff, an order directing the disposal of the representation will not confer any right on the writ petitioner. Similarly, the complaint that is said to have been lodged by Roja Beevi against the defendant was also after the suit had been presented on 11.01.2016. The complaint given to the police official after the suit had been presented does not point out that she is in possession. I will not place reliance upon the after suit documents for the purpose of decreeing the suit of the plaintiff.

29. It is the duty of the plaintiff to give clear and categorical evidence that she has title to the property and on the basis of the title, she has taken



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possession of the same. This crucial evidence lacking in the present case, the learned trial Judge, after confirming in the judgment that the plaintiff has not proved the possession, had shifted the burden on the defendant in order to substantiate his case. It is too well settled, but nonetheless I have to reiterate, that it is the duty of the plaintiff to prove her case and she cannot rely upon the lack of evidence with the defendant to get a decree.

30. The argument of Mr.A.Arun Babu that Ex.B1 points out to his possession is also not agreeable to me for the simple reason that Ex.B1 has come into force only on 06.02.2016 i.e. *pendente lite*. The fact that the plaintiff has admitted to the document during the cross examination does not improve the case of the defendant. He has not been able to substantiate that he is the cultivating tenant who had registered himself under the Tamil Nadu Agricultural Lands Record of Tenancy Rights Act, 1969 and therefore, entitled to continue in possession.

31. These discussions on the defendant's case is only to point out that the plea of Mr.A.Arun Babu, though it is accepted insofar as the lack of evidence on the side of the plaintiff is concerned, I am not in a position to



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accept that he is the cultivating tenant of the property. The error committed by the trial Court had been rectified by the lower appellate Court and therefore, it does not require any interference at the hands of this Court.

32. Before I conclude, I have to point out that this is only a suit for injunction based on possession as it is clear from the perusal of the plaint. It had only been valued under Section 27(c) of the Tamil Nadu Court Fees and Suits Valuation Act. The findings given by me with respect to the plaintiff's failure to prove title is only incidental to the case. It is always open to the plaintiff to file a fresh suit for declaration of title and for injunction if she is in possession or seek recovery of possession, if anyone else, including the defendant is in possession of the property. The findings in the suit and consequent appeals that the plaintiff has not proved the hiba will not stand in the way of the plaintiff to file an appropriate suit seeking declaration of her title and for consequential reliefs.

33. In the light of the above discussion, the judgment and decree of the Court of the learned Subordinate Judge at Tiruvarur in A.S.No.13 of 2018, dated 28.01.2020, in reversing the judgment and decree of the Court



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of the learned District Munsif at Tiruvarur in O.S.No.17 of 2016, dated 19.02.2018, stands confirmed.

34. Accordingly, the Second Appeal stands dismissed. Costs through out. Consequently, connected Civil Miscellaneous Petitions are closed.

12.07.2024

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Index:Yes/No

Speaking Order :Yes/No

Neutral Citation:Yes/No



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V. LAKSHMINARAYANAN, J.

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To

1.The learned Subordinate Judge,
Tiruvarur

2.The learned District Munsif,
Tiruvarur

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and

C.M.P.Nos.7650 & 7651 of 2020

12.07.2024