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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.04.2015

CORAM :

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.53 of 2009  
and M.P.No.1 of 2009

1.Perumal  
2.Periyayee

... Appellants/Plaintiffs

Vs.

Murugesan

... Respondent/Defendant

Prayer:- This Second Appeal has been filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 28.02.2008 passed in A.S.No.120 of 2007 on the file of the Additional Sub Court, Salem, confirming the judgment and decree dated 18.01.2007 made in O.S.No.442 of 2003 on the file of II Additional District Munsif Court, Salem.

For Appellants : Ms.zeenath Begam  
for Mr.T.Murugamanickam

For Respondent : No Appearance

#### J U D G M E N T

The plaintiffs/appellants, who lost their case before the Courts below, have come forward with the present second appeal.

2.The Gist of the case is as follows:

a)The suit is filed for declaration and recovery of possession of the portion in possession of the defendant and for consequential injunction.

b)The plaintiffs are husband and wife and defendant is the younger brother of the first plaintiff. The case of the plaintiffs is that the suit property which are described as two items belongs to them but the dispute is only with regard to Item No.1 in Survey No.34/9, an extent of 0.0027.5 sq.ft of land. It is stated by the plaintiffs that a patta was issued in the name of the first plaintiff's mother Vellaiammal and they sold the same jointly on 27.07.2000 to the second plaintiff under Ex.A9. The suit property also is in possession and enjoyment of the plaintiffs for the past 25 years with a thatched house thereon. The plaintiffs also claimed to have paid the property tax for the said property and also electricity charges are paid by them. According to the



plaintiffs, taking advantage of the relationship of the parties, the defendant has encroached and trespassed into the suit property. As there was a constant threat and disturbance, in the presence of panchayators, a muchalika was established between plaintiffs and the defendant under Ex.A13 dated 19.06.2000. Even after that, the defendant was disturbing the possession of the plaintiffs. Hence, the suit for declaration and injunction was filed.

c)The defendant denied all the allegations set out in the plaint and contended that the properties originally stood in the name of their parents namely, Kariya Gounder and Vellaiammal. As the mother Vellaiammal was not of sound mind for a few years, the plaintiffs got a sale deed executed in their name by taking advantage of the mental illness of the mother. The defendant further contended that in all probabilities, the plaintiffs could not be in possession for the last 25 years as it would have been 18 years of age for the first plaintiff then.

d)Admittedly in the year 1995, patta was transferred in the name of the first plaintiff. Muchalika marked as Ex.A13 between plaintiffs and defendant was never acted upon. There was an agreement between the parties on 21.08.2002 as per which, the defendant constructed the house leaving 1 ½ feet width lane for a length of 43 feet. The defendant has also paid house tax and electricity bill receipts are also filed as Exs.B6 and B7. Hence, the defendant prayed for dismissal of the suit.

3.On the pleadings of both the parties, necessary issues were framed by the Trial Court. Before the Trial Court, the Plaintiffs had marked Exs.A1 to A30 and first plaintiff examined himself as P.W.1. D.W.1 and D.W.2 were examined on the side of the Defendant and Exs.B1 to B11 were marked on the defendant's side.

4.The Trial Court, after considering both the oral and documentary evidence, dismissed the suit and the first appeal filed as against the Judgment and Decree of the Trial Court was also dismissed by the lower Appellate Court. Hence, this second appeal has been filed by the plaintiffs.

5.This court heard the submissions of the learned counsel for the Appellants and also perused the material records placed.

6.This court, while admitting this second appeal, had formulated the following substantial questions of law:-

1.When the respondent herein has given up his rights in the suit property under the panchayat muchalika Ex.A13, whether he can resist the present suit without seeking to set aside the muchalika?

2.When the assignee has sold her rights in the suit property to the second appellant herein, then whether the respondent herein can still continue to claim right under the assignee in his capacity as her son?



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7.The learned counsel for the appellants contended that when admittedly, muchalika was entered into between the parties, the defendant cannot claim any right. It is submitted by the appellant that D.W.2 had admitted that there was a panchayat and Muchalika executed on 19.06.2000.

8.According to Muchalika, the property was equally divided and the house plot bearing patta No.269 was given to the defendant but the first plaintiff had not accepted the said panchayat and had not produced any independent evidence to establish that Ex.A13 was acted upon. It is relevant to be seen that plaintiffs are not placing their claim on Ex.A13 but relying on the Sale deed under Ex.A9, claim independent title. The said Sale deed is in favour of the second plaintiff executed by the first plaintiff's mother. But Ex.A9/Sale deed came into existence after Muchalika under Ex.A13 as per which entire house plot was divided between plaintiffs and defendant and the defendant has also produced the house tax receipts for the property bearing door No.3/51 which are marked as Ex.B6 series. Therefore, the burden is on the plaintiffs to establish that the suit properties absolutely belonged to them. In this regard, plaintiffs have not produced any evidence. In fact, the description of the property shown in plaint also does not disclose the house property. It is only stated that there is a thatched house and no door number is also furnished for the same. From the perusal of the Sale deed under Ex.A9, it is clear that there is no mention about the house or the door number. As per muchalika, there seems to be a division between brothers. The plaintiffs claim absolute right over the property not on the basis of muchalika but on the basis of Ex.A9. Therefore, the burden is on the plaintiffs to establish that muchalika was acted upon. When the same was not acted upon, the defendant cannot be said to have given up his claim. Therefore, the question of law No.1 is answered against the appellants.

9.So far as the second question is concerned, it is the specific case of the plaintiffs that it was purchased from the mother. The fact that the mother was in the sound and disposing state of mind on the date of execution of Ex.A9 was not proved by the plaintiffs, when the defendant had specifically alleged that she was not in a sound disposing state of mind. As such, question of law No.2 also does not find favour with the plaintiffs.

10.The plaintiffs also sought for recovery of possession without giving the specific extent and measurement of land over which the defendant has encroached. Therefore, the plaintiffs themselves are not clear and not able to identify the property for recovering the same from the defendant. In such circumstances, though at the first instance, the plaintiffs seem to have a good case but on perusal of the documents, there are cracks within. In the result, the substantial question of laws are answered against the plaintiffs/appellants.



11. Accordingly, the Second Appeal is dismissed and the judgment and decree dated 18.01.2007 made in O.S.No.442 of 2003 on the file of II Additional District Munsif Court, Salem, as confirmed by the judgment and decree dated 28.02.2008 passed in A.S.No.120 of 2007 on the file of the Additional Sub Court, Salem are affirmed. Consequently, connected Miscellaneous Petition is also closed. No costs.

Sd/-  
Assistant Registrar

//True Copy//  
Sub Assistant Registrar

DP

To

- 1.The Additional Subordinate Judge, Salem.
- 2.The II Additional District Munsif, Salem.

+ 1 cc to Mr.T.Murugamanickam, Advocate Sr.23458

S.A.No.53 of 2009  
& M.P.No.1 of 2009

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