



S.A.(MD) No.537 of 2014

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 27.09.2022

CORAM : JUSTICE N.SESHASAYEE

S.A.(MD) No.537 of 2014
and M.P.(MD) No.1 of 2014

1.S.A.Jamal Mohamed (Died)

2.Mumtaj Begam

... Appellants/Appellants/
Defendants 1 & 2

*[The 2nd appellant who is already on record was recorded as
LR of the deceased 1st appellant vide order dated 24.01.2020
in C.M.P.(MD) No.685 of 2020 in S.A.(MD) No.537 of 2014]*

3.M.Regina Banu

4.J.Jerina John

5.S.A.J.Syed Athuham Mathani

6.S.A.J.Syed Aqthab Johny

7.S.Jesima Sulthana

8.S.Halima

... Appellants 3 to 8

*[Appellants 3 to 8 – brought on record as LRs of the deceased
1st appellant vide order dated 24.01.2020 made in C.M.P.(MD)
Nos.685 and 687 of 2020 in SA(MD) No.537 of 2014]*

Vs

1.Thilsath Begium

2.S.M.Julaika Beevi

3.S.A.Hyroom Beevi (Died)

... Respondents 1 to 3/Respondents/
Plaintiffs

4.Jaffar Ali

... 4th Respondent/Respondent/
3rd Defendant

5.M.Hameed Sultan

6.Ibrahim

... Respondents 5 & 6/Respondents/
Defendants 5 & 6



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[6th respondent is suo motu declared as major and guardianship of his father/natural guardian (R5) is discharged vide order dated 09.09.2021 made in S.A.(MD) No.537 of 2014] /RR5 & 6 are recorded as legal representatives of the deceased R3 – Memo recorded in USR 3006, dated 11.08.2014 vide order dated 12.08.2015 made in S.A.(MD) No.537 of 2014]

7.J.Basheera Kani

8.Nilofar Kursheed Begam

9.Nilofar Afrose Parveen

10.Nilfar Jamruth Banu

... Respondents 7 to 9/

LRs of deceased 1st appellant

[R7 to R10 brought on record as LR's of the deceased 1st appellant vide order dated 24.01.2020 made in C.M.P.(MD) Nos.685 and 687 of 2020 in S.A.(MD) No.537 of 2014]

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 24.10.2013 made in A.S.No.85 of 2009 on the file of the Principal Subordinate Court, Kumbakonam confirming the judgment and decree dated 17.08.2009 made in O.S.No.148 of 2004 on the file of the District Munsif cum Judicial Magistrate's Court, Papanasam.

For Appellant	:	Mr.Rahamadhullah for Mr.C.Suresh Kannan
For Respondents	:	Mr.K.Guhan for RR1, 2 & 5
	:	No appearance for RR4, 6 to 10

JUDGMENT

Defendants 1 and 2 in O.S.No.148 of 2004 on the file of the District Munsif cum Judicial Magistrate's Court, Papanasam, which was laid for declaration of plaintiffs' title over the suit property, for recovery of possession and for



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certain allied relief of injunction, are the appellants herein. The suit was decreed by the trial Court, which decree was later came to be confirmed by the first appellate Court in A.S.No.85 of 2009 filed by defendants 1 and 2. Hence, the second appeal at the instance of defendants 1 and 2. For narrative convenience, parties would be referred to by their rank before the trial Court.

2. The facts leading to the appeal may be stated as below:

- The suit property is described in three schedules of properties. All the three are comprised in S.No.452/4B of Vazhudhur Village, Papanasam Taluk. It has a total extent of 21 cents. Of this, 'A' Schedule property is described as a thatched building measuring 14' x 26' (a little over $\frac{3}{4}$ cents); 'B' Schedule is described as another thatched roof hut measuring 14' x 8' ($\frac{1}{4}$ cents); and 'C' Schedule is a vacant site.
- The property in S.No.452/4B measuring 21 cents was purchased in the name of certain Mohammed Farooq vide Ext.A.2-sale deed dated 25.01.1975. Mohammed Farooq was a minor then and he was



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represented in the sale deed by his mother Julaika Beevi, the second plaintiff herein.

- While so, on 15.12.1999, Mohammed Farooq died leaving behind him surviving his father Mohammed Ali, his mother, the second plaintiff, his widow, the first plaintiff and his sister, the third plaintiff.
- The first defendant herein is the paternal uncle of Mohammed Farooq. To be precise, he is the younger brother of Mohammed Farooq's father Mohammed Ali. The second defendant is the wife of the first defendant, and the third defendant is the brother of the second defendant.
- According to the plaintiffs, Mohammed Farooq has been enjoying the property covered under Ext.A.2, that there was a well and motor pump set in the property, that some time in January, 1990, he shifted to another place, that he was also issued with a patta for the suit property, and that he had planted coconut trees and other trees and has been enjoying the suit property.
- While so, on 10.06.2004, defendants 1 and 2 had caused the third defendant to occupy the 'B' Schedule property.



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➤ In the suit property, there were two thatched roof huts. They are described in Schedules 'A' and 'B' hereto. On purchase, patta came to be mutated in favour of Mohammed Farooq. In 'A' Schedule property, there was a motor pump set and the first defendant married the second defendant they did not have a place to reside. Therefore, Mohammed Farooq permitted the first and second defendants to occupy the 'B' Schedule property.

3. The third defendant remained ex-parte, and only defendants 1 and 2 have filed their written statement. In their written statement, they plead that the suit property was purchased for a sum of Rs.56,000/- which Mohammed Farooq's father Mohammed Ali had given to certain Kader Ali and also the first defendant himself contributing some funds. While the sale deed stood in the name of Mohammed Farooq, the entire property was in the enjoyment of the first defendant. Since the first defendant had advanced money for the purchase of the suit properties, he was permitted to enjoy the same. It is in these circumstances, on 25.12.1987, Mohammed Farooq by an oral Hiba, gifted the suit properties to the first defendant. Subsequently on



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21.06.1991, this was formalised into a written document vide Ext.B.1-document by Mohammed Farooq, and it was attested by D.W.2 and the father of D.W.3. In terms of the oral Hiba, the first defendant has been enjoying the property in his own name. Because of his affection for Mohammed Farooq, he did not bother to effect mutation in the revenue records. So far the installation of motor pump set is concerned, it was done by the first defendant, and that neither of these defendants are permissive occupants under Mohammed Farooq. They also denied that they have inducted the third defendant to occupy the 'B' Schedule property.

4.1. The suit was laid by the Power of Attorneys of the first plaintiff and plaintiffs 2 and 3. During trial, these Power of Attorneys were examined as P.W.1 and P.W.2 and they produced Ext.A.1 to Ext.A.14, of them Ext.A.2 has already been introduced in evidence. Ext.A.3 and Exts.A.5 to A.7 are revenue documents which include Ext.A.5-patta dated 31.03.2003 and Ext.A.3 dated 30.07.1996. For the defendants, the first defendant examined himself as D.W.1. As already indicated earlier, he also examined D.W.2, one of the attesting witnesses to Ext.B.1-document and also D.W.3, the son



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of the other attesting witness. They also examined an independent witness as D.W.4. On their side, they produced as many as several documents which came to be marked as Ext.B.1 to Ext.B.31, of them Ext.B.1 has already been introduced in the narration above. Exts.B.2 and B.3 are house tax receipts. Exts.B.4 to B.7 are receipts issued by TNEB for consumption of electricity and Exts.B.17 to B.30 are telephone bills and receipts. Of them Exts.B.2, B.4 to B.10, B.19, B.21 and B.22 alone were before suit and the rest are after suit.

4.2. During trial, the first defendant was examined as D.W.1. During his cross examination, the plaintiffs confronted him with a photostat copy of a settlement deed dated 08.01.2008. This document was marked as Ext.A.14. It is a copy of the settlement deed, which the first defendant had executed in favour of his wife, the second defendant herein. This document does not involve the suit property, but a property in Sy.No.454. However, in the recital to the document, the first defendant refers to few other documents, one of which is Ext.A.2-sale deed in favour of Mohammed Farooq. Then it proceeds to recite that the son of Mohammed Ali was a minor. Critically the



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document recites that the first defendant/settlee under Ext.A.14 was managing the cultivation of the property for Mohammed Farooq. After reciting thus, it further recites, that on 15.12.1999, Mohammed Farooq died and couple of years later, Mohammed Farooq's father, Mohammed Ali (elder brother of the first defendant) too had died in March, 2001 and that in these circumstances, a partition involving Mohammed Farooq's father Mohammed Ali, his wife Thilsath Begium (the first plaintiff), his sister Hyroom Beevi (the third plaintiff) and the other siblings of both Mohammed Ali, that the first defendant had partitioned the property, that a memorandum of partition too came to be made and in that partition, the first defendant was allotted *inter alia* the property in Sy.No.452/4, the suit property herein.

4.3. On appreciating the evidence, the trial Court disbelieved the case of defendants 1 and 2 about Ext.B.1 and granted a decree in favour of the plaintiffs. The line of reasoning of the trial Court is that:

- (a) While the defendants' core plea in defence rests on an oral Hiba dated 25.12.1987, but Ext.B.1 dated 21.06.1991, nowhere refers the oral Hiba.



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(b) The first defendant as D.W.1 has admitted the cause of action as alleged by the plaintiff vide Ext.A.14 and also has admitted the recital borne in Ext.A.14 as narrated above when he was confronted with the same during his cross examination. This theory of partition, therefore, goes against the tenor of Ext.B.1 document. This apart, Ext.A.14 also refers to a certain memorandum of partition signed by the heirs of Mohammed Farooq, but this was not produced by the defendants.

5. When the dispute reached the first appellate Court, it concurred with the finding of the trial Court and dismissed the appeal. Hence, the second appeal at the instance of defendants 1 and 2. It may be stated that during the pendency of the appeal, the first defendant had passed away and barring the 2nd defendant, who is already in the party array, his other heirs were also brought on record.

6. The appeal was admitted for considering the following substantial questions of law:



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“i) Whether the Courts below erred in ignoring that the 1st Appellant has got a share in the suit properties by overlooking the fact that the 1st Appellant is also entitled to inherit a share in the properties in the capacity as ‘Residuary’ as per the principles of Law of Succession and inheritance under the Mohamed Law?

ii) Whether the courts below erred in passing a decree for declaration and recovery of possession against the appellants when the 1st appellant is entitled to inherit a share in the suit properties under the Mohamedan Law?

iii) Whether the Courts below erred in holding that the ‘Hiba’ under Ex.B.1 in favour of the 1st appellant was not a valid, operative and legally enforceable one when three requirements of a valid gift under the Mohamedan Law viz., declaration, acceptance and deliver of possession are proved to the hilt?”

7. The learned counsel for the appellants made the following submissions:

- a) One of the reasons of the Courts below for rejecting the genuineness of oral Hiba which the defendants alleged as having taken place on 25.12.1987 was not recited in Ext.B.1-document. What the Courts



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below in effect had overlooked is the evidence of D.W.2. He is an attester to the document and he speaks about to his own attestation besides the attestation by the other co-owners, and the Courts below have not taken a serious note of the testimony of D.W.2. When D.W.2 remains unimpeached, the Court ought to have granted greater evidentiary value to the testimony of D.W.2 over the other attending circumstances, but the Courts below have merely touched upon the testimony of D.W.2, who at the end of the day, was only a witness for identifying the signature of the co-attester in Ext.B.1 and no more.

- b) The Courts below were also been in error in attaching significance to the non-mutation of revenue record in favour of the first defendant after the date of Hiba. After all, parties were close relatives and patta has never been treated as a document of title and that the defendants are in actual physical possession is not even disputed by the plaintiffs.

8. Per contra, the learned counsel for the respondents/plaintiffs argued:

- a) That the first defendant as D.W.1, having admitted the entire recital in Ext.A.14, he now cannot balance it with Ext.B.1. The recital in



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Ext.A.14 and Ext.B.1 cannot co-exist. It was not explained even now.

- b) While patta may not be a document of title, it is always considered as a document of possession. A right of assertion of ownership is adequately evidenced by patta. Here, the plaintiffs have produced Ext.A.5-patta and few other revenue documents all of which are subsequent to Ext.B.1. So far as the document produced by the defendants are concerned, they are essentially receipts for payment of electricity bill or the telephone bill. Even the plaintiffs do not dispute the fact that defendants 1 and 2 are in possession and it is necessary that they have to pay their bills.

9. After carefully weighing the rival submissions, this Court may have to hold that the appeal cannot be sustained, and the reason is to state the obvious. The defendants/appellants have set up their case based on an oral Hiba followed by Ext.B.1, but in a *pendente lite* document which the first defendant had executed in favour of the second defendant vide Ext.A.14 he brings in a new theory. Both cannot co-exist, as was rightly contended by the learned counsel for the plaintiffs. Alternatively, even if Ext.B.1 is



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presumed to be genuine, the very fact that the defendants have recited something quite contrary to the theory of Hiba, it only implies the Hiba is neither accepted, nor acted upon. Otherwise, there is no justification for those recitals in Ext.A.14.

10. In fine, this Court, does not find any merit in this Second Appeal. Hence, this Second Appeal is dismissed without costs. Consequently, connected miscellaneous petition is dismissed.

27.09.2022

Internet: Yes
Index: Yes/No

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To

1. The Principal Subordinate Judge,
Kumbakonam.
2. The District Munsif cum Judicial Magistrate,
Papanasam.
3. The Section Officer, VR Section,
Madurai Bench of Madras High Court, Madurai.



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N.SESHASAYEE, J.

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