



S.A.(MD) No.1053 of 2009

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 11.10.2022

Pronounced on : 04.11.2022

CORAM : JUSTICE N.SESHASAYEE

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M.P(MD).Nos.3 and 4 of 2009

Kuppamuthu Servai (Died)	Appellant/Appellant/Defendant
2.Muthammal	
3.Rajendran	
4.Murugesan	
5.Mari	
6.Sivakumar	...Appellants/ LR's of the deceased sole appellant

[Appellants 2 to 6 are brought on record as LR's of the deceased sole appellant vide order dated 29.09.2022 made in C.M.P(MD).Nos.3530 to 3523 of 2022 in S.A.(MD).No.1053 of 2009].

Vs

Chinnaiah Servai (Died)	... Respondent/Respondent/Plaintiff
2.Vallimayil (Died)	
3.Shanthi	
4.Ravikumar	
5.Banumathi	
6.Ramesh Kumar	...Respondents/LR's of the deceased sole respondent



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WEB COM [Respondents 2 to 6 are brought on record as LR's of the deceased sole respondent vide order dated 29.09.2022 made in C.M.P(MD).Nos.3526 to 3528 of 2022 in S.A.(MD).No.1053 of 2009]

PRAYER: Second Appeal is filed under Section 100 of C.P.C., against the decree and judgment dated 27.08.2007 made in A.S.No.20 of 2005 on the file of the learned Principal District Judge, Sivagangai, confirming the decree and judgment dated 29.03.2004 made in O.S.No.164 of 2002 on the file of the learned District Munsif, Sivagangai.

For Appellants : Mr.S.Parthasarathy
For Respondents : R1 and R2-Died
Mr.S.Srinivasa Raghavan
for R3 to R6

JUDGMENT

The defendant in O.S.No.164 of 2002 which was instituted for declaring plaintiff's title and for an ancillary relief of injunction is the appellant herein. The suit was decreed concurrently both by the trial Court as well as the first Appellate Court.

2. The facts are as below:



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- The dispute is over a plot measuring 90 cents in Survey No.25/2 of Alagapuri Village. The total extent in Sy No.25/2 is stated to be 2.80 acres. Out of this, a certain Veeraiah Servai had purchased the eastern 1.40 acres under Ext.B1 sale deed, dated 03.05.1947. The western boundary of the property covered under Ext.B1 was shown to belong to some third party relatives of the vendor.
- Veeraiah Servai died, and his right devolved on his three sons namely (a) Kuppamuthu Servai, the defendant herein, (b) Ramaiah Servai, and (c) Lakshmanan Servai. On 09.04.1974, all the three brothers had jointly sold the property which their father had purchased to the plaintiff vide Ext.A1. However, in providing the western boundary of the property sold under Ext.A1, it was shown as the main road. In other words, the western boundary of the property purchased under Ext.B-1 and that which was sold under Ext.A-1 is not the same, even though Ext.B-1 fed title to Ext.A-1. A comparative reading of the western boundary description as provided under Ext.A-1 and Ext.B-1, it will be seen that the main road lies as a western boundary of the



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entire 2.80 acres covered under Survey No.25/2.

- On purchase under Ext.A1, plaintiff had mutated the revenue records in his name and Ext.A5-Patta was issued to him. He also has been paying *kist* as could be seen from Ext.A6 to Ext.A8.
- While so, Vide Ext.A9 sale deed, dated 04.03.1996, the plaintiff had sold 50 cents to a certain Gandhimathi. After this sale, Survey No. 25/2 was sub-divided into 25/2A and 25/2B. Survey No.25/2B pertains to the property sold to Gandhimathi under Ext.A9, and the balance area retained by the plaintiff is assigned Sy.No:25/2A.

In these circumstances, when the plaintiff tried to fence his property, it was objected to by the defendants, and hence the suit was laid after exchange of notice between the parties.

3. In his written statement, the defendant admits that the property which his father had purchased under Ext.B1 was sold to the plaintiff under Ext.A1, but the intention of the party was to sell only that property which is covered under Ext.B1 and not any property beyond the western boundary stated therein. It is further pleaded that the defendant is in occupation of the



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western half of the property.

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4.1 The dispute went to trial, and before the trial Court the plaintiff examined himself as P.W.1 and also examined his purchaser under Ext.A9 as P.W.3. Besides, he examined two other witnesses as P.W.2 and P.W.4, of whom P.W.2 is the Village Administrative Officer. He had produced Ext.A1 to Ext.A18. Of them, the title deeds in Ext.A1 and Ext.A9 are already introduced and the rest are essentially revenue records or survey records.

4.2 For the defendant, he examined himself as D.W.1 and also examined an independent witness as D.W.2 to show the enjoyment of the property that lies between the main road on the far west and the property covered under Ext.B1. He had produced Ext.B1 sale deed in his father's name to which a reference has already been made. The trial Court had also appointed an Advocate Commissioner whose reports were taken on record as Ext.C1 and Ext.C2.

5. On appreciating the evidence before it, the trial Court chose to decree the



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suit. It essentially relied on the title of the plaintiff and rejected the case of the defendant since he had not produced any documents other than Ext.B1, to substantiate his line of defence. When at the instance of the defendant the suit reached the first appellate Court in A.S.No.20 of 2005, the first appellate Court concurred with the said finding of the trial Court. Hence, the present second appeal.

6. This second appeal is admitted for considering the merit of the following substantial question of law:

"Are not the judgments of Courts below vitiated for having failed to notice that under Ex.A-1; what was expressly intended was to transfer the property that was conveyed to the father of the appellant/defendant vide Exhibit B-1?"

7. The learned counsel for the defendant/appellant submitted:

- The Courts below have failed to appreciate that in a suit for declaration of title, the burden is primarily on the plaintiff. Here it is the case where the plaintiff seeks title based on Ext.A1 sale deed, but what is significant is that the title to Ext.A1 is fed by Ext.B1 sale



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deed which admittedly stands in the name of the father of the defendant. Ext.B1 states that what the defendant's father had purchased was the eastern-half measuring 1.40 acres out of the total extent of 2.80 acres. While Ext.A-1 pushed the western boundary of the property sold up to the main road on the far west, it did not enlarge the extent which the defendant and his brothers could convey to the plaintiff. In other words, neither the defendant nor his brothers could convey anything more than what they had derived under Ext.B1, which implies that they could sell only the eastern half of Sy.No:25/2 and cannot sell the western half. The Courts below however, have gone in error in holding that the defendant had not proved that Sy.No:25/2 indeed has a larger extent of 2.80 acres, and chose to grant an undeserving decree to the plaintiff, overlooking in the process the boundary discrepancy which has inadvertently crept in describing the western boundary of the property sold under Ext.A1.

- So far as the western half is concerned, even though the property stands in the name of the other relatives of the defendant as shown in Ext.B1 sale deed, it is currently in the possession of the defendant,



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and if at all the plaintiff wants to stretch his enjoyment also to the western half, he ought to show his title to occupy the western half of the property, but he has produced none. This implies he cannot travel beyond the western boundary of his parent document in Ext.B1.

- So far as the defendant's possession is concerned, on paper, the plaintiff concedes that the entire property is essentially assessed as dry waste and is not cultivable, nor is it under any cultivation, notwithstanding the fact that these properties were classified as *ryotwari* properties when settlement under the Tamil Nadu Estates (Abolition and Conversion Into Ryotwari) Act, 1948 (Tamil Nadu Act 26 of 1948) took place. This would imply that the possession follows title and therefore, the defendant must be considered to hold title to the western half which the plaintiff does not have right to disturb.

8. Per contra, the learned counsel appearing for the respondents would submit that the defendant is the co-executant of Ext.A1 sale deed, and he cannot speak against the boundary description of the very document that he had executed. This apart, even going by the case of the defendant, neither



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he nor his brothers had any title to the western half of Sy.No:25/2 as according to them it belonged some third party-relatives of the defendant. Therefore, when the defendant does not have any right to the property on the west, he cannot assert title, unless he demonstrates that he has always been in possession of this portion. Here barring Ext.B1, he has not produced any document to show that he has ever been in possession. So far as the plaintiff's possession goes, he is in occupation of the property till the road margin in terms of the boundary description in Ext.A1 and it is too late in the day for one of the co-executors of Ext.A1 to lay a claim to the western half.

9.1 The rival contentions are carefully weighed to ascertain their merit. The dispute is over a piece of property sandwiched between the main road on the west and the property covered by Ext.B-1 on its east. And, this Court finds that the appellant/defendant appears to have helped himself with considerable fallacy in understanding his right. It is an admitted fact that the defendant's father had purchased the property under Ext.B1, and the western boundary shown in this document is not the main road, but a property belonging to a third party-relatives of the defendant's father.



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When the defendant along with his brothers sold this property to the plaintiff under Ext.A1, it is they who had pushed the western boundary of the property sold up to the main road. The executant of a document *prima facie* is bound by the description that he has given. It is not the case of the defendant that the plaintiff had played any fraud at any time. And Ext.A1 was executed sometime in the year 1974 whereas the suit was laid only in 2002, and in between the defendant had taken precious little action to set it right, if only his contention that the western boundary description as given in Ext.A1 was a mistake. Secondly, at no point of time the defendant nor his father had any right to the west of property covered under Ext.B1 up to the main road.

9.2 In terms of the facts available, the property that was sandwiched between the main road on the west and the property purchased by defendant's father under Ext.B1 on the east belonged to some third party, and if the plaintiff had occupied this portion, how does it, and why it should worry the defendant? Here the defendant pleads that he has been in possession of a property which admittedly is not under any cultivation. And,



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it appears that the land also does not appear to be cultivable. As rightly contended by the counsel for the respondents/plaintiff, the defendant had not produced any document worthy of consideration to establish that he was in possession of the disputed property. When the defendant along with his brothers had sold the entire property, he has no *locus standi* to resist the plaintiff's enjoyment of the property covered under Ext.A1.

10. The counsel for the defendant / appellant pivoted his argument on the burden of proof when he contended that the plaintiff ought to have proved his case independently and should not lean on the weakness of the defendant's case. In the estimate of this Court, the plaintiff indeed has been able to create a probability based on western boundary description in Ext.A1, and for sustaining his possession he has not depended on the weakness of the defendant's case.

11. In fine, this Court does not find any merit and accordingly the appeal is dismissed and the decree and judgment dated 27.08.2007 made in A.S.No. 20 of 2005 on the file of the learned Principal District Judge, Sivagangai,



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confirming the decree and judgment dated 29.03.2004 made in O.S.No.164 of 2002 on the file of the learned District Munsif, Sivagangai, is hereby confirmed. No costs. Consequently, connected miscellaneous petitions are closed.

04.11.2022

Index : Yes / No
Speaking order / Non-speaking order
ssb



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- 1.The District Judge
Principal District Court
Sivagangai.
- 2.The Judge
District Munsif Court
Sivagangai.
- 3.The Section Officer
Madurai Bench of Madras High Court
Madurai.



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N.SESHASAYEE, J.

ssb

Pre-delivery Judgement in
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