



S.A(MD)No.762 of 2011

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.01.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)No.762 of 2011

M.Chinnappan

...Appellant/Appellant/Plaintiff

-Vs-

1.R.Meenal

2.K.Raman

... Respondents/Respondents/
defendants

(Memo dated 06.09.2022 presented before the
Court on 07.09.2022 is recorded vide Court order
dated 07.09.2022 made in C.M.P(MD) No.7451 of 2022)

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 01.02.2011 made in A.S.No.17 of 2009 on the file of Subordinate Judge, Sivagangai, confirming the judgment and decree dated 18.08.2008 made in O.S.No.183 of 2000, on the file of District Munsif, Sivagangai.

For Appellant : Mr.T.Antony Arulraj



S.A(MD)No.762 of 2011

WEB COPY

JUDGMENT

The plaintiff in the suit is the appellant. The appellant herein filed a suit for declaration, mandatory injunction in respect of item-I of the suit property and declaration and recovery of possession in respect of the item-II of the suit property. The suit as well as the first appeal filed by the appellants were dismissed.

2. According to the appellant/plaintiff, the first item of the suit property was purchased by his father Viyagulam @ Mariya Viyagulam under a registered sale deed, dated 08.04.1942, from one Athinamilagi. It was further averred in the plaint that the plaintiff got the property from his father by inheritance. The respondents/defendants possessed the vacant site on the western side of item-I of the suit property. While constructing a house in their property, the respondents extended the sun shed of their house 3 feet into the first item of the suit property. Thus, the respondents encroached a portion mentioned as 'ABCD' in the plaint plan. The east-west measurement of the encroached portion is shown as 3 feet and the north-south measurement of the encroached portion is shown as 41 feet.



S.A(MD)No.762 of 2011

WEB COPY

According to the appellant, item -II of the suit property with an extent of 22 cents was purchased by the appellant from one Sundarrajan Servai. The second item of the suit property lies in Survey No.132/37 and the same is shown as 'EFGH' in the plaint plan. After the death of Sundarrajan Servai, his wife Saraswathi sold it to the appellant on 12.04.2000 under Ex.A.4. It was further pleaded that the appellant, after purchase, surveyed the item-II of the suit property and found that an extent of 4 ½ feet in item-II was encroached by the respondents. Therefore, the appellants were constrained to file a suit for the aforesaid reliefs.

3.The respondents/defendants filed a written statement and denied the title of the appellant over the suit property. The respondents further averred that in item-I of the suit property, the father of the appellant put up a compound wall on the eastern extremity of his property by dividing the property of the appellant and respondents. The appellant, after demolishing the old house put up by his father, while putting up a new house, annexed the said compound wall along with his house and treated the compound wall as his eastern main wall and put up building over it. Thus, it is the case of the respondents that the appellant has no right over the property, which lie on the immediate east of his eastern main wall. The



S.A(MD)No.762 of 2011

WEB COPY

respondents set up an independent title over the suit item-I of the suit property.

According to them, the first respondent/first defendant purchased item-I of the suit property from one Muthulakshmi under Ex.B2, dated 01.12.1986. The said Muthulakshmi in turn purchased item-I along with the property on the western side, under Ex.B1, dated 31.03.1960 from one Ramanujathammal. The respondents also claimed independent title over item-II of the suit property. According to them, item-II of the suit property was purchased by them under Ex.B.4, dated 01.12.1986 from Muthulakshmi and the said Muthulakshmi purchased the same from one Sonaimuthu Ambalam under Ex.B3, dated 11.07.1961. The respondents further pleaded that one Sundarrajan Servai under whom the appellant claimed title in respect of item-II died intestate by leaving behind his wife, a son and two daughters and hence, the appellant cannot purchase item-II of the suit property from Sarawathi alone and acquire title over the same. On these pleadings, the respondents sought for dismissal of the suit.

4. Before the trial court, the appellant/ plaintiff was examined as P.W.1 and 7 documents were marked on his side as Ex.A1 to ExA.7. The second respondent was examined as D.W.1 and two other witnesses were examined on behalf of the



S.A(MD)No.762 of 2011

respondents as D.W.2 and D.W.3 and 6 documents were marked as Ex.B.1 to Ex.B.6.

5. The trial Court, on consideration of evidence available on record, came to the conclusion that the appellant is not entitled to succeed in his prayer for declaration without impleading his siblings as parties to the suit. Further in respect of item-II, the trial Court held that the vendor of appellant, namely, Saraswathi had no absolute right over the suit property to convey good title to the appellant as he had three children, who were not parties to the sale deed. Though the trial Court found a portion of item-I of the suit property had been encroached by the respondents, in view of its finding in respect of the main prayer for declaration, the suit was dismissed in its entirety. Aggrieved by the dismissal of the suit, the appellant herein filed appeal in A.S.No.70 of 2009 on the file Sub Court, Sivagangai. The first appellate Court also concurred with the findings of the trial Court that the appellant is not entitled to maintain a suit for declaration without impleading his siblings and consequently, his prayer for mandatory injunction in respect of item-I has to be rejected. In respect of item-II also, the first appellate Court concurred with the findings of the trial Court that in the



S.A(MD)No.762 of 2011

absence of material to show that other heirs of Sundarrajan Servai, namely, a son and two daughters executed any sale deed in favour of the appellant, he is not entitled to get declaration of his absolute title over the suit property and consequently, his prayer for recovery of possession was not maintainable. Therefore, the first appellate Court dismissed the appeal. Aggrieved by the same, the appellant is before this Court.

6. At the time of admission, this Court formulated the following substantial questions of law:-

“ (i) Whether the suit is barred for non-joinder of the brother of the appellant herein as co-plaintiff?

(ii) Whether the Courts below are justified in not relying upon Ex.B.4 in favour of the plaintiff on the ground that the vendor's children were not made as co-executants therein?

(iii) Whether the dismissal of the suit on the ground of omission to plead the exact date of encroachment by the defendants is justified when the plea of adverse possession projected by the defendants had been rejected?”



S.A(MD)No.762 of 2011

WEB COPY

7. The learned counsel for the appellant submitted that the Courts below have come to the conclusion that there is an encroachment in item-I of the suit property by the respondents/defendants and hence, the suit should have been decreed in respect of the prayer for mandatory injunction. The learned counsel also tried to assail the findings of the Courts below that the suit for declaration of title is not maintainable in the absence of impleadment of siblings of the appellant. The learned counsel further submit that in respect of item-II, the same was purchased by the appellant from one Sarawathi, widow of its original owner Sundarrajan Servai and the son and daughters of Sundarrajan Servai have not been objected to the sale by Sarawathi. Therefore, the appellant is entitled to acquire good title and based on the conveyance deed executed by Saraswathi alone, the appellant is entitled to maintain the suit for declaration.

8. A perusal of the pleadings of the appellant in the plaint would make it clear that insofar as item-I is concerned, the appellant claimed title over the same by succession. It was his case that the appellant's father acquired the suit property from one Athinamilagi under a sale deed dated 08.04.1942 and after his death, he inherited the property. When the appellant was examined as P.W.1, he



S.A(MD)No.762 of 2011

category WEB C category WEB C
categorically admitted that his father had seven children. Therefore, it is clear that after death of the father of plaintiff, all the seven children have got right over the item-I of the suit property. It is not explained by the appellant how he is entitled to declaration of his exclusive title over the suit property. The finding of the Courts below that the prayer for declaration is not maintainable for non-joinder of necessary party, namely, the siblings of the appellant, is in accordance with law and the same requires no interference from this Court.

9. As far as the second item of suit property is concerned, the case of the appellant is that the second item originally belonged to one Sundarrajan Servai and after his death, he purchased the same from his wife Saraswathi. The respondents in their written statement specifically pleaded that Sundarrajan Servai had died leaving behind one son and two daughters apart from his widow Saraswathi. The non-joinder of necessary party was specifically raised by the respondents in their pleadings. The appellant also, during the course of his examination, admitted that Sundarrajan Servai had one son and two daughters at the time of his death. Therefore, the widow of Sundarrajan Servai, namely, Saraswathi cannot convey good title to the appellant, when the other heirs of



S.A(MD)No.762 of 2011

WEB COPY

Sundarrajan Servai, were not added as parties to the sale deed. Therefore, the findings rendered by both the Court below that the appellant is not entitled to seek declaration of his title over second item of the suit property is also correct and the same needs no interference from this Court.

10. Though the trial Court found there is an encroachment by the respondents to the extent of 4½ feet into the property of the appellant in item-I, the said question was not considered by the first appellate Court in view of its conclusion with regard to the main prayer in the suit, namely, the declaration of title of the appellant. The prayer for mandatory injunction and recovery of possession are consequent to the prayer for declaration of title by the appellant/plaintiff. When he failed to prove his main prayer for declaration of title, he is not entitled to seek consequential prayer for mandatory injunction and recovery of possession . However, it is made clear that it is always open to the appellant to cure the defect of non-joinder of necessary party and file a fresh suit by joining the necessary parties and seek appropriate relief, if so advised. With these observations, the substantial questions of law are answered against the appellant and the second appeal is dismissed.



S.A(MD)No.762 of 2011

WEB COPY

11. In nutshell,

(i) The Second Appeal is dismissed by confirming the judgment and decree, dated 01.02.2011, made in A.S.No.17 of 2009 on the file of Subordinate Judge, Sivagangai, confirming the judgment and decree dated 18.08.2008 made in O.S.No.183 of 2000, on the file of District Munsif, Sivagangai; and

(ii) In the facts and circumstances, there will be no order as to costs.

10.01.2023

NCC : Yes/ No
Index : Yes / No
Internet : Yes / No
cp

To

- 1.The Subordinate Judge, Sivagangai.
2. The District Munsif, Sivagangai.
- 3.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

10/11



WEB COPY



S.A(MD)No.762 of 2011

S.SOUNTHAR, J.

CP

S.A(MD) No.762 of 2011

10.01.2023