



S.A.No.1923 of 2000

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 10.02.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.No.1923 of 2000

Pichayappa

... Appellant

Vs.

1.Chinnaiyah Vijayathevar (Died)

2.Jothi @ Jothikannu

3.Pavunammal

4.Kannaiyan

5.Dharmaraj

6.Annathammal @ Annathai

7.Murugaiyan

... Respondents

(Respondents 2 to 7 are brought on record as LRs of deceased sole respondent vide court order, dated 25.09.2020 made in C.M.P(MD)No.11169 and 11170 of 2019 in SA.No. 1923 of 2000 by JNBJ)

PRAYER :-

This Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 18.07.2000 made in A.S.No.16 of 1999 on the file of the Subordinate Judge, Pattukkottai and judgment and decree dated 24.12.1997 made in O.S.No.31 of 1997 on the file of District Munsif, Orathanadu.



S.A.No.1923 of 2000

For Appellant : Mr.N.Balakrishnan

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JUDGMENT

The plaintiff in the suit is the appellant. He filed a suit for declaration and injunction with an alternative prayer that in case the Court finds that the appellant is not in a possession of entire suit property, a decree for possession was also sought for in respect of the extent over which he is found to be out be possession. The suit was dismissed by the trial Court. The first appeal filed by the plaintiff was also dismissed and hence he is before this Court.

2. According to the appellant/plaintiff, originally the suit property with an extent of 45 cents in S.No.179/2 belonged to Thiruman Samban. He had three sons by name Natesan, Kalimuthu and Arumugam. The appellant purchased southern 15 cents in the suit property under Ex.A1, dated 22.06.1965 from Kalimuthu. Subsequently, he purchased another 15 cents on immediate north of southern 15 cents from Natesan, under Ex.A2, dated 08.11.1966. Thus the appellant claimed 30 cents out of total extent of 45 cents. According to the appellant, the northern most 15 cents was retained by Arumugam. On these pleadings, the appellant filed a suit for recovery of possession.

2/10



S.A.No.1923 of 2000

3.The respondent/defendant filed a written statement denying the claim of the appellant that Thiruman Samban had three sons. It was the case of the respondent/defendant that Thiruman Samban had only two sons namely Kalimuthu and Arumugam and the claim of the appellant that he had another son by namely Natesan was specifically denied. The respondent claimed that after death of Thiruman Samban, Kalimuthu and Arumugam inherited 22 ½ cents. The eastern 22 ½ cents belonged to Kalimuthu and western 22 ½ cents belonged to Arumugam. It was further averred that Kalimuthu under Ex.A7, dated 15.04.1965 created an usufructuary mortgage in favour of the respondent/defendant in respect of his eastern 22 ½ cents. The respondent also claimed that the western 22 ½ cents belonged to Arumugam was purchased by him under two sale deeds, dated 11.12.1965 and 14.12.1968, which were marked as Ex.B1 and Ex.B2. Thus, the respondent/defendant claimed title over the entire extent of 45 cents in the suit property.

4.The trial Court on appreciation of oral and documentary evidence available on record came to the conclusion that the appellant could not have received actual possession of the suit property under Ex.A1 – Sale Deed in his favour, in view of the fact that the suit property was mortgaged to defendant



S.A.No.1923 of 2000

under Ex.A7, which was a registered document. The trial Court also had given a factual finding that the sale deed executed by Arumugam in favour of the respondent/defendant under Ex.A4 was specifically admitted by PW1 during his cross examination. Therefore, the trial Court had given a factual finding that Ex.A1 and Ex.A2 - Sale Deeds executed in favour of the appellant would not convey any title to the appellant. The trial Court also found that though the appellant claimed right over 30 cents under Ex.A1 and Ex.A2, he laid a suit for entire 45 cents belonged to the family of Thiruman Samban. On these grounds, the suit was dismissed by the trial Court. Aggrieved by the same, the appellant filed an appeal in A.S.16 of 1999 on the file of the Sub Court, Pattukottai. The appellate Court also found that the appellant could not have taken possession of the properties as alleged by him under Ex.A1 and Ex.A2, in view of the registered mortgage deed executed in favour of the defendant Ex.A7, which was anterior document. The Appellate Court also had given a finding that in view of earlier mortgage executed by Kalimuthu in favour of the respondent/defendant, the appellant will not get title for the entire property as he allegedly purchased under Ex.A1 and he could not have taken possession of the property covered under Ex.A1 and Ex.A7. The Appellate Court also found that though the appellant claimed right over 30 cents under



S.A.No.1923 of 2000

Ex.A1 and Ex.A2, the declaration sought for by him in respect of 45 cents could not be considered. Therefore, the appeal filed by the appellant was dismissed and confirming the decision of the trial Court. Aggrieved by the same, the appellant is before this Court.

5.The learned counsel appearing for the appellant submitted that though Ex.A7 – Mortgage Deed is anterior to the title documents of the appellant, creation of mortgage deed by appellants vendor would not affect his title and at the most, subject to the mortgage liability, the title will pass on to the appellant. In the case on hand, the appellant produced Ex.A1 and Ex.A2 to prove his title and therefore, even assuming that the Court came to the conclusion that the appellant failed to prove his possession, the decree should have been passed in favour of the appellant for recovery of possession based on his title over the 30 cents purchased by him.

6. The sole defendant, who was arrayed as respondent in the Second Appeal died pending second appeal and his legal representatives were brought on record as respondents 2 to 7. Though the respondents 2 to 7 were served, they have not chosen to enter appearance. The names of the respondents 2 to 7



S.A.No.1923 of 2000

are printed in the cause list and there is no representation on behalf of them.

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7.In the case on hand, the appellant claimed title over 30 cents of property on the southern side out of total extent of 45 cents under Ex.A1, dated 22.06.1965 and Ex.A2, dated 08.11.1966. The deceased first respondent/defendant claimed the right over the entire extent of 45 cents under mortgage deed Ex.B3, dated 15.04.1965 and two sale deeds in his favour namely, Ex.B1 and Ex.B2, dated 11.12.1965 and 04.12.1968. The earliest document is Ex.A7 (A7 is equivalent to B3, both certified copies of same mortgage) usufructuary mortgage deed whereunder Kalimuthu one of the son of Thiruman Samban mortgaged 22 ½ of cents of suit property on the eastern side in favour of the respondent. It is settled law the anterior documents will prevail over the documents, which came into existence subsequently. If the mortgage deed executed by Kalimuthu in favour of the first respondent/defendant in respect of 22 ½ cents on the eastern side of suit property is accepted, he could not have executed Ex.A1 in favour of the appellant conveying southern 15 cents to the appellant. For the same reason, the other document relied on by the appellant under Ex.A2 cannot be accepted. Further, even before purchase of 15 cents from Natesan, under



S.A.No.1923 of 2000

Ex.A2 by the appellant, the first respondent purchased 15 cents out of western side 22 ½ cents from Arumugam. The learned counsel for the appellant submitted that though the defendant claimed that he purchased the entire suit property from two sons of Thiruman Samban namely, Kalimuthu and Arumugam, a reference to Ex.A6 would make it clear that Thiruman Samban had three sons by name Kalimuthu, Arumugam and Natesan. Therefore, the respondents cannot claim right over entire 45 cents of Thiruman Samban's property by purchasing 22 ½ cents each from two sons of Thiruman Samban. In other words, the learned counsel for the appellant contended that two sale deeds by two sons of Thiruman Samban would not bind other son Natesan. The learned counsel further submitted that the Court below factually found that Thiruman Samban had a son by name Natesan.

8.In the light of earliest document Ex.A3 – Mortgage Deed by Kalimuthu in favour of the first respondent/defendant, the appellant could not to have taken possession of properties described under Ex.A1 and Ex.A2 by metes and bounds. At the most, it can only be treated as a conveyance of undivided interest of his vendor. All the sons of Thiruman Samban are not impleaded in the present suit. Therefore, whether there was a partition in the



S.A.No.1923 of 2000

family and properties were enjoyed in the fashion as claimed by the appellant and the respondents in their respective pleadings cannot be decided in the present suit and relief for partition cannot be moulded in favour of the appellant in the present suit.

9. Therefore, I do not find any error in the findings of the Courts below that the appellant could not have taken possession under subsequent document under Ex.A1 and Ex.A2 as against the specific recitals contained in anterior document namely Ex.A7. However, the appellant will get title to the property purchased by him under Ex.A1 and Ex.A2 subject to the mortgage liability created under Ex.A7 provided, he is able to establish that properties were enjoyed by his vendors in the fashion as mentioned in his title documents. Therefore, while confirming the findings of the Courts below, this Court grants liberty to the appellant to file a suit for partition and separate possession by impleading all the legal heirs of Thiruman Samban and in the said suit it is open to the appellant to establish that the properties were enjoyed by legal heirs of Thiruman Samban in the fashion as mentioned in the title documents and in case the appellant proves the manner of enjoyment as pleaded by him, he is entitled to seek partition and other incidental relief in



S.A.No.1923 of 2000

that suit.

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10. With this liberty,

(a) the Second Appeal stands dismissed by confirming the judgment and decree passed by the Courts below;

b) in the facts and circumstances of the case, there would be no order as to costs.

10.02.2023

NCC : Yes/No
Index : Yes / No
vsd

To

1. The Subordinate Judge,
Pattukkottai.
2. The District Munsif,
Orathanadu.
3. The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



S.A.No.1923 of 2000

S.SOUNTHAR, J.

vsd

S.A.No.1923 of 2000

10.02.2023