
(1976) 03 MAD CK 0063
In the Madras High Court
Case No : Second Appeal No. 261 of 1971

Chellappan Nadar

APPELLANT

Vs

Periaswamiyar and Others

RESPONDENT

Date of Decision : 23-03-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Citation : (1976) ILR (Mad) 335

Hon'ble Judges : Ismail, J

Bench : Single Bench

Advocate : S. Padmanabhan, for the Appellant; K. Alagiriswami, P. Ananthakrishnan Nair, T.R. Rajagopalan and T.R. Rajaraman, for the Respondent

Final Decision : Allowed

Judgement

Ismail, J.—The third Defendant in Original Suit No. 80 of 1965 on the file of the Court of the Subordinate Judge of Nagercoil is the Appellant herein. The controversy involved in this case has been considered by Raghavan J., while he disposed of Civil Miscellaneous Petition No. 13669/72 filed for impleading some parties who were not originally impleaded as parties to the second appeal. The order of Raghavan J. is reported in Muriyattu Nakaranna Krishna Dass Narayana Bhrahmananda Dheerthar Peria Swamiyar Thirumum Pilli Vs. Panchayat Union Arudesom Village and Others, . The facts leading to the institution of the present suit had been set out by the learned Judge in his order as follows:

The suit properties situate in Arudesom Village belonged to the Plaintiff's Matom and (were) subject to mortgage in favour of various persons. The first Defendant is the Panchayat Union and the second Defendant is the President of the Panchayat. The third Defendant is a road contractor and the fourth Defendant is the Union Commissioner, Munchira Panchayat Union in which Arudesom Panchayat is included. The Plaintiff has filed a suit against the Defendants for recovery of Rs. 5,500 as damages on the ground that the Defendants have unlawfully and without obtaining the consent of the Plaintiff opened a road way

along portions of the suit properties that such portions are wrongfully taken over and road has been laid and thereby the Defendants had completely destroyed the Plaintiff's land. The Plaintiff sent a notice to the first Defendant. A reply was sent by the second Defendant enclosing a copy of the resolution passed by the Panchayat and the third Defendants sent a reply stating that the first Defendant gave contract to him to cut open the road and that the first Defendant alone is answerable for all the loss. In view of the wrongful acts of the Defendants the present suit for recovery of damages amounting to Rs. 5,500 was filed.

The trial Court decreed the suit against the third Defendant alone for a sum of Rs. 2,218.75 and dismissed the rest of the claim.

The third Defendant filed Appeal Suit No. 213 of 1968 in the Court of the District Judge, Kanyakumari. The learned Judge confirmed the judgment and decree of the trial Court on all the issues except on the issue as to the quantum of damages. While confirming the third Defendant's liability the appellate Court remanded the matter to the trial Court to fix the liability on a different basis. The Plaintiff was directed to pay the costs of the appeal to the first, second and the fourth Respondents. The third Defendant has filed the above second appeal (the present second appeal) and when the appeal came up for hearing before me at the first instance, I considered that the real parties are not before the Court in the second appeal in case I came to the conclusion that the third Defendant is not liable, but that the Plaintiff is entitled to get a decree against the third Defendant's principal, viz., the first Defendant or the second Defendant. I, therefore, directed the Appellant to implead the other Defendants as parties to the second appeal.

I may point out in this context that before the lower appellate Court, namely, the District Judge, Kanyakumari, it was not only the third Defendant, who preferred an appeal, Appeal Suit No. 213 of 1968, but also the Plaintiff preferred an appeal, namely Appeal Suit No. 332 of 1968, claiming a decree against Defendants 1 and 4 also. That appeal also was dismissed.

2. It was thereafter that the aforesaid Civil Miscellaneous Petition No. 13669 of 1972 was filed to implead the first, second and fourth Defendants as parties to the second appeal and that petition was ordered by the learned Judge by the order reported as above.

3. Now the question for consideration is, whether the third Defendant-Appellant is liable at all; if not; against whom the Plaintiff is entitled to a decree. The Plaintiff-first Respondent died pending second appeal and his legal representative has been brought on record as the fifth Respondent.

4. There can be no doubt whatever that the third Defendant is not liable on the facts found by the Courts below. As a matter of fact, the trial Court recorded a finding in paragraph 12 of its judgment in the following terms:

It is not pretended by the Union (the first Defendant) that any acquisition

proceedings were taken for acquiring the portions of the Plaintiff's land, over which, the suit road has been laid. It is also idle for the Union to plead that the encroachment, if any, must have been done unauthorisedly by the third Defendant, rendering him alone liable, for the plaint claim, in the face of the assertion of the third Defendant (D.W. 1) and the admission of D.W. 4 the road Inspector of the Union, that the officers of the Union, including himself (D.W. 4) the Commissioner and Engineer, peg-marked the limits of the road and that the third Defendant, laid the road, within such limits. It is a clear case of the Union taking the law in its own hands, through its officers and the contractors the third Defendant and proceeding with the work, by encroaching upon private lands, in utter disregard of the rights of the owners of such lands. I am satisfied on the materials available before Court, that the plea of consent or acquiescence by the Plaintiff, by reason of mere default to obstruct the encroachment, as and when it was done, is not available to the Defendants.

Thus it is clear that the third Defendant-Appellant, who was only a contractor, laid the road only on the portions marked out for that purpose by the officers of the Union and as a matter of fact by the Commissioner himself. Therefore, from the very finding of the trial Court, as above, it is indisputably clear that the third Defendant cannot be made liable at all. It is not contended that the second Defendant, Panchayat, is liable. Therefore, once it is found that the third Defendant is not liable and the second Defendant is not in the picture at all, the only other two persons that can be made liable at all are Defendants 1 and 4. However, the learned Appellate Judge in paragraph 6 of the his judgment stated:

The mere fact that under a resolution of the Panchayat Union Exhibit B-5, the connecting road was authorised to be put up cannot point to any authorisation so as to lay a road into private property. It does not appear that the contractor was in specific terms authorised to lay a road in Plaintiff's private property, the survey numbers concerned. It has not been suggested to him or proved by material placed that the Panchayat Union and the Commissioner knew while laying the road that the road occupied the Plaintiff's field. The result is the Panchayat Union and the Commissioner are protected by good faith in their action.

On the face of it, this reasoning and conclusion are utterly untenable. This conclusion has been reached overlooking the admission of D.W. 4 and the evidence of the third Defendant that as far as the work is concerned, he laid the road only on the portions marked out by the officers of the Panchayat Union. Therefore, it is the officers of the Panchayat Union who were responsible for the encroachment or damage caused to the Plaintiff. The learned District Judge who disposed of the appeal appeared to have been suffering from some misapprehension that the Panchayat Union and the Commissioner were protected. As a matter of fact, in the same paragraph 6, the learned District Judge stated:

In so far as the Plaintiff is concerned however the question is different. The

Plaintiff is prima facie responsible for his individual act. (Obviously the learned District Judge is referring to the third Defendant.) The normal rule of liability is that one who commits wrong is liable for it himself. He cannot excuse himself by saying that he was acting as agent or servant or on behalf and for the benefit of another. The contractor on his own admission has not enquired as to whether the site on which the road was laid formed part of Plaintiff's property. It was his duty to have made enquiries before proceeding to lay the road. The act of the contractor has not been that of a prudent individual. He is therefore liable for the encroachment and the consequential damage caused as a result thereof. It follows the Panchayat Union, its commissioner and the Panchayat are not liable.

To say the least, the above observations are perverse. Once the third Defendant was only a contractor and he laid the road only on the places marked out by the Panchayat Union and its officials, certainly no further duty was cast upon the third Defendant to make enquiries as to whether the property really belonged to the Panchayat or it was such over which the panchayat had control or it belonged to some private individual. In so far as the Panchayat Union and the fourth Defendant had not cared to peg-mark the lands belonging to them and peg-marked the lands belonging to the Plaintiff also, it would constitute a clear case of neglect outside the exercise of their powers and therefore they cannot claim any protection on the ground of good faith. Under these circumstances, it is clear that it is the Panchayat Union, namely, the first Defendant, and its Commissioner, namely, the fourth Defendant that are liable to pay the damages to the Plaintiff.

5. The only other question that remains to be considered is, whether the first Defendant and the fourth Defendant can be made liable and any decree can be passed against them by me in the present second appeal, because the Plaintiff had not preferred any second appeal against the judgment and decree of the trial Court granting a decree only against the third Defendant and declining to grant a decree against the first and fourth Defendants and which decree has been affirmed on appeal by the lower appellate Court. I am of the opinion that Order XLI, Rule 33 CPC enables the Court to pass such a decree. That was the view taken by me in an unreported judgment of mine namely, *The Combine v. Narayanan* Second Appeal No. 306 of 1966 disposed of on 28th September 1970. In *Sadasivam v. Ramanathan* ILR (1970) Mad. 378. Alagiriswami J., also took the same view. After referring to a judgment of the Supreme Court in *Pannalal Vs. State Bombay and Others*, the learned Judge proceeded to state that the said judgment:

Supports the proposition that where a Plaintiff files a suit against two Defendants and the suit is decreed against one of them but dismissed against the other and the person against whom the suit has been decreed files an appeal and the appellate Court finds that the decree against him cannot be sustained, it is open to the appellate Court to pass a decree against the person against whom the suit has been dismissed, if he is the Respondent in the appeal.

6. The Supreme Court in *Koksingh Vs. Smt. Deokabai*, observed:

In *Giasi Ram and Others Vs. Ramjilal and Others*, the Court said that in Order 41, Rule 33, the expression "which ought to have been passed" "means" what ought in law to have been passed and if an appellate Court is of the view that any decree which ought in law to have been passed was in fact not passed by the Court below, it may pass or make such further or other decree or order as the justice of the case may require.

Therefore, we hold that even if the Respondent did not file any appeal from the decree of the trial Court, that was no bar to the High Court passing a decree in favour of the Respondents for the enforcement of the charge.

7. In this case, as I have pointed out already, on an application made by the Appellant herein, Defendants 1, 2 and 4 have been impleaded as parties and therefore there is absolutely no impediment to this Court passing a decree in favour of the Plaintiff against Defendants 1 and 4 instead of the decree that was passed by the Courts below against the third Defendant-Appellant alone.

8. Accordingly the second appeal is allowed and the judgment and decrees of the Courts below are set aside and it is made clear that it is only the first and fourth Defendants that are liable to pay the damages to the Plaintiff for encroaching upon and laying a road on portions of his property. However, the order of remand passed by the lower appellate Court with reference to the determination of the actual damages will stand. The parties will bear their costs in the second appeal. The Plaintiff will be entitled to his costs from Defendants 1 and 4 both in the trial Court and in the first appellate Court. The Plaintiff will pay the costs of the second Defendant both in the trial Court and in the first appellate Court. This order regarding costs will cover the costs so far incurred.

9. No leave.