

(1999) 09 MAD CK 0007
In the Madras High Court
Case No : Second Appeal No. 1842 of 1987

Chinnakannu (died) and another	Vs	APPELLANT
Athal and 2 others		RESPONDENT

Date of Decision : 27-09-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (1999) 09 MAD CK 0007

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : T.R. Rajaraman, for the Appellant; R. Sekar for M/s. Sarvabhauman Associates, for the Respondent

Final Decision : Dismissed

Judgement

M. Karpagavinayagam, J.

The plaintiff is the appellant herein.

1. The plaintiff filed a suit in O.S. No. 149 of 1983 on the file of the District Munsiffs Court, Pattukottai for permanent injunction as against the

defendants, the respondents herein, in respect of 12 items of the properties. The trial Court decreed the suit only in respect of 4 items. Challenging

the said decree, the defendants, the respondents herein filed an appeal in A.S. No. 45 of 1986 on the file of Sub Court, Pattukottai. The lower

Appellate Court partly allowed the appeal and set aside the decree in respect of 4 items in favour of the plaintiff and held that the plaintiff would be

entitled to the decree only in respect of 2 items. As against this judgment and decree passed by the lower Appellate Court, the plaintiff has filed this

Second Appeal before this Court seeking for the relief of permanent injunction in respect of all the items of the suit properties.

2. During the pendency of the Second Appeal, the son of the plaintiff was brought on record as second appellant. Since the plaintiff died.

3. The case of the plaintiff is as follows:-

The suit properties among other properties originally belonged to the plaintiff's grand father. One Veeran, he had three sons by name (1) Avidai,

(2) Velan and (3) Karuppan. After the death of Veeran, the three sons divided the properties among themselves orally in the year 1939. The first

son Avidai is the father of the plaintiff Chinnakannu. After the oral partition, the three branches have been in separate possession and enjoyment of

their respective items allotted to each. The first defendant Athal is the widow of Velan, the third son of Veeran. Defendants 2 and 3 are the sons of

the first defendant. They were living in Ceylon. They came back to village two years ago and began to disturb the possession of the plaintiff and

tried to alienate the suit properties unauthorisedly. There was a specific instance of disturbance on 2.3.1983. Hence, the suit for permanent

injunction restraining the defendants from in any way dealing with the suit properties or interfering with the peaceful possession and enjoyment of

the suit properties by the plaintiff.

4. The case of the defendants is as follows:-

The suit properties items 1 to 4, 6, 7, 9, 11 and 12 were allotted to the share of the first defendant's husband in the oral partition. Suit item 8 was

jointly sold by her husband and his brothers Avadai and Karuppan to the first defendant's mother Palaniyayee. After the death of Palaniyayee, the

first defendant and her sister Srirangi became entitled to suit item 8. Srirangi was the first wife of the first defendant's husband. Item 10 originally

belonged to one Chellan. After his life time, the said item was purchased by the husband of the first defendant from Chellan's wife Karupayee in

the year 1966. All these properties were entrusted by the first defendant's husband to his brother Avadai, the father of the plaintiff, while leaving

India for Ceylon with a condition that the same should be returned to him or to his heirs when he comes back to India. Subsequently, Avadai died.

Then, the first defendant's family came to India to attend the funeral. In 1980, the first defendant again came to India and settled here. The plaintiff,

on being requested, handed over the possession of all the properties to the first defendant in 1983. When she wanted to alienate some properties,

the plaintiff has filed the suit with false allegations. Under these circumstances, the plaintiff would not be entitled to any relief.

5. On the basis of the above pleadings, the trial Court considered the evidence and concluded that the plaintiff, the appellant herein would be

entitled to the decree for permanent injunction only in respect of items 2, 5, 10 and 11 and dismissed the suit in respect of other items.

6. The defendants, the respondents herein, on aggrieved over the decree passed by the trial Court, filed an appeal before the lower Appellate

Court in respect of items 10 and 11 alone. During the pendency of the appeal, the plaintiff filed cross-objection requesting to pass a decree in his

favour in regard to all the suit items.

7. On considering the materials available on record, the lower Appellate Court dismissed the Cross-objection filed by the plaintiff and allowed the

appeal filed by the defendants in respect of items 10 and 11 holding that the plaintiff would not be entitled to the relief of permanent injunction in

respect of those items. Thus, the decree passed by the trial Court in respect of items 2 and 5 was confirmed by the lower Appellate Court.

8. The plaintiff has filed this Second Appeal challenging the findings of both the trial Court as well as the lower Appellate Court contending that

both the Courts below have not considered the materials placed by the plaintiff in the proper perspective and given a wrong finding in favour of the

defendants, instead of granting decree in favour of the plaintiff in respect of all the suit items.

9. At the time of admission of the Second Appeal, the following substantial question of law was formulated by this Court:

Whether the lower Appellate Court has misconstrued and omitted to construe the material evidence on record when it choose to reverse the

judgment and decree of the first Court with respect to items 10 and 11 of the suit properties?

10. In elaboration of the above question of law, Mr. Rajaraman, the learned counsel appearing for the appellant, would contend elaborately mainly

attacking the lower Appellate Court's judgment, that having found that items 10 and 11 were found in possession of the plaintiff, it ought not to

have held that the said possession must be construed to be possession on behalf of the defendants. He would also contend that the plaintiff has

marked several documents such as Exs.A1 to A27 to establish that he has been in continuous possession and enjoyment of the suit properties after

the oral partition, which took place in 1939, by which these properties were allotted to the plaintiff's father and that these documents were not

given due consideration by both the Courts below. According to him, when the evidence available on record have not been taken into

consideration, this Court would certainly interfere with the finding of the lower Courts, despite the restriction put by Section 100 of C.P.C. In

support of his submissions, he would cite several authorities.

11. On the other hand, Mr. Sekar, the learned counsel appearing for the respondents, by pointing out various portions of the evidence and the

judgments of the Courts below, would resist the above submission by contending that the plaintiff having failed to prove his possession on the date

of suit, especially in respect of items 10 and 11 and particularly when the defendants have proved the title and possession in respect of all the items

except items 2 and 5, would not be entitled to the relief sought for in the Second Appeal. He would also cite various authorities in support of his

plea.

12. In the light of the rival contentions, it becomes my endeavour to consider the merits of the points urged.

13. Before launching discussion over the findings with reference to the relief sought for. by both the Courts below, it would be appropriate, at this

juncture, to refer to the scope and power of this Court u/s 100, C.P.C. in order to decide whether the finding of fact arrived at by both the Courts

below could be interfered with by this Court.

14. Let me now refer to the authorities on this aspect cited by the counsel for both the parties.

15. In *Sokkuthai Ammal and another v. Pandiaraj and 2 others* (1997-I-L.W.733), this Court would hold thus:-

Therefore, the Court of first Appeal is competent to entertain a question of fact and decide whether the findings of fact by the trial Court are or

are not erroneous. The Court of Second Appeal is not competent to entertain the question, as to the soundness of the finding of fact by the Courts

below.

16. In *Arumugham and others v. Sundarambal and another* (1999-2-L.W.588),

the Apex Court would observe as under:-

It is open to the first Appellate Court to consider the evidence adduced by the parties and give its own reasons for accepting the evidence on one

side or rejecting the evidence on other side. It is not permissible for the Second Appellate Court to interfere with such findings of the first Appellate

Court only on the ground that the first Appellate Court had not come to grips with the reasoning given by the Appellate Trial Court.

17. In *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar* (1999 (II) C.T.C.468), the Supreme Court would hold thus:-

It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last Court of fact, being the

first Appellate Court. It is true that the lower Appellate Court should not ordinarily reject witnesses accepted by the trial Court in respect of

credibility but even where it has rejected the witnesses accepted by the trial Court, the same is no ground for interference in Second Appeal when

it is found that the Appellate Court has given satisfactory reasons for doing so. In a case where from a given set of circumstances, two inferences

are possible, one drawn by the lower Appellate Court is binding on the High Court in Second Appeal.

18. In *Rajiah Nadar v. Mohanmani Ammal* (1999-I-L.W.536), this Court would observe as follows: -

If a finding of fact had been recorded by the Appellate Court without any evidence, then such a finding can be successfully challenged in Second

Appeal and if there were circumstances of compelling reasons warranting such interference. Therefore, the fact remains that a question of fact is

not a taboo for Section 100, C.P.C. It is also well settled that an Appellate Court cannot interfere and set aside the findings of the trial Court which

had the advantage of watching the demeanour of the witnesses, unless there are very strong and compelling reasons to reverse the judgment.

19. In *K.R. Chinnathambi Gounder Vs. Bhanumathy and Others*, the Apex Court would hold thus:-

It is obvious that under Sec. 100, C.P.C. in Second Appeal, it was not open to the second appellate Court to reappraise the evidence and

reject the evidence accepted by the Courts below on the question of possession.

20. The ratio of these decisions mentioned above would show that this Court has

no jurisdiction to interfere in the Second Appeal with a finding of fact given by the first Appellate Court, based upon the appreciation of the relevant evidence unless the said finding of fact was rendered without any evidence.

21. Bearing the above principles in mind, let us now look into the facts of the case.

22. According to the plaintiff, all the suit items were allotted to the plaintiff's father under an oral partition in 1939. It is the case of the defendants

that on the oral partition, the suit properties were allotted to the first defendant's husband and when he went to Ceylon, he handed over the said properties to the plaintiff's father to have permissive possession.

23. In the light of the above stand, it is the duty of the plaintiff to prove that the properties which were allotted to the plaintiff's father in oral

partition in 1939 are the suit properties. In the absence of any document regarding the allotment, it has to be seen whether the oral evidence

adduced by the plaintiff could be accepted with reference to the identity of the properties allotted to the father of the plaintiff.

24. Admittedly, both in the plaint and the evidence given by P.W.1, the details of the properties allotted to the plaintiff's father are not available.

No doubt, it is true that several documents were filed like kist receipts, patta, in order to show that the plaintiff had been in possession.

25. Both the Courts below have considered these documents and held that these documents alone would not be sufficient to pass a decree in

favour of the plaintiff in respect of all items of the suit properties.

26. It is also to be noticed, in this context, that the relief of permanent injunction is sought by the plaintiff on the basis of title also, though there is no

specific relief for declaration of title. Under those circumstances, both the Courts below considered the question of granting of the relief sought for

on the basis of the documents relating to title.

27. The documents relied upon by the plaintiff would reveal that those documents would relate to the possession of the properties prior to the year

1980. According to the defendants, the possession of the properties was handed over to the defendants in the year 1980. The documents Exs.B8

to B18, as per the finding of the trial Court, would show that all the properties except items 2, 5, 10, and 11 were in possession of the defendants.

28. The trial Court found that the plaintiff was in possession of the item No. 10 on the basis of Ex.A8, item 11 on the strength of Ex.A26 and items 2 and 5 on the basis of Exs.A5, A18, A20, A21, A24 and A27. But, the lower Appellate Court, though found in favour of the plaintiff in respect of items 2 and 5, held that the plaintiff would not be entitled to items 10 and 11, since the title in respect of those items was transferred to the name of the defendant.

29. However, it is pointed out by the learned counsel for the appellant that there is an observation by the lower Appellate Court that Exs.A8 and A26 would show that the plaintiff was in possession after the date of suit. Though no relief was given by the lower Appellate Court, despite this observation, on going through the records, in my view, the said observation is factually wrong.

30. The lower Appellate Court on finding that Ex.A8 dated 18.1.1983 and Ex.A26 dated 18.1.1983 would observe that these documents would show that the plaintiff was in possession even subsequent to the suit, since these documents would relate to January, 1983. But, a perusal of the documents would show that the kist was paid for the faslis 1388 and 1389 which would relate to the years 1978 and 1979.

31. Under those circumstances, the stray observation made by the lower Appellate Court regarding the alleged possession of the plaintiff in respect of items 10 and 11 on the strength of Exs.A8 and A28 would not be of any use for the appellant.

32. On the side of the plaintiff, two witnesses were examined. P.W.1 is the plaintiff and P.W.2 is one Kuttiyappa Thevar, who is a local resident.

The analysis of the evidence of P.W.2 would make it clear that it does not help in any way to support the case of the plaintiff. The reading of the evidence of P.W.1 also, as stated earlier, would not give the details about the identity of the suit properties stated to have been allotted to the father of the plaintiff.

33. On the other hand, the evidence of D.W.1, the first defendant, would show that the plaintiffs father was permitted to have the possession of these properties and in 1980 the possession was handed over to her by the plaintiff after the death of her husband.

34. Under those circumstances, in my view, the plaintiff has failed to prove his

case by adducing acceptable materials in order to get the relief sought for, except the items 2 and 5.

35. The principles regarding the exercise of the discretion by the Court in favour of the plaintiff granting injunction, are well laid down in the following decisions:-

1. Seeni Chettiar v. Santhanathan Chettiar (6 M.L.J. 281 (F.B.));
2. Ponnaiyan v. Munian (died) and others (1995-I-L.W. 680);
3. Alagi Alamelu Achi Vs. Ponniah Mudaliar,
4. S. Subba Reddiar and others v. Bhagyalakshmi Ammal and another (1996-2-L.W.31);
5. Mrs. S. Kousalyaa Bai v. The Commissioner, Corporation of Madras (1995-I-L.W.611.);
6. Chettathurai v. Perianal Nadar (1998 III M.L.J. 567);
7. Raman and another v. Dakshnamurthy (1996-2-L.W.811);
8. Thangavelu, P. v. R. Dhanalakshmi Ammal (95 L.W. 708);
9. Srinivasa Pillai v. Ragunathan (1983-I-M.L.J. 159);

36. There is no dispute that the plaintiff would be entitled to have his possession protected by a decree of permanent injunction, if he is found to be in possession on the date of the suit when there is material to show that the plaintiff has title by deed or by adverse possession.

37. In the present case, there is a dispute on the question of title to the suit properties between the plaintiff and the defendants. Therefore, it must be found out as to whether the plaintiff was in possession on the date of the suit and the defendant has no title to the suit properties.

38. The plaintiff can succeed only on the basis of the proof of his own allegation in the plaint as regards his title especially when the same is being questioned and he cannot succeed by picking holes in the title of the defendant.

39. In a suit for injunction, it is the duty of the plaintiff to prove that he continued to be in possession till the date of the suit.

40. In view of the settled principles of law regarding granting of injunction as laid down by this Court and the Apex Court, I am of the considered

view that both the Courts below took into consideration the entire evidence, oral and documentary, adduced by both the parties and gave a factual

finding.

41. As indicated earlier, the lower Appellate Court, who is competent to entertain a question of fact, has considered the evidence as well as the

finding of fact arrived at by the trial Court and correctly held that the plaintiff would be entitled to the relief of permanent injunction only in respect

of items 2 and 5 and not with reference to the items 10 and 11.

42. In the above circumstances, I do not find any illegality in the finding given by lower Appellate Court, so as to interfere with the judgment and

decree impugned. In the result, the appeal is dismissed No costs.