

(2002) 03 MAD CK 0104

In the Madras High Court

Case No : S.A. No. 425 of 1992 and C.M.S.A. No. 32 of 1992

D. Krishnamurthy

APPELLANT

Vs

A. Subramania Mudaliar and D. Shanmugam, D. Munuswamy
and D. Govindasamy

RESPONDENT

Date of Decision : 01-03-2002

Acts Referred:

Citation : (2002) 1 MLJ 708

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

Advocate : Viswanathan, for K. Venkata Subramanian, for the Appellant; A.E. Kalaichelvan, for Subhashini Kulasekaran, for the Respondent

Final Decision : Dismissed

Judgement

Prabha Sridevan, J.—The fifth defendant in O.S.No.238 of 1983 who is the second respondent in the execution proceedings filed in O.S.NO.726 of 1985 has filed the second appeal and the Civil Miscellaneous Appeal respectively. One Munusamy the first respondent herein, the brother of the appellant filed the above suit for declaration and recovery of possession. According to him, the suit property was purchased by him for valuable consideration under a registered sale deed Ex-A10, dated 03-03-1978. The property purchased under Ex-A10, was for an extent of 1.25 cents. Out of this, he sold the eastern 62 1/2 cents to Vanajakshi Ammal, under Ex-A3 dated 25-09-1981. The purchaser is the wife of the sixth defendant who was later transposed as the second plaintiff and is now the second respondent herein. The remaining western 62 1/2 cents was with the first respondent/plaintiff. His father, now dead who was the first defendant had attested Ex-A3. Therefore, his brothers including the appellant cannot question his right and title of the suit property. The first respondent executed a simple mortgage deed in favour of the second respondent and one Thayarammal in 1981. The first respondent leased out the suit property to the fourth defendant under an oral lease agreement in August 1982. Since the first respondent

received a legal notice from the appellant's Advocate claiming joint ownership, he filed the suit for the aforesaid reliefs. Subsequently, the plaint was amended transposing the second respondent as the second plaintiff and including certain averments that the said Thayarammal had filed the suit O.S.No.726 of 1987 and had obtained a preliminary decree and that, final decree on the foot of the mortgage deed and that, she had brought the suit property to sale and that, the second respondent had purchased the suit property in the Court auction sale held on 15-04-1989, which was duly confirmed and that the sale certificate was also issued. When the second respondent went to take delivery of the suit property the appellant and the fourth defendant, who is the fourth respondent raised obstruction. The suit was decreed and delivery was ordered. Against that an appeal and C.M.A were filed, and they failed. Therefore, the present two appeals have been filed.

2. Mr. Viswanathan, learned counsel for the appellant would submit that the property was never intended to be the exclusive property of the first respondent. Valuable property had deliberately been sold by the first respondent to the second respondent herein to defeat the rights of the co-owners. Both the Courts had totally failed to appreciate the evidence of the respondents. It is the case of the first respondent in the plaint that was originally filed, that the appellant was in possession as a cultivating tenant. The Court below had rejected that there was a tenancy agreement. While doing so, it failed to render a correct finding regarding the nature of possession of the appellant. It was not the first respondent's case that the appellant was an encroacher. If the appellant's possession is neither illegal nor traceable to a tenancy agreement, then it follows his possession is as a co-owner. The explanation given by the appellant for the attestation of the sale deeds were wrongly rejected by the Court below. The parties are poor agriculturists, and may not have formal proof of their possession. He would also submit that Ex-B3 notice would show that the case of the respondents is that the appellant is a cultivating tenant. Therefore, according to the learned counsel, if he is a cultivating tenant, then he can only be evicted in accordance with the provisions of Act 25/55. But if they are not cultivating tenants then they are co-owners and suit cannot be decreed. The learned counsel would therefore, pray that the judgment and decree of the Court below be set aside.

3. The learned counsel for the respondent on the other hand would submit that the case of the cultivating tenancy itself was set up by the first respondent only so that the second respondent would be prevented from getting possession of the property which was purchased in the Court auction sale. He would submit that the appellant cannot sustain two conflicting characters of possession one as a joint family owner and the other as the cultivating tenant, the two cannot co-exist. It was submitted that there was absolutely no proof of joint family funds. The appellant knew fully well that the property belongs exclusively to the first respondent who pass his title and interest in the property free of any encumbrance. The first defendant, the father had attested the sale deed in

favour of Vanajakshi and therefore, the appellant was stopped from disputing the title of the first respondent. It is not open to the appellant to claim that they had any right in the suit property either as joint owners or as tenants. Ex-B3 notice was brought about to defeat the legal rights of the respondents. The concurrent findings of fact that the property is not family properties cannot be easily reversed in second appeal. He would also submit that the appellant cannot claim any relief on the basis of Ex-B3 notice because his case is that he is a co-owner and no person can be a co-owner and a tenant at the same time. Therefore, the appeals shall be dismissed.

4. The substantial question of law that was framed at the time of admission of the second appeal is:

"Whether the Court below erred in holding that the suit property is not the joint family property of the 1st defendant, notwithstanding the admission of D.W.2, the vendor under Ex-A10 ?"

and in the C.M.S.A. :

"1) Whether the lower Appellate Court erred in law in directing delivery of possession of the land in the occupation of the appellant herein, who is a cultivating tenant, when under Order 21 Rule 35 CPC only symbolical delivery can be effected?

2) Whether the jurisdiction of the Civil Court is barred under Sec.6 of the Tamilnadu Cultivating Tenants Protection Act 1955 which provides that notwithstanding any decree of the civil court, the party has to apply to the Revenue Court for eviction of the tenant?"

4. The dates and events are relevant to decide this case:

03-03-1978 - Purchase of the suit property by the 1st respondent, Ex-A10

25-09-1981 - sale deed Ex-A3 in favour of the respondent's wife attested by the father of the appellants.

14-06-1982 - mortgage of the remaining half in favour of Thayarammal.

31-01-1983 - Ex-B3 notice.

1983 - present suit.

1985 - suit filed by Thayarammal (decreed ex parte)

15-04-1987 - Court auction sale

16-06-1987 - sale confirmed in favour of respondent herein

5. It is the case of the appellants that valuable joint family property had been parted with for a very nominal price because of collusion between the respondent and the first plaintiff. Whereas the respondent would submit that it is evident that the brothers were colluding to defeat his rights.

6. The question whether the property is joint family property has been discussed in detail by both the Courts below. The Courts below have appreciated the evidence and found that the appellants have not given any evidence with regard to either ancestral nucleus or existence of joint family funds for purchase of the suit property. The evidence of P.W.3 is that there was no property belonging to their grandfather and that their father had not purchased any land, that, there was no house in the name of their father and there was no income from door No.12 and so on. Therefore, on a total reading of the evidence of D.W.1 and D.W.3, the correct conclusion is that there were no joint funds for purchase of the suit property. Though the witnesses would say that their father was cultivating land as a tenant they would admit that there was no record for the same. Further the evidence of D.W.1 is that, after Ex-A10, the sale deed, it was the first respondent who received the title deeds. If it was intended to be a joint family property either the father, who was the first defendant or the appellant herein, the elder brother would have received the title deeds. It is also relevant to note that D.W.3 is the first son of the first defendant. The first respondent is only the junior son. There are materials to show that he was in the Army and thereafter, he was a mechanic. In fact in the plaint it is stated that because he was working as a mechanic he could not cultivate the property directly. Another circumstance, which supports the case that the property is the self-acquired property of the first respondent is the fact that the first defendant had attested Ex-A3, the sale deed in favour of Vanajakshi Ammal, the wife of the respondent. Ex-A5 shows that the chitta extract is in the name of the first respondent. Ex-A6 is the Adangal extract for fasli 1397. Ex-A7, is the mortgage deed executed by the first respondent to the 2nd respondent herein. Therefore, it is clear from this that the first respondent had been treating the suit property as his own by alienating a portion thereof and by creating encumbrance of the property. No objection has been raised by the appellant to Ex-A3. If the property purchased under Ex-A10 was truly a joint family property, the co-owners would have taken steps to set aside this transaction. It is well-settled that there is no presumption that a joint family possesses joint property and if a party claims a particular property to be joint family property the burden of proving that it is so rests on him.

7. In *Muniappa Naicker Vs. Balakrishna Naicker* 1988 II LW 259 certain broad principles were highlighted. Among them the following are relevant to this case:

(1) A Hindu family is presumed to be joint. But at the same time, there is no presumption that the joint family is possessed of joint family properties even in such cases presumption will arise.

(2) Members of a joint family can without disturbing the status of the joint family acquire certain property.

(3) Burden of proving the property as joint family is on the person who claims it to be so and only when possession of nucleus is admitted or proved and when nucleus is adequate, the onus shifts on to the person who claims the property as

self acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

In this case the appellant had not discharged the burden that the property is joint family property.

8. The next question is whether the Civil Court has jurisdiction to evict a cultivating tenant. In this case, the first respondent claimed that the appellant was his cultivating tenant and prayed for possession. Pending the suit, the second respondent, who is the Court auction purchaser was impleaded as the sixth defendant and thereafter, he was transposed as the second plaintiff. Both the Courts below disbelieved the case of cultivating tenancy. On behalf of the appellant it was urged that when they claimed to be joint owners and the plaintiff had filed a case on the ground that they were only cultivating tenants, if their possession cannot be traced by a tenancy agreement then their case of co-ownership must be accepted or if this Court accepts that they are cultivating tenants then the Civil Court cannot evict them in view of the provision of Act 25/55. One has come across suits for recovery of possession resisted by the defendant claiming cultivating tenant's rights, which is denied by the plaintiff. In this case there is a quixotic situation where the plaintiff claimed that the defendants are cultivating tenants and the defendants denied that they are cultivating tenants and now seek the assistance of the Civil Court for protection under the Act.

9. In *Palani Ammal Vs. Viswanatha Chettiar (dead) and others*, :which arose out of proceedings under the Madras City Tenants' Protection Act, the Supreme Court held that the scheme of the protection Act furnishes an umbrella of statutory protection to the tenants of open lands who might have put up construction by incurring substantial costs. It was further held that, Section 9 of the Act will apply only when there is an admitted relationship of landlord and tenant, contractual or statutory, between the parties, and once such relationship is contra-indicated by denial of title of landlord by the tenant, Section 9 will become inoperative.

10. In *Chinnamuthu Gounder and Others, etc. Vs. P.A.S. Perumal Chettiar*, : it was held that the appellants having denied the title of the landlord became disentitled to the benefits of the Act. The Act under question being the Madras Estates Land Act.

11. In *Veeramalai Vs. Murugesan* 1999 I LW 309, the plaintiffs sought for recovery of possession. In the written statement it was contended that he was a cultivating tenant. In that case this Court took note of the denial of title in the written statement and instead of driving the landlord to file a separate suit which will amount to giving premium to the person who violates the contract, and held that the Court can mould the relief and grant a decree for recovery of possession.

12. In that reliance was placed on *Chinnamuthu Gounder and Others, etc. Vs. P.A.S. Perumal Chettiar*, : where it was held that Section 6(A) of the Act was

applicable only to those persons who had not only proved that they are cultivating tenants but also they are entitled to the benefits of the Act.

13. In *Rajeswari Vs. Dhanammal* 1994 I MLJ 401 it was held that the principle that one party cannot abandon his own case and claim relief on the basis of the other party's plea is not applicable where one party does not seek relief on the basis of the plea of the other party but only on the facts established on record, that they are at variance with his own pleadings. For this reliance was placed on *Madhavan Vs. Kannammal* 1990 II LW 274. In that case, the question relates to the title to the suit property. The plaintiffs traced their title to an earlier partition. This case was not accepted by the Court whereas the plaintiffs were actually entitled to a property by virtue of a Will. The Trial Court dismissed the suit on the ground that the plaintiff has not traced their title through the Will. The Appellate Court reversed the judgment on the ground that the plaintiff had not traced their title in a proper way. In the above decision, the learned Judge held that it would not be proper for the Court to refuse relief on a technical ground when the Courts of law have the power to grant relief which would be warranted by the facts of the case which are established by indisputable records even though they are not exactly proved by the parties.

14. In this case, the sequence of events clearly shows that the first respondent has played a devious game. He had created mortgagee on the suit property. He allowed the suit by the mortgage to be decreed ex parte. In the mean time he filed a suit for recovery of possession against his own brothers introducing a case of cultivating tenancy. Then he abandons his suit. The second respondent has to get transposed to protect his rights. All along the appellant had denied that he was a cultivating tenant. His claim is that he was a co-owner. It has been proved that he was not co-owner. There is absolutely no proof that he was a cultivating tenant. When the appellant himself denies that he is a cultivating tenant he cannot seek the protection of the Act. The case of collusion between the first respondent and the second respondent cannot be believed because even as early as 1981, the first respondent had asserted his rights as the sole owner of the properties and had sold it to Vanajakshi ammal. The appellant cannot claim co-ownership of this property nor cultivating tenant's rights. He cannot obstruct the delivery of possession.

15. In these circumstances, the judgments of the Courts below is confirmed. The substantial questions of law are answered against the appellant. The second appeals stands dismissed.