

(1995) 12 MAD CK 0038

In the Madras High Court

Case No : O.S.A. No's. 305 to 307 of 1995

K. Mariappan and Others

APPELLANT

Vs

Chennaivazh Nadargal Sangam and Others

RESPONDENT

Date of Decision : 01-12-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Evidence Act, 1872 — Section 114

Citation : (1996) 1 CTC 148

Hon'ble Judges : Srinivasan, J;S.S. Subramani, J

Bench : Division Bench

Advocate : P. Gopalan, for the Appellant; V. Shanmugham, for the Respondent

Final Decision : Allowed

Judgement

Srinivasan, J.—These appeals arise out of inter-locutory applications in two suits O.S. Nos. 1566 and 1567 of 1994 on the original side of

this Court. O.S.A. No. 305 of 1995 is against O.A. No. 1074 of 1994 in C.S. No. 1567 of 1994. O.S.A. Nos. 306 and 307 of 1995 are against

O.A. Nos. 1075 and 6154 of 1994 respectively in C.S. No. 1566 of 1994. The parties will be referred to hereinafter by their rank in the suits.

2. C.S. No. 1566 of 1994 is for declaration that the plaintiffs are the absolute owners of the schedule mentioned properties and for consequential

injunction restraining the first defendant and his agents etc., from in any manner interfering with the possession and enjoyment of the schedule

mentioned properties. The subject matter of the suit comprises three items of dry land of an extent of 2.56 acres in Survey No. 10/2, 3.76 acres in

Survey No. 41 and 1.40 acres in Survey No. 43/1, taking a total of 7.72 acres in Thandalkalani village. Saidapet Taluk, Chengai M.G.R. District.

Items 2 and 3 of the said properties were purchased on 5.12.1975 by the first plaintiff from the second defendant who is the father of the first defendant. Item No. 1 was purchased on 28.9.1979 by the first plaintiff from the second defendant. By a deed dated 9.12.1983, the President of the first plaintiff Sangam created the second plaintiff Trust. The administration of the Trust is governed by a scheme framed by the District Court, Chingleput in O.S. No. 145 of 1987. The plaintiffs purchased several other properties adjacent to the suit properties and erected superstructures thereon, though admittedly the suit properties remained vacant lands. According to the plaintiffs, the entire properties of an extent of 35.50 acres belonging to them are enclosed by a fence with a gate for having access. It is the case of the plaintiffs that they are in possession and enjoyment of the said properties including the suit properties.

3. In C.S. No. 1567 of 1994, the prayer is for declaring the title of the plaintiff to the suit property viz., dry land of an extent of 2.04 acres in

Survey No. 19 in Tandalkalani Village, Ponncri Taluk, Chengai M.G.R. District and for consequential injunction restraining the defendants from

interfering with the possession and enjoyment of the plaintiff. According to the plaintiff, the property was purchased from the second defendant

under sale deed dated 19.3.1979. The plaintiff claims to have raised eucalyptus trees by enclosing the land with fence.

4. It should be noted that defendants 1 and 2 in both the suits are the same persons being the son and the father. In C.S. No. 1567 of 1994, the

plaintiff filed O.A. No. 1074 of 1994 for injunction restraining the defendants from interfering with the plaintiff's possession pending disposal of the

suit. In the other suit, the plaintiffs filed O.A. No. 1075 of 1994 for a similar relief of injunction and O.A. No. 6154 of 1994 for appointment of

Advocate- Commissioner to make local inspection of the suit properties for noting the physical features and the features of possession.

5. The defence in short raised by the defendants in both the suits is that the properties involved in these two suits were ancestral family properties

belonging to the first defendant and his father, the second defendant. The first defendant filed C.S. No. 130 of 1979 on the file of this Court on

28.2.1979 for partition and separate possession of one half share in the properties set out in the schedule thereto which included the present suit

properties. The second defendant in the present suit was the first defendant in that suit. According to the first defendant herein, the third defendant in that suit is the first plaintiff in C.S. No. 1566 of 1994. Defendants 1 and 3 in the said suit received summons therein and remained ex parte. A preliminary decree was passed on merits on 4.1.1984. The first defendant, who was a minor at the time of the institution of the said suit represented by his mother after attaining majority got himself declared major and got the decree consequently amended. He applied for final decree and, after service of notice on the defendants therein, the Court passed a final decree on 26.8.1988. The first defendant got the decree transferred to the Sub Court, Poonamallee for execution purposes, which in turn, transferred it to the Court of the District Munsif, Ponneri. In the execution proceedings, the defendants, after receiving notice remained absent and delivery was ordered. The second plaintiff filed O.A. No. 361 of 1989 in O.P. No. 2 of 1989 in the executing Court for re-delivery of the properties involved in both the present suits. That application was contested and it was dismissed later as not pressed. The second plaintiff, however, filed O.A. No. 999 of 1989 u/s 47 of the CPC for dismissal of the execution petition on the various grounds not out therein. That application was contested and dismissed on merits on 18.8.1994. The contentions urged by the applicant therein were found against by the executing Court. It was also found that the properties had already been delivered actually by the bailiff of the Court to the decree-holder. Thereafter, the present suits have been filed. It is the contention of the first defendant that after having taken possession of the suit properties in 1989, he has alienated the same in favour of the other defendants who have since been impleaded in the present suits as defendants 3 to 7 in C.S. No. 1567 of 1994. In so far as the applications are concerned, the contention of the defendants is that they are in possession and the prayer for injunction is not sustainable. It is also their contention that there is no ground for appointing a Commissioner to note the physical features as the plaintiffs are not in possession.

6. It is the case of the plaintiffs that the decree in C.S. No. 130 of 1979 is vitiated by fraud and collusion and that the plaintiffs therein are not entitled to any right in the property. According to them, the properties were exclusive properties of the father, the second defendant in the present

suit. It is also their contention that the first defendant had deliberately omitted to implead the plaintiffs herein as parties to the suit for partition and

that a non-existent person was shown as the third defendant. It is their contention that the decree and the further proceedings in C.S. No. 130 of

1979 are null and void. It is also their contention that there was only a symbolic delivery in favour of the first defendant in the execution

proceedings and the plaintiffs continued to be in actual possession throughout.

7. The learned Judge has granted the prayers of the plaintiff in all the three applications. Aggrieved thereby, the contesting defendants have

preferred these three appeals.

8. We have set out above the respective contentions of the parties to the extent necessary for the purpose of these appeals. We must also point

out that the pleadings in the two suits as well as the affidavits and counter-affidavits in the applications have been extracted in detail by the learned

Judge in his judgment in paragraphs 1 to 11 thereof, though the paragraphs are not numbered after the fourth paragraph. That is also a reason why

we do not think it necessary to repeat all the contentions of the parties in this judgment. In paragraph 1, the learned Judge has referred to the

arguments on both sides and intermittently made some observations as if they are his conclusions. With respect to the description of the third

defendant in C.S. No. 130 of 1979, the learned Judge has after adverting to the argument of the plaintiffs' counsel observed that there is some

force in the contention that proper person was not made a party in C.S. No. 130 of 1979. But, the learned Judge has not chosen to give even a

prima facie finding for the purpose of supporting his order. After referring to some more arguments advanced on both sides, the learned Judge has

stated thus:

It is no doubt true that the second plaintiff in C.S. No. 1566 of 1994 has filed an application u/s 47 of the CPC and it has been dismissed after

enquiry by the learned District Munsif, Ponneri. The records would show that subsequent to the dismissal of the application the Amin of the Court

has delivered vacant possession of the property which is the subject matter of the suit in C.S. No. 156 of 1994.

9. In so far as the above passage in the judgment is concerned, the learned Judge is right in observing that the application u/s 47 of the CPC filed

by the second plaintiff was dismissed after enquiry. But, the learned Judge failed to notice that the delivery of possession by the Amin was long

prior to the said order of dismissal and that the executing Court has found as a matter of fact in that order that possession had been delivered to the

decree-holder by the Amin. It is to be noted that the Amin was examined as a Court witness in the said proceeding and the records relating to

delivery were marked as Court exhibits. It may be mentioned here that delivery was effected as early as on 1.3.1989 and the Amin filed a report

to that effect in Court. The learned Judge is also in error in thinking that the said delivery was only of the subject matter of C.S. No. 1566 of 1994.

He has ever-looked that the delivery was of all the properties allotted in the final decree to the plaintiff therein who is the first defendant in the

present suits. Thus, there is a Court record to show that actual delivery was effected in 1989 to the first defendant of the properties involved in

both the present suits and the same was accepted by the executing Court to be true in a proceeding initiated by the second plaintiff in C.S. No.

1566 of 1994 after adverting to the evidence recorded in that proceeding to prove the said delivery.

10. The only question which is relevant at this interlocutory stage in an application for injunction restraining the defendants from interfering with the

possession of the plaintiffs is whether the plaintiffs are in possession as alleged by them, Unless the plaintiffs prove prima facie that they are in

possession, no order of injunction can be granted in their favour. Even if the possession of the defendants is illegal and unlawful, there cannot be an

order of injunction by the Court in favour of a person who is not in possession, even if, that person is the true owner.

11. Unfortunately, the learned trial Judge has over-looked this aspect of the matter and proceeded to grant an order in favour of the plaintiffs

without even giving a prime facie finding that they are in possession of the suit properties. After referring to the claim of the plaintiffs that they are in

possession of the suit properties. After referring to the claim of the plaintiffs that they are in possession of the property and the production of

certain photographs by them showing the performance of "Boomi Pooja" for putting up superstructures, the learned Judge has observed that the

question whether the plaintiff has acquired title is a serious disputed question to be tried in the suit. Apart from referring to the allegations of

possession made by the plaintiffs, the learned Judge has not chosen to give a finding that he has come to a prima facie conclusion in their favour in that regard. Then, the learned Judge has proceeded to refer to the principle of law that a compromise decree made in a suit excludes the application of Section 52 of the Transfer of Property Act. We are at a loss to know how and why the learned Judge has referred to the said principle. Probably, he has been under a wrong impression that the decree in C.S. No. 130 of 1979 is a compromise decree. The learned Judge makes a statement that the decree obtained in C.S. No. 130 of 1979 is obtained by the allegations of fraud and collusion and, therefore, Section 52 of the Transfer of Property Act cannot be said to be applicable. In our opinion, the said observations are wholly unwarranted and there is no material at present before the Court to draw any inference that the decree in C.S. No. 130 of 1979 is vitiated by fraud or collusion. The learned Judge has proceeded to observe that the Court's interference is necessary to protect the applicants from sustaining irreparable injury or damages until they got their legal right established in the trial. The learned Judge has also stated that if the injunction is vacated and the first defendant is allowed to enter into the suit property in which there are massive constructions put up by the plaintiff for the purpose of running a polytechnic and where the applicants have claimed to have raised more than 2000 eucalyptus trees, the relative hardship which could be caused to the plaintiff will outweigh the advantage which the first defendant would derive, if injunction is not granted. The above observations are again unwarranted and unrelated to the facts of the case.

12. Obviously, the learned Judge has assumed that there are massive constructions put up by the plaintiffs in the suit properties overlooking the fact that admittedly the suit properties are vacant dry lands. According to the plaintiffs, the constructions are only in the adjacent lands purchased by them from other parties. In so far as the suit properties are concerned, their only case is that they have performed "Boomi Pooja" with a view to put up constructions. But, they have come forward with an inconsistent case even on that aspect of the matter. They have produced certain photographs to prove the performance of "Boomi Pooja". The learned Judge would appear to have taken the photographs for granted over-

looking the material discrepancy in the case put forward by the plaintiffs in their affidavit. In Application No. 6154 of 1994, the Secretary of the

first plaintiff Association has filed the affidavit. It is stated by him in paragraph 5 that "Boomi Pooja" was performed on 14.9.1994 in survey No.

41 for putting up additional constructions. In paragraph 6, he has stated that the photographs were taken on 20.10.1994 to prove that the lands

are in possession of the plaintiffs. The two averments show that the photographs were not taken on the date of the "Boomi Pooja" or at the time of

performance of "Boomi Pooja". Admittedly, the photographs were taken about a month and 6 days after the alleged performance of "Boomi

Pooja" and they cannot be accepted to be true without further evidence on the side of the plaintiffs or an explanation on their part with regard to

the discrepancy. There is also no evidence at present to show that the plaintiffs have raised 2000 eucalyptus trees in the suit properties. The report

of the Amin shows that he delivered the suit properties with 200 eucalyptus plants in survey No. 19. Suffice it to point out that as against a Court

record which has been found to be true in a contested proceeding to which the second plaintiff is a party, the plaintiffs have not produced any

acceptable record to establish prima facie their possession of the suit properties. It is needless to point out that the presumption u/s 114(e) of the

Indian Evidence Act will apply in this case and there is no material at present to rebut the same.

13. As regards the application for appointment of Commissioner, the learned Judge has taken the view that no prejudice would be caused to the

defendants on account of the inspection by Advocate-Commissioner and a Commissioner is necessary not only to note down the physical features,

but also, the physical possession of the suit properties. Learned counsel for the plaintiffs has fairly stated that there cannot be a commission for

noting the possession of the properties and to that extent, he is not supporting the order of the learned Judge. In the view we have taken on the

question of possession, there is no necessity or justification for appointing and Advocate- Commissioner to note the physical features.

14. We have no hesitation to hold that the plaintiffs have not made out a prima facie case of possession being with them. As per the available

records, the first defendant had taken possession even in 1989 through Court and he has passed on the same to the persons who are purchasers

from him subsequently.

15. Learned counsel for the plaintiffs has placed reliance on a judgment of the Supreme Court in S.P. Chengalvaraya Naidu v. Jagannath (1994) 1

SCC and contended that a judgment or decree obtained by playing fraud on the Court is a nullity and non est in the eyes of law. The proposition

will not apply in this case at present. It is for the plaintiffs to prove in the trial that the decree in C.S. No. 130 of 1979 is vitiated by fraud or

collusion. It is not a question which can be decided at this interlocutory stage as the materials placed before us are not sufficient. We may also

point out that the mere fact that the third defendant in C.S. No. 130 of 1979 was wrongly described will not lead to a conclusion that the plaintiff

therein played a fraud on the Court. It should not be forgotten that it may be a case of mere mis-description as all the details given in the

description of the third defendant fit in with the first plaintiff excepting the fact that the word "school" has been used instead of the word "college". It

is also not in dispute that the person in management of the first plaintiff at that time was A. L. Srinivasa Nadar who was described to be the

manager of the Managing board in C.S. No. 130 of 1979. There is also no dispute about the address of the said person at which he was served

with the summons in the said suit and the notices in all the subsequent proceedings including the execution proceedings.

16. Our attention is drawn to the judgments of the Supreme Court in Wander Ltd. and Anr. v. Antox India P. Ltd., 1990 SCC 727 and Dalpat

Kumar and Another Vs. Prahlad Singh and Others, and the Judgment of this Bench in Vijay Lalchand HUF and Another Vs. K.M. Lulls HUF, .

All those judgments set out the general principles on which applications for injunction should be considered as well as the duty of the appellate

Court in such matters. As has been held by the Supreme Court in Wander's case (Supp) 1990 SCC 727, if the trial Court has ignored the settled

principles of law regulating grant or refusal of interlocutory applications, the appellate Court can interfere. In this case, the trial Judge has entirely

forgotten the only question which is relevant for consideration in this matter viz., the question of possession.

17. As regards the appointment of Commissioner, learned counsel for the plaintiffs places reliance on Amulya Kumar Samaddar and Others Vs.

Annada Charan Das and Others, and S KUPPUSWAMI Vs. COMMISSIONER OF Income Tax, MADRAS. OCTOBER 20, 1953., . It is

contended that a Commissioner can be appointed to note the physical features under Order XXVI Rule 9 of the Code of Civil Procedure. It is a

matter which depends on the facts of each case. In this case, in view of our prima facie finding on the question of possession, there is no necessity

or justification for appointing an Advocate-Commissioner at this state. Hence, the two rulings have no bearing in this case.

18. In the result, the order passed by the learned Judge in the applications is not sustainable and it is set aside. The appeals are allowed. The

applications O.A No. 1074 of 1994 in C.S. No. 1567 of 1994 and O.A. No. 1075 of 1994 and O.A. No. 6154 of 1994 in C.S. No. 1566 of

1994 are dismissed. There will be no order as to costs.