

(2009) 03 MAD CK 0016

In the Madras High Court

Case No : S.A. No's. 1205 and 1206 of 2008 and M.P. No. 1 of 2008

L. Pushpalingam, L. Pushpa and L. Radha (deceased)

APPELLANT

Vs

R. Arumugam

RESPONDENT

Date of Decision : 30-03-2009

Acts Referred:

Citation : (2009) 5 MLJ 263

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : M. Vivekanandan, for the Appellant; K.P. Gopalakrishnan, for the Respondent

Judgement

G. Rajasuria, J.—The respondent in both the second appeals, namely, Arumugam, as plaintiff, filed the original suit, initially for declaration,

so as to get declared that he was entitled to 5 cents of land. But, subsequently, the plaint got amended so as to get declared that the plaintiff was

entitled to an extent of 5.75 cents of land.

2. The trial Court decreed the suit partly by declaring that the plaintiff was entitled to an extent of 5 cents of land in the ""A"" scheduled property and

also ordered injunction in respect of the entire ""A"" scheduled property and dismissed the suit in respect of the rest of the prayer, which was one for

recovery of possession of the ""B"" scheduled property measuring an extent of 0.75 cents of land.

3. Being aggrieved by the judgement of the trial court both the plaintiff and the defendants preferred appeals. The plaintiff preferred appeal A.S.

No. 327 of 2005 as against the dismissal of the prayer relating to ""B"" scheduled property, whereas the defendants filed the appeal A.S. No. 330

of 2006 even relating to grant of relief in respect of the said 5 cents of lands. The Appellate court by its common judgement, dismissed the appeal

filed by the defendants and allowed the appeal preferred by the plaintiff, by holding that the plaintiff was entitled to the reliefs in toto as prayed for

in the plaint.

4. Being disconcerted and aggrieved by the common judgement rendered by the first Appellate Court, these two second appeals have been

focussed by the defendants on various grounds including the common following proposed substantial questions of law.

a) Whether the judgement of the lower appellate Court in reversing the judgement of the trial Court by misconstruing Ex.B3 as title document in

favour of the plaintiff is maintainable in law?

b) Whether the respondent is entitled for a declaration and permanent injunction in respect of "A" schedule property based on the mere fact that

the respondent mother same found in the list of occupants as against the land owner who is not at all party to the suit.

c) Whether the respondent is entitled for mandatory injunction with respect of "B" schedule property which is not a part of Ex.B3 document?

d) Whether Ex.P1 settlement deed for 5.75 cents in favour of respondent son is valid in the eyes of law?

e) Whether the lower appellate Court is right in not discussing the case of the appellants in its judgement and state the reasoning for the decree?

f) Whether the lower appellate Court is right in reproducing the written arguments filed by the respondent Counsel as judgement?

5. After hearing for some time the arguments on both sides, this Court felt that with the consent of both sides, both these matters could be disposed

of finally by framing the following substantial questions of law.

1. Whether the First Appellate Court was justified in giving a finding that plaintiff is entitled to 5.75 cents as against 5 cents of land contemplated in

Ex.A3?

2. Whether the First Appellate Court correctly understood the concept burden of proof and applied the same in adjudging the appeals?

3. Whether the plaintiff's plea that the defendant is not entitled to S. No. 54 and therefore the defendant was not justified in taking defence as

against the plaintiff was correctly appreciated by the First Appellate Court?

4. Whether the judgements of both the Courts below are fraught with perversity?

Heard both sides on these substantial questions of law.

6. A bare poring over and perusal of the typed set of papers, including the copies of the judgements of both the Courts below, would display and

demonstrate, highlight and spotlight the fact that the plaintiff-Arumugam filed the suit on the main ground that by virtue of Ex.A1-the settlement

deed dated 17.02.1973 executed by his mother-Kuppammal in his favour, on the strength of the Settlement records, he is the absolute owner of

the suit property; in fact in para No. 3, the precise contention of the plaintiff was that originally the suit property, which is described as ""A

Scheduled property, which is extracted here under:

House and ground bearing Door No. 8/1, Vinayagarkoil Street, Velachery Road, Guindy, Madras-32, measuring North to South on the Eastern

side 26"" and on the Western side 20'6"". East to West on the Northern side 104"" and on the Southern side 108"" admeasuring 2464 sq.ft. bounded

on the North by land belonging to David, Devanesan and Lakshmanan and the South by Muthumari Ammal Koil Street Lane, on the East by

Government poramboke land, the West by Vinayagar Koil Street, situated in T.S. No. 54, Block No. 3 of Adyar Madura Venkatapuram Village,

Corporation Division No. 119, within the Saidapet Sub Registration District, originally belonged to his father and it devolved upon his mother

Kuppammal, who in turn, executed the deed of Settlement dated 17.02.1973-Ex.A1 in favour of the plaintiff; according to the plaintiff, the

defendants encroached into the ""B"" scheduled property, which is described here under:

All that piece and parcel of vacant land measuring 5.5. feet North to South and 32.5 feet east to west bounded on the east, south west by the

plaintiff's property and north the property bearing the present door number 11 of Vinayagar Koil Street and forming part of the land more fully

described in the Schedule ""A"" hereinabove.

The B scheduled property, as per plaintiff's version, forms part of the ""A"" scheduled property.

7. The main contention of the defendants is that at no point of time, the plaintiff or his mother owned and enjoyed an extent of 5.75 cents of land as

found described in the ""A"" schedule of the plaint and consequently, there

cannot be any ""B"" schedule of property at all, over which, the plaintiff could claim right.

8. The learned Counsel for the defendants also would convincingly and appropriately draw the attention of this Court to Ex.A3, the Proceedings of the Assistant Settlement Officer, Madras in SR.Nos.1 to 32 of Block Nos. 3 and 6/ Zamin Venkatapuram Village, dated 11.5.1959. In the said proceedings, there is not even any reference that Kuppammal had any right over the suit property. However, there is an indication that Kuppammal was in possession of Survey No. 54 measuring an extent of 5 cents, over which a thatched roof house was found existing. Learned Counsel for the defendants would submit that at the most, the plaintiff could lay claim over the said 5 cents of land and not to an extent of 5.75 cents of land. In other words, there could not be any claim over the ""B"" scheduled property referred to supra.

9. Whereas the learned Counsel for the plaintiff would advance his argument to the effect that the plaintiff's mother Kuppammal was in possession and enjoyment of an extent of 5.75 cents of land and it is fortified by Ex.A3. However, in Ex.A3, the extent mentioned is only 5 cents and not 5.75 cents. This is a crucial fact. By way of expounding and explaining away the discrepancy on the plaintiff's side, it was contented as though the defendants had no right at all in Survey No. 54, over which Kuppammal's right was recognised as an occupier even in Ex.A3-the settlement proceedings. No doubt, from a deep analysis of the records as well as the arguments advanced on the side of the defendants, it could be understood that there is no record to demonstrate that the defendants had any right over survey No. 54. But, they had right over the land in survey No. 53, which is adjacent to the survey No. 54.

10. The learned Counsel for the defendants, by drawing the attention of this Court to Ex.B1- the previous proceedings filed before the City Civil Court, Madras, in E.P.No.283/73 in O.S. No. 3951 of 1964, which emerged between the following parties, viz.,
M. Lakshmanan by L.Rs. 1. L. Pushpalingam, 2. L. Saraswathi, 3. L. Radha and 4. L. Pushpam

and

1. Kuppammal, 2. M. Devanesan by L.Rs. 3. Dhanalakshmi, 4. Jayaraman, 5.

Daya Nidhi, 6. Santhi and 7. Kasturi

would develop his argument that Kuppammal was very much a party in that proceeding and as per Ex.B2-Sketch, Kuppammal was evicted from

her holding in that E.P. scheduled mentioned property, which is described here under:

Piece or parcel of land in 8, Vinayagar Koil Street, Guindy, Madras measuring East to West 60" and North to South 10" bounded on the North

by vacant land South by portion allotted to Devanesan East by Vinayagar Koil Street, West by Open space and vacant land and situated within

the registration Sub-District of Saidapet and Reg. District of Madras.

11. The learned Counsel for the defendants would point out that the said E.P. scheduled mentioned property was in survey No. 53 and the

southern boundaries are mentioned as "the south by Survey No. 54" and there is some discrepancy in describing the property. However, he would

clarify that in Ex.B4-the lawyer's notice, Kuppammal's Advocate himself sets out the following boundaries:

2. That the said Lakshmanan filed a suit O.S. No. 3951/64 on the file of VI Assistant City Civil Judge, Madras, against my client and M.

Devanesan for a partition of the property, i.e. premises bearing door No. 8, Vinayagar Koil Street, Velachery Road, Guindy, Madras-32,

bounded on the West by the Street, on the North by Vinayagar Koil, on the East by Poramboke Land of Mariamman Koil and on the South by

Pavalakodi Ammal's House and measuring North to South 40" and East to West and comprised in S.No.53 in Block No. 3 and situate within the

Registration Sub-District of Saidapet and the Registration District of Madras, Chingleput.

relating to the said E. P. mentioned property. It is therefore clear that in the previous proceedings, it is shown that South of survey No. 53 was

survey No. 54.

12. The learned Counsel for the defendants would invite the attention of this Court to paragraph 19 of the judgement of the first appellate Court

and submit that the lower Court was wrong in construing as though as per Ex.A3, Kuppammal was entitled to an extent of 5.75 cents of land in

Survey No. 54. Paragraph 19 of the first appellate Court's judgement is extracted here under for ready reference:

19. The land covered by Survey No. 54 has been clearly shown to be in the possession of the plaintiff's mother Kuppammal even prior to

23.12.1958, the date of commencement of enquiry by the Assistant Settlement Officer, Madras as evidenced by Ex.A3. All along it had been

alleged by the defendants that there is no land available to Kuppammal, the plaintiff's mother in and around the suit, except the land covered by the

Old Suit O.S. No. 3951/64. Having realised that the plaintiff is able to prove his right over the suit property through his mother Kuppammal under

Ex.A3, the defendants have now shifted their defence that the plaintiff has got to approach Jaganatha Babu Naidu and Sundara Babu Naidu for his relief.

13. A plain reading of the above excerpt would clearly indicate and exemplify as to how the first appellate Court misdirected itself in understanding

as though Kuppammal, the plaintiff's mother, was held to be in possession of 5.75 cents of land, as per Ex.A3, when Ex.A3 contemplates only 5

cents of land and not 5.75 cents of land.

14. It appears, the first appellate Court has not taken initiative to verify Ex.A3, which speaks of Kuppammal's possession in an extent of 5 cents

alone. The first appellate Court, in paragraph 25 of its judgement, placing reliance on the Commissioner's report and sketch, held that the

defendants are in occupation of the "B" Scheduled property, which is in Survey No. 54, over which, the defendants are having no right.

15. The approach of the first appellate Court is basically erroneous, on this aspect. It is a trite proposition of law that the plaintiff has to prove his

case. ""Possession is nine points in law"" is the maxim. Here, the plaintiff alone seeks to obtain possession of the "B" scheduled property, over

which, the defendants are in occupation.

16. The first appellate Court was not justified in expecting the defendants to prove the title over the "B" Scheduled property. Even though the

defendants have not established their right over the "B" scheduled property, nonetheless the records would demonstrate that they have been in

possession of the said property. Absolutely there is no clarity as to when the defendants precisely encroached into the "B" Scheduled property.

The plaint is silent about it.

17. A perusal of the plaint would not in any way highlight and spotlight, clarify

and enlighten as to when the defendants trespassed into the "B"

Scheduled property and raised the construction.

18. The first appellate Court, by referring to the proceedings under the earlier partition suit O.S. No. 3951 of 1964, would misdirect itself and

arrive at the conclusion that because the defendants are having no right to occupy any portion in Survey No. 54, they should be dispossessed as

prayed for by the plaintiff. As has been already highlighted supra, I would like to, without being tautologous, point out that the plaintiff should prove

his right over the "B" scheduled property, which admittedly and indubitably according to the finding, is in Survey No. 54. The earlier proceedings

in O.S. No. 3951/64, even as per the finding of the first appellate Court, were relating to Survey No. 53 and not relating to Survey No. 54.

19. The trial Court's judgement clearly highlights that Kuppammal- the mother of the plaintiff, was in occupation of 5 cents of land in Survey No.

54. The trial Court correctly raised the query as to how Kuppammal could have settled validly an extent of 5.75 cents in favour of the plaintiff, as

per Ex.A1, and absolutely there is no answer to that pertinent question raised by the trial Court by the first appellate Court, which reversed such

finding of the trial Court.

20. It is a rudimentary principle of law that the first appellate Court being the last Court of fact, was expected to delve deep into the evidence, both

oral and documentary and in the event of intending to reverse any finding of the trial Court, reasons should be assigned. But in this case, the first

appellate Court, wrongly assumed and presumed as though Ex.A3 recognised Kuppammal was in possession of 5.75 cents of land. In such a

case, the first appellate Court should have raised the point as on what ground Kuppammal could claim right over "B" Scheduled property herein.

Without addressing itself to the main issue, based on burden of proof, the first appellate Court, simply by picking holes in the case of the

defendants, allowed the appeal filed by the plaintiff, warranting interference by this Court in the second appeal.

21. As such, the first substantial question of law is answered to the effect that even though Ex.A3 contemplates the plaintiff's mother-Kuppammal

having been in possession of an extent of 5 cents in Survey No. 54, the first appellate Court wrongly held as though her possession was recognised

in respect of 5.75 cents of land, including the "B" scheduled property, and consequently the first appellate Court wrongly decided the appeal filed by the plaintiff.

22. The learned Counsel appearing for the plaintiff would develop his argument that the defendants, without in any way establishing their right to occupy the suit property, whether could get the suit of the plaintiff dismissed. Such an argument is untenable in view of my discussion supra.

23. Even though the learned Counsel for the defendants would try to put forth an argument to the effect that the entitlement of the defendants under the earlier suit 3951/64 was in Survey No. 53, measuring an extent of 40 feet width, it was shown as only 31 feet in the Commissioner's report, which emerged in the present suit concerned. In my opinion these are all farfetched arguments, which can not be considered in this second appeal, in view of my discussion supra.

24. Accordingly, the substantial question of law No. 3 is answered to the effect that the plaintiff has to stand or fall on the strength of his own pleadings and evidence and not by picking holes in the evidence of the defendants.

25. In view of the ratiocination adhered to above, the second appeal No. 1206 of 2008, which was filed as against the dismissal of the first appeal, by the defendants, is dismissed. Whereas, the second Appeal No. 1205 of 2008 is allowed, setting aside the judgement and decree of the first appellate Court dated 20.10.2006 passed by the Additional District Judge, Fast Track Court No. II, Chennai, in A.S.Nos.327 of 2005 and the judgement and decree of the trial Court is restored. No costs. Consequently, connected miscellaneous petition is closed.