
(1998) 02 MAD CK 0101
In the Madras High Court
Case No : S.A.No. 1166 of 1990

P. Haridoss

APPELLANT

Vs

N. Subbayya Pillai and 3 others

RESPONDENT

Date of Decision : 04-02-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Specific Relief Act, 1963 — Section 36

Citation : (1999) 2 CivCC 139 : (1998) 1 CTC 453 : (1998) 2 MLJ 343

Hon'ble Judges : S. M. Abdul Wahab, J

Bench : Single Bench

Advocate : Mr. S. S. Sundar for Mr. T. R. Rajaraman, for the Appellant; Mr. P. Ananthakrishnan Nair, Mr. P. Peppin Fernando, for the Respondent

Final Decision : Allowed

Judgement

1. The third defendant in O.S.No.424 of 1981 on the file of the Court of the Additional District Munsif, Padmanabhapuram, is the appellant in this Court.

2. The suit was filed for declaration and injunction.

3. The case of the plaintiff is that Survey No.5842 of Aloor Village consisted of two letters, namely, "A" letter having an extent of 60 cents and

"B" letter having 95 cents. The total extent of one acre 55 cents lies together as a single property. It is a joint family property and plaintiff is in

possession of "A" letter. "B" letter is a trust property. The plaintiff is performing ceremonies attached to the trust. The plaintiff was in Indian Army.

He leased out the suit property to one Ayyappan Nair, a friend of the first defendant. He constructed a tea. shop and he is running the business.

Second and third defendants have no right or possession over the suit property.

Since they attempted to trespass into the suit property, the suit was filed.

4. Defendants 1 to 3 have filed a common written statement. "B" letter was a joint family property. Plaintiff cannot claim exclusive possession or right over "B" letter. The defendants are having independent title and they are in possession. First defendant is in possession of 5 cents at the south western corner in the suit property. He is the absolute owner of the same. There is no attempt of trespass by second and third defendants. The other sharers have sold the property to the defendants. They are in legal possession. The suit is bad for non-joinder of other sharers. Originally, the suit property belonged to three brothers. Survey No.5842-A was allotted for common enjoyment.

5. The fourth defendant has filed a separate written statement. He contended that the entire 1 acre 55 cents of "A" and "B" letters in survey No.5842 lie separately in different pieces with boundaries and fences. Defendants 1 to 3 have independent title. First defendant is the absolute owner of 5 cents. Plaintiff is not entitled to represent joint family. The suit is bad for non-joinder of necessary parties. "A" letter belonging to three brothers, namely, Ramaswami, Sivathanu and Perumal. There is no burial ground in the suit property. Three brothers dealt with the properties separately. Fourth defendant, son of Kumaravelu, became entitled to 1/3rd share over 1 acre 52 cents, i.e., 50 and 2/3 cents in suit property.

6. The trial Court framed four issues and two additional issues. After consideration of the evidence the trial Court dismissed the suit. However, on appeal, the lower appellate Court reversed the judgment and decree of the trial Court and granted a decree in favour of the plaintiff. Aggrieved by the same, the third defendant has filed the above second appeal.

7. The main contention urged in the second appeal is whether the sale deed executed in favour of the third defendant under Ex.B-5, dated 13.10.1980 by the fourth defendant and others in respect of 1 acre 10 cents in both "A" and "B" letters is a valid one. The contention urged by the learned counsel for the respondents is that admittedly "B" letter is a trust property, while "A" letter property is a burial ground set apart for the members of the family. Therefore, the sale of these two items covered by Ex.B-5 cannot be valid.

8. The trial Court has given a clear finding as regards the "A" letter property. It simply states that as claimed by fourth defendant, the sharers will be competent to convey their shares in "A" letter. However, it has said that as the defendants 1 to 3 claim right under the other co-sharers, the defendants 1 to 3 cannot be termed as trespasser or stranger. As the co-sharers are necessary parties, and as they are not impleaded, the suit was dismissed by the trial Court.

9. The appellate Court has also stated that Exs.B-2, B4, B5 and B6 have been executed by the fourth defendant and other members of the family.

Then, it is also found that under Ex.A-4 partition, "A" letter property was set apart to be enjoyed in common as graveyard and cremation ground

and "B" letter and other trust properties are set apart for charitable purposes. There arose a suit in O.S.NO.101 of 1110 to set aside certain

alienations in the District Court, Nagercoil and a verdict was given that "B" letter and other items were the trust properties and the partition with

reference to the present "A" letter is valid. A perusal of the said judgment also shows that the partition deed is invalid so far as the trust properties

are concerned. The trust properties were covered by letter "B" in the said suit. The lower Appellate Court has also accepted this position when it

says in paragraphs 8 that the portion with reference to the present "A" letter is valid. If the co-sharers have partition deed, "A" letter property,

when they have conveyed a portion in favour of third defendant under Ex.B-5, the sale will be valid as regards that portion atleast. It is true that

Ex.B-5 covers both portions in "A" and "B" letters.

10. The trial Court, has also found that the plaintiff himself has conveyed a portion of the property which he obtained under Ex.A-4 partition. That

apart, he has also put first defendant in possession of a portion by executing a lease deed in favour of one Ayyappan Nair. There is also no

evidence to show that the "A" letter property said to have been allotted for graveyard was being used as graveyard. In the circumstances, when

the said "A" letter property was partitioned and enjoyed by the co-sharers and a portion of the same is conveyed, it cannot be termed as an invalid

conveyance. That apart, the validity of the sale deed in question, namely, Ex.B-5, cannot be challenged in the absence of a co-sharer who

conveyed. Therefore, I am of the view that the tower appellate Court is not

correct in holding that the sale deed in favour of the third defendant is invalid to the entire extent and not binding on the family of the plaintiff.

11. The learned counsel appearing for the appellant Mr. T.R. Rajaraman cited the following judgments:-

(a) Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another, ; (b) Joseph Costa v. Stanislaus Costs A.I.R.,1968 SC 161; (c) Profulla

Chorone v.Satya Chorone, ; (d) Prithi Vs. Yatinder Kumar and Others,

The learned counsel contended that the suit to recover property from an alienee by a co-sharer is not maintainable in the absence of the co-sharer.

12. In Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another, , the Apex Court has held that the suit by daughter to recover property

from the beneficiary under the will of father without impleading the brothers was not competent for non-joinder of necessary parties. In Joseph

Costa v. Stanislaus Costs AIR 1968 SC 161a Bench of this Court has held that the sale after 12 years will not be set aside and the beneficiaries

cannot claim to follow trust property when the purchase was without notice of trust. In Profulla Chorone v. Satya Chorone, , it has been held by the

Apex Court that the suit by trustees was not properly constituted and must be dismissed when all the Shebaites, though necessary parties, were not

impleaded. In Prithi Vs. Yatinder Kumar and Others, the learned single Judge has held that in a suit by other co-owners for declaration that sale to

certain extent was only valid, the vendor-co-owner is a necessary party.

13. From the aforesaid judgments, the case of the third defendant is strengthened, because, in the suit what we find in substance is that the sale in

his favour by some of the co-sharers is under challenge by one co-sharer, namely, the plaintiff in the absence of the co-sharers, who conveyed their

shares to him.

14. The learned counsel for the respondents contended that the suit is maintainable in the absence of the co-sharers as parties. He cited the

following judgments:

(a) Syed Ahamed Sahib v. The Magnesite Syndicate Ltd. 28 M.L.J. 598; (b) Shivangouda v. Gnagawwa, AIR 1967 Mys 14; (c) Ram Niranjana

Das and Another Vs. Loknath Mandal and Others, ; (d) Sri Ram Pasricha Vs. Jagannath and Others, ; (e) Ramachandran & 2 others v.

Valliammal & 2 others 1992 (2) L.W. 470

15. In Syed Ahamed Sahib v. The Magnesite Syndicate Ltd. 28 M.L.J. 598 a Bench of this Court has held that it is open to one of several co-

owners laying claim to a certain property, to institute a suit for an injunction against a trespasser, without impleading the other co-owners. In

Shivangouda v. Gnagawwa AIR 1967 Mys 143 a single Judge of the High Court of Mysore has held that a co-owner can sue to eject trespasser

from property. In Ram Niranjana Das and Another Vs. Loknath Mandal and Others, , a Full Bench of Patna High Court has held that a suit by a

co-owner for possession of property against trespasser is maintainable even when the other co-owners are not impleaded. In Sri Ram Pasricha

Vs. Jagannath and Others, , the Apex Court has held that a co-owner is as much an absolute owner as a sole owner is with reference to the

interest held by him. In Ramachandran & 2 others v. Valliammal & 2 others 1992 (2) L.W. 470 also, a learned single Judge of this Court,

Srinivasan, J, as he then was, has rejected the plea that a suit against trespasser for eviction is not maintainable because of non-joinder of the co-

owners.

16. The proposition laid down in the aforesaid judgments is not at all in dispute. First of all, the third defendant is not a trespasser. He is claiming

the right under Ex.B-5, executed by the co-sharers. The plaintiff, who is a co-sharer cannot challenge the alienations by other co-sharers in their

absence especially after the properties were partitioned.

17. The learned counsel Mr. Ananthakrishnan Nair contended that even though the third defendant has purchased a share in "A" and "B" letter

properties, he was not given any specific share and he has not taken possession of the same. Therefore, he can be prevented by an injunction from

committing trespass.

18. The trial Court has held that the defendants 1 to 3 claim right under the co-sharers and cannot be termed as trespassers or strangers. The

lower appellate Court has held that Exs.B-4, B-5 and B-6 are not valid documents and they are binding on the family of the plaintiff and that they

are not followed by possession. Therefore, the plaintiff is entitled to the decree as prayed for. The trial Court has held that it cannot be said

certainly that second and third defendants have got possession of the areas

covered under sale deeds obtained by them. As regards possession, the lower appellate Court has held that defendants 1 to 3 have not examined themselves to prove the possession and they have not produced tax receipts also. Even though the appellate Court has found that the third defendant is not in possession of the suit property, it has not found that the plaintiff is in possession of the entire extent. The trial Court has held on the additional issue No. 1 that the plaintiff is not in exclusive possession of the whole of the plaint schedule property. However, it has stated that as regards defendants 2 and 3, though the possibility of their possession in the suit, property claiming under other sharers of the suit property cannot be ruled out, there is no conclusive evidence to show exactly in how much area they are in possession. But the lower appellate, Court has not said anything about the possession of the plaintiff. Further what it says is that possession was not followed pursuant to Exs.B4 to B6.

19. It is well settled principle of law that to grant an injunction in favour of a person, possession must be proved to be with that person. Especially in a suit for injunction against co-sharers, this aspect assumes significance. That apart, the suit property is landed property. Plaintiff has not proved that he is cultivating the same. Therefore, in the absence of the plaintiff's possession and as he happens to be a co-sharer owning a small extent alone, he cannot claim for injunction against the co-sharers who have title to larger extent. Therefore, I am not in a position to agree with the contention of the learned counsel for the respondents that the third defendant is not in possession of any specific extent. The other co-sharer, namely, the plaintiff has also not proved his, possession to the Entire extent. Hence, the injunction cannot be granted against the third defendant.

20. The second appeal is only by the third defendant. Hence, we have to deal with only with reference to his interest alone in the subject matter of the suit. For the foregoing reasons, the second appeal is allowed. The judgment and decree of the lower appellate Court is set aside insofar as it relates to the third defendant. The suit against the third defendant is dismissed. However, there will be no order as to costs.