
(2010) 10 MAD CK 0044

In the Madras High Court

Case No : SA (MD) No"s. 690 and 976 of 2008 and MP (MD) No. 1 of 2008

Paulsamy Nadar, A. Ganesan Nadar, Vairava Nadar and
Karuthapandian

APPELLANT

Vs

Udaya Kumar Lingan rep. through the Power Agent,
Sathiaselvan, The Panchayat Chairman, Rayagiri Town
Panchayat, The Executive Officer, Rayagiri Town Panchayat
and Rajamani
The Panchayat Chairman, Rayagiri Town
Panchayat and The Executive Officer, Rayagiri Town
Panchayat Vs Udaya Kumar Lingan rep. by his Power Agent,
Sathiaselvan and Others

RESPONDENT

Date of Decision : 29-10-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 9
Tamil Nadu Panchayats Act, 1994 — Section 231, 231(1), 231(2), 232
Transfer of Property Act, 1882 — Section 123

Citation : (2011) 3 MLJ 52

Hon'ble Judges : A. Selvam, J

Bench : Single Bench

Advocate : S. Siva Thilakar, in SA MD No. 690 of 2008 and S. Pon
Senthilkumaran, in SA MD No. 976 of 2008, for the Appellant; V.K.
Vijayaraghavan, for R-1 in SA (MD) No. 690 of 2008, S. Pon Senthilkumaran, for
RR-2 and 3 in SA (MD) No. 690 of 2008 and K. Vinayagan, Caveator for R-1 in SA
(MD) No. 976 of 2008, for the Respondent

Final Decision : Dismissed

Judgement

A. Selvam, J.—The judgment and decree passed in Appeal Suit No. 9 of 2006 by the Sub Court, Sankarankoil are being challenged in the present second appeal.

2. The first Respondent herein as Plaintiff has instituted Original Suit No. 37 of 2002 on the file of the District Munsif-cum-Judicial Magistrate

Court, Sankarankoil for the reliefs of declaration, permanent injunction,

mandatory injunction and also for recovery of possession of the suit

second schedule, wherein the Appellants in Second Appeal No. 690 of 2008 have been shown as Defendants 1 to 4 and the Appellants in

Second Appeal No. 976 of 2008 have been shown as Defendants 6 and 7.

3. It is averred in the plaint that the suit properties are originally belonged to one Thanapathi Ammal and she purchased the same under two

registered sale deeds dated 06.12.1978. The Plaintiff has purchased the suit first schedule under a registered sale deed dated 20.09.2001. The suit

second schedule forms part of the suit first schedule and the same has been shown as "ghdf" in the plaint plan. Since the predecessor in title of the

Plaintiff has served in some other place, the first Defendant and Defendants 6 and 7 have trespassed into the suit second schedule and formed a

pathway. No land acquisition proceedings have been taken. During December 2001, the Plaintiff has attempted to put up compound wall and at

that time the Defendants 1 to 5 have restrained the Plaintiff from proceeding with the construction of compound wall. The Defendants are not

having any manner of right, title and interest over the suit second schedule. Under the said circumstances, the present suit has been instituted for the

reliefs sought for in the suit.

4. In the written statement filed by the Defendants 2 and 4 it is averred that it is false to contend that the Plaintiff has purchased the suit properties

under a registered sale deed dated 20.09.2001. It is also equally false to contend that during December 2001 the Plaintiff has attempted to put up

compound wall in the suit second schedule. In Rayagiri Village one Hindu Nadar Uravinmurai is in existence and from the said Uravinmurai, a

school by name Ci.Pa. Sivanthi Athithanar Girls High school has been running and the same is situate in Survey No. 1029 and further, Higher

secondary School is also situate near the school mentioned supra. In Survey No. 1026/1 to 9 a road has been formed to a width of 16 feet. The

vendor of the Plaintiff has gifted a portion in the suit properties to a width of 16 feet from north to south for the purpose of forming road and

accordingly a road has been formed in the suit properties and subsequently in the year 1996 the same has been handed over to the sixth

Defendant. The present suit is bad for non-joinder of necessary parties and there is no merit in the suit and the same deserves to be dismissed.

5. In the written statement filed on the side of the sixth Defendant it is averred that in the year 1996 the Plaintiff has orally gifted the suit second schedule to the sixth Respondent and the same has been accepted by the sixth Respondent and also taken delivery of possession. As per the resolution dated 29.08.1997 a tender has been called for and one Ayyanr has become a successful bidder and he has been permitted to form road. Since the Plaintiff himself has given the suit second schedule orally to the sixth Defendant, the Plaintiff is not entitled to get the reliefs sought for in the plaint. There is no merit in the suit and the same deserves to be dismissed.

6. On the basis of the divergent pleadings raised on either side, the trial Court has framed necessary issues and after evaluating the evidence available on record has dismissed the suit. Against the judgment and decree passed by the trial Court, the Plaintiff as Appellant has preferred Appeal Suit No. 9 of 2006 on the file of the first appellate Court.

7. The first appellate Court after hearing both sides and upon reappraising the evidence available on record has allowed Appeal Suit No. 9 of 2006 and consequently decreed the suit as prayed for. Against the judgment and decree passed by the first appellate Court, the Defendants 1 to 4 as Appellants have preferred Second Appeal No. 690 of 2008 and the Defendants 6 and 7 have preferred Second Appeal No. 976 of 2008.

8. In Second Appeal No. 690 of 2008, the following substantial questions of law have been raised for consideration on the side of the Appellants/Defendants 1 to 4.

(i) Whether the lower appellate Court is correct in law in holding that the 1st Respondent is entitled to the 2nd schedule suit property, when the suit is as framed against the Respondents 1 to 4 in their individual capacity is sustainable in law?

(ii) Whether the lower appellate Court is correct in law in not adverting to vital legal aspect that the suit is not sustainable in law in view of Order 1

Rule 9 and Order 1 Rule 10 of the Code of Civil Procedure, when the persons concerned over the suit 2nd schedule pathway property is the

Hindu Nadar Uravinmurai which is running the Ci.Pa. Sivanthi Adithanar Girls Higher Secondary school for which the pathway is being used has

not been arrayed as necessary party in the suit?

(iii) Whether the lower appellate Court is correct in law in not holding that the suit is liable to be dismissed on the ground of non-joinder of

necessary parties as required under Order 1 Rule 9 and Order 1 Rule 10 of the Code of Civil Procedure?

(iv) Whether the lower appellate Court is correct in law does not deserve adverse inference against the 1st Respondent, since the original Plaintiff

did not enter into witness box to put forth their case?

9. In Second Appeal No. 976 of 2008, the following substantial questions of law have been raised for consideration on the side of the

Appellants/Defendants 6 and 7.

(i) Whether the lower appellate Court is correct in law in holding that the 1st Respondent is entitled to the 2nd schedule suit property, when the 1st

Respondent as Plaintiff has failed to issue mandatory notice to the Appellant panchayat as required by Section 231 of the Tamil Nadu Panchayat

Act, 1994?

(ii) Whether the lower appellate Court is correct in law in not holding that the vendor of 1st Respondent is estopped by her own conduct when she

had waived her right over the 2nd schedule property for several years and allowed the appellate panchayat to lay the pucca metal road and having

kept quite for several years has deposed that she has not given oral gift to the Uravin Murai School?

(iii) Whether the appellate Court is correct in law in not holding that the suit is liable to be dismissed on the ground of non-joinder of necessary

parties as required under Order 1 Rule 9 and Order 1 Rule 10 of the Code of Civil Procedure?

(iv) Whether the lower appellate Court is correct in law in not drawing adverse inference against the 1st Respondent since the original Plaintiff did

not enter into witness box to put forth his case?

10. As agreed by the learned Counsels appearing for both sides, the present second appeals are disposed of on merits at the stage of admission.

11. The crux of the case of the Plaintiff is that his predecessor in title by name Thanapathi Ammal has purchased the suit properties under two

registered sale deeds dated 06.12.1978 and thereafter she sold the same in favour of the Plaintiff under a registered sale deed dated 20.09.2001.

The suit second schedule forms part of the suit first schedule and the same has

been shown as "ghdf" in the plaint plan and the Defendants have trespassed into the suit second schedule and formed a road by way of denying the title of the Plaintiff. Under the said circumstances the present suit has been instituted for the reliefs sought for in the plaint.

12. In the written statement filed on the side of the Defendants 2 and 4 it is averred that the predecessor in title of the Plaintiff viz., Thanapathi

Ammal has orally gifted 16 feet north south in the suit properties for the purpose of forming road so as to reach Girls High School as well as Higher

Secondary School and subsequently a road has been formed and thereafter orally handed over the same to the sixth Defendant in the year 1996.

13. In the written statement filed on the side of the sixth Defendant it is averred that in the year 1996 the Plaintiff himself has orally gifted the suit

second schedule for the purpose of laying road and subsequently a road has been formed and therefore, the Plaintiff is not entitled to get the reliefs

sought for in the plaint.

14. As stated earlier, the trial Court has dismissed the suit. But the first appellate Court has decreed the suit.

15. The learned Counsel appearing for the Appellants in Second Appeal No. 690 of 2008 has strenuously contended that in the year 1996 the

predecessor in title of the Plaintiff viz., Thanapathi Ammal has orally gifted an extent of 16 feet from north to south for the purpose of laying road

and subsequently a road has been formed and thereafter in the year 1996, the same has been handed over to the sixth Defendant and the Plaintiff

has attempted to put up construction in the suit first schedule, wherein he has clearly admitted that the suit second schedule has been set apart for

the purpose of laying road and further the Defendants 2 and 4 are not having independent right over the suit second schedule and since the school

authorities have not been impleaded in the present suit, the same is bad for non joinder of necessary parties and the trial Court after considering the

available evidence on record has rightly dismissed the suit. But the first appellate Court has erroneously decreed the same and therefore, the

judgment and decree passed by the first appellate Court are liable to be interfered with.

16. The learned Counsel appearing for the Appellants in Second Appeal No. 976 of 2008 has also equally contended that in the year 1996 the

Plaintiff himself has orally gifted the suit second schedule to the sixth Defendant for the purpose of forming road and subsequently a tender has

been called for and thereafter a road has been formed and therefore, the Plaintiff is not having title to the suit properties and he is not entitled to get

the reliefs sought for in the plaint and further, even without giving prior notice the present suit has been instituted against the sixth Defendant and

therefore as per Section 231 of the Tamil Nadu Panchayats Act, 1994 the present suit is not legally maintainable and the first appellate Court has

failed to look into the same and therefore, the judgment and decree passed by the first appellate Court are liable to be set aside.

17. In order to controvert the arguments advanced by the learned Counsels appearing for the Appellants, the learned Counsel appearing for the

first Respondent/Plaintiff has also equally contended that neither the Plaintiff nor his predecessor in title has orally gifted any portion of the suit

properties and therefore, the alleged oral gift trotted out on the side of the Defendants 2, 4 and 6 is not true and further as per Section 123 of the

Transfer of Property Act, 1882 alleged oral gift is not legally permissible and the trial Court without considering the correct factual as well as legal

premise has erroneously dismissed the suit. But the first appellate Court after evaluating all the evidence available on record has rightly decreed the

suit and further the provision of Section 231 of the Tamil Nadu Panchayats Act, 1994 is not at all applicable to the present suit and altogether the

present second appeals deserve to be dismissed.

18. On the basis of the divergent submissions made by either Counsels, the Court has to analyse the following factual as well as legal aspects:

(a) whether the Plaintiff or his predecessor in title has orally gifted any portion of the suit properties for the purpose of forming road?

(b) whether the alleged oral gift is legally permissible?

(c) Whether the present suit is not legally maintainable in view of Section 231 of the Tamil Nadu Panchayats Act, 1994?

19. The present suit has been instituted for the reliefs of declaration, permanent and mandatory injunctions and also for recovery of possession in

respect of the suit second schedule which has been described as "ghdf" in the plaint plan. The predecessor in title of the Plaintiff viz., Thanapathi

Ammal has purchased both the items of suit properties under two registered sale

deeds dated 06.12.1978 and the same have been marked as

Exs.A1 and A2. The Plaintiff has purchased both items of suit properties under a registered sale deed dated 20.09.2001 and the same has been

marked as Ex.A3. Therefore, by virtue of Ex.A3, the Plaintiff is having absolute right, title and interest over the suit first as well as second schedule

properties.

20. In the written statement filed on the side of the Defendants 2 and 4 it has been specifically averred that the predecessor in title of the Plaintiff

viz., Thanapathi Ammal has orally gifted an extent of 16 feet width from north to south for the purpose of forming road so as to reach the schools

mentioned in the written statement filed by them. But on the other hand on the side of the sixth Defendant it has been specifically averred that

during the year 1996 the Plaintiff himself has orally gifted the suit second schedule for the purpose of forming road.

21. As adverted to earlier, the Plaintiff has purchased the suit properties only under Ex.A3 on 20.09.2001. Therefore, the oral gift alleged to have

been given by the Plaintiff in the year 1996 is totally false. Under the said circumstances the oral gift trotted out in the written statement filed on the

side of the sixth Defendant cannot be accepted.

22. Now the Court has to look into the oral gift alleged to have been given by the predecessor in title of the Plaintiff in favour of the school

authorities mentioned in the written statement filed on the side of the Defendants 2 and 4.

23. At this juncture, it would be more useful to look into Section 123 of the Transfer of Property Act, 1882 and the same reads as follows:

Transfer how effected.- For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by

or on behalf of the donor, and attested by at least two witnesses.

24. Even a cursory look of the said provision would clearly show that a gift of an immovable property should be effected only by way of registered

instrument and the same should be signed by donor or on behalf of the donor and also attested by at least two witnesses. In view of the provision

of Section 123 of the Transfer of Property Act, 1882, oral gift alleged to have been given by the predecessor in title of the Plaintiff in favour of the

school authorities mentioned in the written statement filed by the Defendants 2

and 4 is not legally valid.

25. Now the Court has to look into as to whether the present suit is not legally maintainable in view of Section 231 of the Tamil Nadu Panchayats

Act, 1994 and the same reads as follows:

Notice of action against village panchayat, etc.- (1) Subject to the provisions of Section 232, no suit or other legal proceeding shall be brought

against any village panchayat or its president or executive authority or any panchayat union council or its chairman or the commissioner or the

district panchayat or its chairman or the [secretary] or any member, officer or servant thereof or against any person acting under the direction of

such village panchayat, president, panchayat union council or its chairman, district panchayat or its chairman, executive authority, commissioner

[secretary] member, officer or servant, in respect of any act done or purporting to be done under this Act or in respect of any alleged neglect or

default in the execution of this Act or any rule, by-law, regulation or order made under it until the expiration of two months next after notice in

writing, stating the cause of action, the nature of the relief sought, the amount of compensation claimed and the name and place of residence of the

intended Plaintiff has been left at the office of the village panchayat or panchayat union council and if the proceeding is intended to be brought

against any such president, executive authority, chairman, commissioner, chairman or district panchayat, [secretary] member, officer, servant or

person, also delivered to him or left at his place of residence.

(2) Every such proceeding shall, unless it is a proceeding for the recovery of immovable property or for a declaration or title thereto, be

commenced within six months after the date on which the cause of action arose or in case of a continuing injury or damage, during such

continuance or within six months after the ceasing thereof.

(3) If any village panchayat, panchayat union council, or district panchayat or person to whom notice is given under Sub-section (1) tenders

amount to the Plaintiff before the proceeding is commenced and if the Plaintiff does not in such proceeding recover more than the amount so

tendered, he shall not recover any costs incurred by him after such tender and the Plaintiff shall also pay all costs incurred by the Defendant after

such tender.

26. The learned Counsel appearing for the Appellants in Second Appeal No. 976 of 2008 has advanced his argument mainly on the basis of the

provision of the said section. In Sub-section 1 of the said section, it is mentioned that if any proceeding is taken under the Tamil Nadu Panchayats

Act, 1994 against any authority mentioned in the said Act, two months notice is required. But in Sub-section 2, an exception has been given with

regard to suit instituted for recovery of immovable property or for declaration of title.

27. The learned Counsel appearing for the first Respondent/Plaintiff has befittingly drawn the attention of the Court to the Full Bench decision

reported in Panchayat Union Council and Another Vs. C. Tirupathy, , wherein the Division Bench of this Court has held that ""the material part of

the section is that no suit or other legal proceeding shall be brought against any Panchayat in respect of any act done or purporting to be done

under this Act or in respect of any alleged neglect or default in the execution of this Act or any rule, by law, regulation or order made under it until

the expiration of two months next after notice in writing stating the cause of action, the nature of the relief sought, the amount of compensation

claimed, ect. Sub-section (2) provides that every proceeding shall, unless it is a proceeding for the recovery of immovable property or for a

declaration of title thereto, be commenced within six months after the date on which the cause of action arose or in case of a continuing injury or

damage, during such continuance or within six months after the ceasing thereof. Further the Full Bench has observed that Section 231 is not

applicable to a suit instituted for recovery of immovable property or to a suit instituted for getting declaration of title.

28. The present suit has been instituted for the reliefs of declaration, permanent and mandatory injunctions and also for recovery of possession.

Therefore, it is easily discernible that the exception given under Sub-section 2 of Section 231 of the said Act is squarely applicable to the present

suit and the present suit is legally maintainable and the provision of the said section is not a bar to the present suit. Therefore, the entire argument

advanced on the side of the Appellants in Second Appeal No. 976 of 2008 is sans merit.

29. The learned Counsel appearing for the Appellants in Second Appeal No. 690 of 2008 has also advanced a feeble argument to the effect that

the Plaintiff himself while getting permission for putting up construction in the suit first schedule property has candidly admitted that the suit second schedule property has been set apart for the purpose of forming road and therefore, the Plaintiff cannot turn around to say that it is his property and the trial Court after considering all the evidence available on record has rightly observed the same. But the first appellate Court has failed to look into the contention of the Plaintiff and therefore, the judgment and decree passed by the first appellate Court are totally erroneous and the same are liable to be interfered with.

30. The predecessor in title of the Plaintiff viz., Thanapathi Ammal has purchased the suit properties under Exs.A1 and A2. The Plaintiff has purchased the suit properties under Ex.A3. Therefore, by virtue of Ex.A3, the Plaintiff is having unfettered right, title and interest over the suit properties. Even assuming without conceding that at the time of getting permission for putting up construction in the suit first schedule property, the Plaintiff has conceded that the suit second schedule has been set apart for the purpose of forming road, that does not create any embargo upon the Plaintiff from claiming title to the suit second schedule, since oral gift alleged to have been given by him or alleged to have been given by his predecessor in title is legally not permissible. Therefore, the residual argument made by the learned Counsel appearing for the Appellant in Second Appeal No. 690 of 2008 also goes out without merit.

31. As stated in many places, the present suit has been instituted for the reliefs of declaration, permanent and mandatory injunctions and also for recovery of possession in respect of the suit second schedule which has been described as "ghdf" in the plaint plan. By virtue of Exs.A1 to A3, the Plaintiff is having absolute right, title and interest over the suit second schedule property. Since the Plaintiff is having absolute right, title and interest over the suit second schedule property and since the oral gift introduced by the Defendants 2 and 4 as well as the sixth Defendant is not legally permissible, it is needless to say that the Plaintiff is entitled to get the reliefs sought for in the plaint.

32. The trial Court without considering the legal effect of Exs.A1 to A3 and also without considering that the alleged oral gift is not legally permissible, has erroneously dismissed the suit. But the first appellate Court

after perpending the available evidence on record properly has rightly decreed the suit. In view of the foregoing enunciation of both the factual and legal aspects, this Court has not found any error nor infirmity in the judgment and decree passed by the first appellate Court and further the substantial questions of law raised on the side of the Appellants in both the second appeals are not at all relevant for the purpose of deciding the factual as well as legal aspects involved in the present case. Therefore, viewing from any angle, these second appeals deserve to be dismissed.

33. In fine, these second appeals deserve dismissal and accordingly are dismissed without cost at the stage of admission. Connected Miscellaneous petition is also dismissed. The judgment and decree passed in Appeal Suit No. 9 of 2006 by the Sub Court, Sankarankoil are confirmed.