
(2011) 08 MAD CK 0262

In the Madras High Court

Case No : Second Appeal No. 189 of 1996

S. Krishnapillai [died] and Others

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 05-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10(2)
Limitation Act, 1963 — Article 112

Citation : (2011) 08 MAD CK 0262

Hon'ble Judges : M. M. Sundresh, J

Bench : Single Bench

Advocate : T.R. Rajagopalan for J. Anandhavalli, for the Appellant; K. Chellapandian, A.A.G., for the Respondent

Final Decision : Dismissed

Judgement

M.M. Sundresh, J.—This Second Appeal has been preferred by the unsuccessful Plaintiffs, who have lost before the Courts below.

2. Claiming title to an extent of 18 Acres in Survey No. 583/1 as absolutely belonging to the Appellants/Plaintiffs, a suit in O.S. No. 98 of 1989, on the file of the Sub Court, Padmanabhapuram, was filed by them seeking a relief of declaration and permanent injunction restraining the Respondents/Defendants from interfering with their rights regarding the possession or the disposal and transport of timber cut and removed from the suit schedule property.

3. The case of the Appellants, as seen from the averments made in the plaint, is that an extent of 18 Acres of land forms part of 95 Acres of lands was purchased by the Appellants/Plaintiffs in Survey No. 583/1, which consists of an extent of 483.50 Acres. Alleging that the Respondents/Defendants are claiming the said extent of land as Government Forest Department land and trying to interfere with the rights of the Appellants/Plaintiffs to cut the trees and disturbing their possession, they have filed the said suit. The Appellants/Plaintiffs have filed the said suit based upon a title under Ex-A-2, dated 26.08.1977. They have also

claimed adverse possession as against the Respondents/Defendants. Originally, a claim was made only for eight acres and in pursuant to the report of the learned Advocate Commissioner, the plaint has been amended seeking the relief of 18 acres.

4. A detailed Written Statement has been filed by the Respondents/Defendants followed by an additional Written Statement, in which, it has been stated that the Appellants/Plaintiffs have illegally entered into and occupied the Government Forest land, which has come to the knowledge of the Respondents/Defendants in pursuant to the complaints made by the general public. They have already cut the trees worth about Rs. 34.5 Lakhs. The Revenue Records clearly indicate the fact that the suit properties are the Government Forest Lands. Therefore, the Respondents/Defendants have prayed that the suit will have to be dismissed.

5. The Trial Court has appointed an Advocate Commissioner, who has found that an extent of 18 acres of lands are in possession of the Appellants/Plaintiffs. The learned Advocate Commissioner has also found that some of the trees belonging to the Government were found in the suit property. The report has been made based upon the plan prepared and produced by the counsel for the Appellants/Plaintiffs.

6. The Courts below have dismissed the suit filed by the Appellants/Plaintiffs on the ground that being the Plaintiffs, it is for the Appellants to prove and establish the title. The Appellants/Plaintiffs have nowhere established the fact that the disputed 18 acres of lands form part of 95 acres of lands purchased by them under Ex-A-2. There is No. explanation as to why the Appellants/Plaintiffs have not marked the plan, which forms part and parcel of the sale deed in their favour under Ex-A-2. The said plan has been marked at the instance of the Respondents/Defendants as Ex-B11 and the vendor of the Appellants/Plaintiffs was also examined to say that the specific extent of land sold in favour of the Appellants/Plaintiffs has been measured. There is also absolutely No. explanation as to why the vendor of the Appellants/Plaintiffs has not been examined on their behalf.

7. The Courts below have rejected the report of the learned Advocate Commissioner by holding that the said report has been given based upon mere surmises and without any factual basis. The learned Advocate Commissioner has not measured the entire extent of lands belonging to the Appellants/Plaintiffs, and therefore, the findings of the Advocate Commissioner to the effect that the suit property belongs to the Appellants/Plaintiffs has got No. factual basis. Further, the learned Advocate Commissioner has not taken into consideration either Ex-A-11 or the Revenue Records. However, he has chosen to rely upon the plan prepared and produced by the learned Counsel for the Appellants/Plaintiffs. Considering the fact that it is the specific case of the Respondents/Defendants that survey stones have been removed and re-planted by the Appellants/Plaintiffs, coupled with the documentary evidence under Exs-B5 and B-7, being Revenue Records, the Courts below have rejected the report filed by the learned Advocate Commissioner. Another finding has been given by the Courts below that

the re-survey sketch pertaining to Survey No. 583/1 has not been given to the learned Advocate Commissioner, and therefore, it is not known as to how the said finding has been given. The report of the learned Advocate Commissioner, being a piece of evidence to be appreciated by the Courts of law is not binding on the Courts below, and therefore, considering the discussion made above, the Courts below have rejected the same.

8. On the contrary, the Courts below have made reliance upon Exs-B-5 to B-7 in coming to the conclusion that the suit property belongs to the Respondents/Defendants. A factual finding has been given by the Courts below by taking into consideration of Exs-B-9 and B-10 read with the evidence of PW-5, who has stated that the stones have been originally planted as per the Revenue Records. By taking into consideration of Ex-C-4, the Courts below have come to the conclusion that the Appellants/Plaintiffs encroached upon the suit property from 1985 onwards, and therefore, there is No. question of adverse possession as claimed by them. Accordingly, the suit filed by the Appellants/Plaintiffs was dismissed.

9. The learned Senior Counsel appearing for the Appellants/Plaintiffs submitted that Ex-B7 has been made behind the back of the Appellants/Plaintiffs and it has been filed before the Court, after the evidence on the side of the Appellants/Plaintiffs was over. There is No. finding about the Survey Number, in which the suit property is situated. Exs-A24 and 25 have not been taken into consideration by the Lower Appellate Court. The report of the learned Advocate Commissioner, being a piece of evidence, ought to have been taken into consideration and if that has been done, the Courts below ought to have decreed the suit as prayed for. Hence, the learned Senior Counsel submitted that the Second Appeal is liable to be allowed by reversing the judgment and Decree rendered by the Court below.

10. Per contra, the learned Additional Advocate General for the Respondents/Defendants submitted that the Appellants/Plaintiffs have not approached this Court with clean hands and there is No. explanation for removing Ex-B-11 and filing another sketch. The learned Advocate Commissioner has relied upon the irrelevant materials. The report of the learned Advocate Commissioner is nothing, but a piece of evidence. DW-6, vendor of the Appellants/Plaintiffs has clearly spoken to about the specific extent of the lands sold to the Appellants/Plaintiffs and the Appellants/Plaintiffs were not sure about the specific extent of suit property in their possession and they have amended the plaint only based upon the report of the Advocate Commissioner. In a suit for declaration, the Appellants/Plaintiffs will have to establish the title and they cannot place reliance upon a report of the Advocate Commissioner, which cannot be used to collect the evidence in favour of a party. Hence, the learned Additional Advocate General submitted that the Second Appeal will have to be dismissed.

11. I have considered the above rival submissions made by the respective learned Senior Counsel and perused the records carefully.

12. As seen from the records, originally, the Appellants/Plaintiffs filed a suit seeking title only to an extent of 8 acres in Survey No. 583/1, which covers an extent of 483.50 acres of lands, of which under Ex-A-2, the Appellants/Plaintiffs have purchased 95 acres. In a suit for declaration, it is for the Appellants being the Plaintiffs to establish the title. They were not quite sure of the specific extent of the possession and they have amended the plaint based on the report filed by the learned Advocate Commissioner. There is absolutely No. explanation as to why they have removed Ex-B11, which forms part and parcel of the registered sale deed executed in their favour by DW-6, their vendor.

13. Now coming to the report of the Advocate Commissioner, it is settled law that a report of the Advocate Commissioner is only a piece of evidence enabling the Court to decide the dispute between the parties and elaborate discussions have been made by the Courts below giving cogent and sufficient reasons for rejecting the report of the Advocate Commissioner. There is absolutely No. reason as to why the learned Advocate Commissioner has not taken into consideration the Re-survey Records pertaining to Survey No. 583/1 and No. attempt has been made to measure the entire extent of land situated in Survey No. 583/1 purchased under EX-A2. In fact, the Appellants ought to have taken such measurement to substantiate their case. Curiously, the learned Advocate Commissioner has relied upon the plan prepared and produced by the counsel for the Appellants/Plaintiffs. The Appellants/Plaintiffs have not examined their vendor, who was, in fact, examined on the side of the Respondents/Defendants as DW-6. As found by the Courts below, there is absolutely No. basis for the Advocate Commissioner to hold that the suit property comes under Survey No. 583/1. The learned Advocate Commissioner has taken into consideration of the irrelevant materials which are extraneous to the suit. Further, the learned Advocate Commissioner himself has found that some of the trees belonging to the Forest Department were found in the suit property.

14. A Division Bench of this Court, after following various Judgments of the Hon'ble Supreme Court as well as this Court, in Charles Hereward Simpson v. The Government of Tamil Nadu reported in 1989 (1) MLJ 512, has observed as follows:

Order 26 Rule 10 (2) CPC says that the report of the commissioner shall be evidence in the suit and shall form part of the record. It is not to be stated as a proposition of law that the report of the Commissioner is an unimpeachable substantive evidence in the case.

15. The Courts below, taking into consideration the entire documents filed by the Appellants/Plaintiffs as well as the Respondents/Defendants, have dismissed the suit filed by the Appellants/Plaintiffs rejecting the report of the learned Advocate Commissioner. Much reliance has been made on Ex-B5 and B7. Ex-B5 is the sketch, pertaining to new land measurement, whereas Ex-B6 is pertaining to the corresponding old Survey Numbers and Ex-B7 is the super-impose sketch. Taking into consideration of the above said documents, coupled with Ex-B-11, the

Courts below have correctly held that the suit property belongs to the Respondents/Defendants and the Appellants/Plaintiffs have not established their case that the suit property belongs to them.

16. Insofar as the plea of adverse possession is concerned, it is trite law that the Appellants, being the Plaintiffs, cannot be permitted to take such a plea after having claimed title. The Courts below, on a careful consideration of the entire documents, have held that the Appellants/Plaintiffs have encroached upon the Government Forest land right from the year 1985. Moreover, clear, strong and cogent evidence is required to establish the adverse possession against the Government. In this context, I may usefully refer to a judgment of the Hon'ble Supreme Court in *R. Hanumaiah and Another Vs. Secretary to Government of Karnataka, Revenue Department and Others*, wherein the Hon'ble Supreme Court has observed as follows:

19. Suits for declaration of title against the Government, though similar to suits for declaration of title against private individuals differ significantly in some aspects. The first difference is in regard to the presumption available in favour of the Government. All lands which are not the property of any person or which are not vested in a local authority, belong to the Government. All unoccupied lands are the property of the Government, unless any person can establish his right or title to any such land. This presumption available to the Government, is not available to any person or individual. The second difference is in regard to the period for which title and/or possession has to be established by a person suing for declaration of title. Establishing title/possession for a period exceeding twelve years may be adequate to establish title in a declaratory suit against any individual. On the other hand, title/possession for a period exceeding thirty years will have to be established to succeed in a declaratory suit for title against the Government. This follows from Article 112 of the Limitation Act, 1963, which prescribes a longer period of thirty years as limitation in regard to suits by the Government as against the period of 12 years for suits by private individuals. The reason is obvious. Government properties are spread over the entire State and it is not always possible for the Government to protect or safeguard its properties from encroachments. Many a time, its own officers who are expected to protect its properties and maintain proper records, either due to negligence or collusion, create entries in records to help private parties, to lay claim of ownership or possession against the Government. Any loss of government property is ultimately the loss to the community. Courts owe a duty to be vigilant to ensure that public property is not converted into private property by unscrupulous elements.

20. Many civil courts deal with suits for declaration of title and injunction against the Government, in a casual manner, ignoring or overlooking the special features relating to government properties. Instances of such suits against the Government being routinely decreed, either ex parte or for want of proper contest, merely acting upon the oral assertions of Plaintiffs or stray revenue

entries are common. Whether the Government contests the suit or not, before a suit for declaration of title against a Government is decreed, the Plaintiff should establish, either his title by producing the title deeds which satisfactorily trace title for a minimum period of thirty years prior to the date of the suit (except where title is claimed with reference to a grant or transfer by the Government or a statutory development authority), or by establishing adverse possession for a period of more than thirty years. In such suits, courts cannot, ignoring the presumptions available in favour of the Government, grant declaratory or injunctive decrees against the Government by relying upon one of the principles underlying pleadings that plaint averments which are not denied or traversed are deemed to have been accepted or admitted.

21. A court should necessarily seek an answer to the following question, before it grants a decree declaring title against the Government: whether the Plaintiff has produced title deeds tracing the title for a period of more than thirty years; or whether the Plaintiff has established his adverse possession to the knowledge of the Government for a period of more than thirty years, so as to convert his possession into title. Incidental to that question, the court should also find out whether the Plaintiff is recorded to be the owner or holder or occupant of the property in the revenue records or municipal records, for more than thirty years, and what is the nature of possession claimed by the Plaintiff, if he is in possession-authorized or unauthorized; permissive; casual and occasional; furtive and clandestine; open, continuous and hostile; deemed or implied (following a title).

22. Mere temporary use or occupation without the animus to claim ownership or mere use at sufferance will not be sufficient to create any right adverse to the Government. In order to oust or defeat the title of the Government, a claimant has to establish a clear title which is superior to or better than the title of the Government or establish perfection of title by adverse possession for a period of more than thirty years with the knowledge of the Government. To claim adverse possession, the possession of the claimant must be actual, open and visible, hostile to the owner (and therefore necessarily with the knowledge of the owner) and continued during the entire period necessary to create a bar under the law of limitation. In short, it should be adequate in continuity, publicity and in extent. Mere vague or doubtful assertions that the claimant has been in adverse possession will not be sufficient. Unexplained stray or sporadic entries for a year or for a few years will not be sufficient and should be ignored.

23. As noticed above, many a time it is possible for a private citizen to get his name entered as the occupant of government land, with the help of collusive government servants. Only entries based on appropriate documents like grants, title deeds, etc. or based upon actual verification of physical possession by an authority authorised to recognise such possession and make appropriate entries can be used against the Government. By its very nature, a claim based on adverse possession requires clear and categorical pleadings and evidence, much

more so, if it is against the Government.

17. Further, as I discussed above, the report of the Advocate Commissioner being a piece of evidence is for the appreciation, which has been done correctly by the Courts below by giving cogent reasons, and therefore, this Court is of the considered view that there is No. question of law, much less a substantial question of law, involved in this Second Appeal.

18. In the result, the judgment and Decree dated 13.10.1995 made in A.S. No. 19 of 1993, on the file of the District Court, Kanyakumari at Nagercoil, confirming the judgment and Decree dated 12.02.1993 made in O.S. No. 98 of 1989, on the file of the Sub Court, Padmanabhapuram, are confirmed and the Second Appeal is dismissed. No. costs.