

(1999) 04 MAD CK 0144
In the Madras High Court

Sellambana Gounder and Others

APPELLANT

Vs

Sinnia Gounder and Others

RESPONDENT

Date of Decision : 01-04-1999

Acts Referred:

Citation : (1999) 3 MLJ 465

Hon'ble Judges : A. Raman, J

Bench : Division Bench

Judgement

A. Raman, J.—Defendants 1 to 4 are the appellants herein.

2. The plaintiff filed a suit for injunction and declaration. Briefly stated, the plaintiff's case is thus:

The plaintiff is the absolute owner of the suit property, having obtained the same in a partition that took place about 50 years ago. The plaintiff and

before him, his ancestors were in possession of the specific portions. There are ridges, showing the divisions. The plaintiff is entitled to 1/3rd right

in the suit well. The plaintiff has been given separate patta in the re-survey proceedings. The plaintiffs has put up pipes and is taking water to

S.F.No. 195/B, measuring 1-84 cents. It cannot be questioned by the defendants. The plaintiff is in possession of the property for more than the

statutory period and has prescribed title by adverse possession as well. On 26.12.1977 the plaintiff leased out the suit property to one Muruga

Gounder, who redelivered the possession to the plaintiff. The defendants cannot question the plaintiff's possession of enjoyment. But on account of

enmity, the defendants are denying the title of the plaintiff to the suit properties and also attempting to disturb the plaintiff's peaceful possession.

They have no right to do so. Hence, the suit.

3. The 1st defendant filed a written statement, which has been adopted by defendants 2 to 4. They contended as follows:

The plaintiff is not entitled to the entire suit property. The plaintiff is entitled to only 1/3rd share in the suit well. The plaintiff is not in possession of

the 1 acre and 84 cents in S.No. 195/B. The plaintiff is not entitled to take water from the well in S.F.No. 178/B to S.F.No. 195/B of 179 A/1.

The defendants 1 to 4 have also shares in S.F.No. 179A/1 and they also have no right to take water to 179A/1 from the suit well. The suit well is

intended for S.F.Nos. 178 and 196 only. It is not admitted that the plaintiff had perfected his title to the property by adverse possession. The

alleged lease is not admitted. The plaintiff is not adhering to the turn system in the matter of enjoyment of the well. The plaintiff is entitled only to

one day out of six days. The defendants are entitled to lift water 3 days out of 6 days. The defendants 5 to 7 and others are entitled to one day.,

One Senni Gounder and his pangalis are entitled to one day. They are necessary parties to the suit. Hence, the suit is bad for non joinder of parties,

Therefore, the defendants pray that the suit may be dismissed with costs.

4. The 7th defendant filed a written statement, contending as follows:

The plaintiff is put to strict proof of all the allegations made in the plaint. The lands are not divided by metes and bound. S.No. 179 of Koodakarai

village, measuring 12.85 acres was enjoyed by all the sharers in common, and out of the said extent 1.40 acres was acquired by the Government

and the compensation amount was shared by all the sharers, and the remaining 11.45 acres of land is being enjoyed in common. The defendant

herein gave a notice for division of the properties on 12.4.1981, and the plaintiff had agreed for a division, but has filed the suit,

There is no cause of action.

5. Before the District Munsif, Gobichettipalayam who tried the suit, the plaintiff examined totally five witnesses, while the defendant examined three

witnesses. Exs. A-1 to A-15 and B-1 to B-3 were marked. The learned District Munsif dismissed the suit with costs. Aggrieved by the said

decision, the plaintiff has preferred an appeal to the sub court in A.S.No. 17 of 1984. The Subordinate Judge, by his judgment dated 1.10.1986,

allowed the appeal in part. Aggrieved by the same, the defendants have now come forward with this second appeal.

6. At the time when the appeal was admitted, the following question of law was framed for consideration:

Whether the lower appellate court is right in granting the relief of declaration in favour of the plaintiff without impleading all the other co-shares in

the suit items, especially when it is admitted by the plaintiff that there are other co-sharers?

7. The point: The plaintiff would contend that the properties were divided by metes and bounds and the plaintiff is in possession of definite and

specific shares in the items of the property. The plaintiff has produced only patta book, which has been marked as Ex. A-1. Besides filing the

patta, the plaintiff has not produced any other document to establish his contention. The patta is neither a document of title nor it can be accepted

to up held the title. It is a best an evidence for permanent of kist and thus there is nothing but a bill of cost. The other documents produced by the

plaintiff are not helpful to the plaintiff to establish his case. In the appeal, the plaintiff filed certain documents such as chitta extract, adangal extract

and field map. They were ordered to be received as additional evidence in appeal by the Subordinate Judge. I do not find any reasoning in the

judgment of the lower appellate court for admitting those documents as additional evidence in appeal. Simply, in para 4, he has stated that certain

documents have been produced along with the appeal. In para 11, the lower appellate court has specifically observed that the plaintiff has not

joined as parties the other sharers. He has further observed that the plaintiff has not filed any document to show that he is entitled to irrigate the

lands in S.Nos. 179/A1 and 195/B from the well. Thus the very discussion of the lower appellate court shows that there are other sharers, who

were entitled to share in the well and who ought to have been impleaded but yet not impleaded. It is also obvious from the finding of the lower

appellate court that the plaintiff has not filed any document to show as to how he is entitled to irrigate the lands in S.Nos. 179/A1 and 195/B. In

the written statement, a specific plea has been taken that there are other sharers and the suit is bad for non-joinder of necessary parties. The lower

appellate court has not chosen to consider this objection or give a finding therein. When both the courts have held that there are other sharers

entitled to specific shares in the well and when those sharers have not been made parties to the suit, no declaration can be given in their absence.

8. The suit is filed for declaration and injunction. In the absence of those person who are also entitled to some definite sharers in the property, it is not possible for a court to give a verdict or accept the plaintiff's case as to grant relief to the plaintiff. In the absence of the persons concerned in the property, it is not open to one of the sharers to ask for any relief. More so, when a specific stand has been taken by putting the plaintiff on notice of the non-maintainability of the suit for non-impleading of those parties. Therefore, in such circumstances, the decree granted by the lower appellate court be maintained. Considering the nature and scope of the suit, it is not possible to remand the case with a view to enable the plaintiff to implead the necessary parties. For we have to take into account the subsequent events. The suit was filed in the year 1981 and was disposed of by the trial court on 6.2.1984 and the first appeal was disposed of by the lower appellate court on 1.10.1986. Now we are in the year 1999. As to the present situation, we have no information. Therefore, in such circumstances, if this matter is remanded back to the trial court, it would only cause hardship to the parties concerned. Therefore, from a practical point of view, the matter has to be considered. Hence, the suggestion that the matter should be remanded back to the trial court with a view to give an opportunity to the plaintiff to implead the necessary parties is not a worthy one in view of the long pendency of the matter.

9. Therefore, in such circumstances, I have to hold that the suit must fall as necessary and proper parties to the suit have not been brought on record. For the decree granted by the lower appellate court cannot be executed against those, who are not parties to the suit. There cannot be a decree, which is executable against some and not executable against others. For it concerns a share in the well and right to take water from the well. Knowing fully well that there are other sharers, the plaintiff has failed to take necessary steps to implead the parties concerned, despite the fact that such specific stand was taken by the defendants. Therefore, having omitted to observe the pre-caution, it is too late in the day for the plaintiff to retrace his foot steps. Therefore, in such circumstances, the suit has to be dismissed since proper and necessary parties to the suit have not been impleaded and in the absence of those parties, it is not possible to pass an effective decree.

10. In the result, the appeal is allowed, setting aside the decree and judgment of the lower appellate court. The suit shall stand dismissed. In the circumstances of the case, the parties shall bear their costs throughout.