
(1998) 03 MAD CK 0030
In the Madras High Court

Sooriyamurthy and Others

APPELLANT

Vs

Chinnaswamy (Died) and seven Ors.

RESPONDENT

Date of Decision : 11-03-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (1998) 2 LW 178 : (1998) 2 MLJ 638

Hon'ble Judges : S.S. Subramani, J

Bench : Division Bench

Judgement

S.S. Subramani, J.—Defendants in O.S.No.361 of 1980, on the file of District Munsif's Court, Thiruthuraipundi, are the appellants.

2. Parties herein will be referred to according to their rank in the suit.

3. Plaintiffs filed the suit for declaration of their possessory right and for consequential injunction restraining the defendants from interfering with

their possession and enjoyment. The subject matter of the suit is acre 16 cents of land in R.S.No.52/4, which is a poromboke land. It is originally a

tank area used as seed bed for raising seedlings and the fishery income was realised by Kottur Srinivasa Mudaliar family and subsequently by

Vasudeva Iyer and others, and thirdly by one M. Sheik Mohammed and Syed Mohammed. Plaintiffs purchased the right on 4.10.1979 orally from

the said M. Sheik Mohammed and Syed Mohammed. They are in possession. They are paying kist in the name of their vendor and separate

receipts are being issued. Even though the oral sale was in favour of four plaintiffs, even now the property is undivided. The tank is vested in the

Panchayat. Defendants are residents of the same village and are related to one another. They attempted to interfere with the possession of the

plaintiffs on 22.6.1980. Their attempt was thwarted by the timely intervention of the plaintiffs. A police complaint was also lodged. Their

apprehension is that the defendants may again attempt to commit trespass. Therefore, the suit was filed for the reliefs stated above.

4. In the written statement filed by the first defendant and adopted by other defendants, it is said that they are in possession of the suit property in

Resurvey No. 52/4. They are having some land close to the subject matter of the suit and they have been using the same for a long time. It is said

that they have applied for assignment, to the Tahsildar. As the suit property is situated adjacent to their property, first plaintiff filed a petition before

the Collector of Thanjavur and Tahsildar at Thiruthuraipoondi for assignment of the said land. On that application, the Revenue Inspector

conducted an enquiry and recorded his statement. A further application was filed before the Village Panchayat Authorities on 24.6.1979. They

passed a Resolution favouring the assignment of the suit land in favour of first defendant. Copy of the Resolution was also sent to the Revenue

Authorities. Thereafter, the R.D.O. decided and passed orders not to issue B Memos in the name of the landlords. It is further said that the first

defendant, after getting oral permission from the Tahsildar, Thiruthuraipoondi, did all maintenance works and raised two "kottais" of ADT 31

seedlings on 24.6.1980, and he also wanted the B Memos to be issued in his name. At that time, the landlords filed the suit, in the name of the

plaintiffs, who are their farm servants. Neither Sheik Mohammed Syed Mohammed ever enjoyed the property as alleged in the plaint. The alleged

oral sale by them in favour of plaintiffs is also denied. There cannot be any question of alienation of Government land. It is also said that when the

defendants/appellants raised crops, plaintiffs attempted to trespass into the suit property. On a complaint given by 1st defendant, police have

registered a case under Sections 147, 148 and 324, I.R.C. against the plaintiffs. It was at that time, the suit was filed without any bona fides. They

prayed for dismissal of the suit.

5. The trial Court, after suggesting issues, marked Exs.A-1 to A-21 on the side of the plaintiffs, and Exs.B-1 to B-5 on the side of the defendants.

On the side of the plaintiffs, 1st plaintiff was examined as P.W.1 and four other witnesses were examined as P.Ws.2 to 5. Defendants 1 and 3

examined themselves as D.Ws.1 and 3 and one more witness was examined on their side as D.W.2.

6. The trial court, after elaborately considering the evidence, came to the conclusion that the plaintiffs have miserably failed to prove their

possession, and the suit was dismissed. It came to the conclusion that the question of possession was a matter which was considered by the

Revenue Authorities for the purpose of assignment. It was found that the defendants are in possession. The trial court found that the Karnam of the

Village (P.W.1) has given false evidence. P.W.2 was also not believed on the ground that it was at his instance the Karnam (P.W.4) made false

entries in the adangals, against whom strictures were passed by the local Tahsildar. In fact, it was also found that the very suit was filed by the

plaintiffs at the instance of P.W.2. Plaintiffs are none other than the employees under P.W.2. Regarding the documentary evidence, it was found

that most of them were obtained after institution of the suit, on the basis of an interim order passed by court. The plea of oral sale was also found

against the plaintiffs. It was further found that the defendants are in possession and they have been cultivating the property for a long time and also

on the date of suit.

7. The matter was taken in appeal before the lower appellate court as A.S.No. 108 of 1981, on the file of Sub Court, Nagapattinam. The lower

appellate court reversed the findings of the trial court, and passed a decree in favour of the plaintiffs. It extracted the evidence of all the witnesses,

and by a five sentences judgment, it held that in view of the evidence extracted, and also on the basis of documentary evidence, plaintiffs were

entitled to succeed. A degree was granted. The same is challenged in this second appeal.

8. The following substantial questions of law have been raised in the second appeal:

(1) Whether the civil court has jurisdiction to entertain the suit in respect of a Government land when the Revenue Authorities had already initiated

proceedings under Land Encroachment Act and the same was pending and whether the lower appellate court was right in reversing the trial court's

judgment and decree?

(2) Whether a trespasser of a Government land could convey the title to or

create interest in the Government land?

(3) Whether the oral sale of immovable properties (Government Poramboke land) set up by plaintiff is valid in law?

(4) Whether the lower appellate court is right in accepting the evidence of Karnam when in the proceedings before the Tahsildar,

Thiruthuraipoondi, under the Land Encroachment Act, which was initiated earlier, it was found that the Karnam has wilfully failed to enter the name

of the second appellant and falsely entered the names of respondents and when the Tahsildar had already directed the rectification of Revenue

Records against which the respondents themselves Had preferred an appeal?

9. It may be stated that respondents 1 and 5 died. For impleadment of their legal representatives after setting aside the abatements, Petitions were

filed, and, after hearing the respondents, those petitions were allowed on 6.3.1998, and additional respondents have been impleaded.

10. learned Counsel for appellants submitted that even though the suit is one for declaration and injunction, the lower appellate court has not

considered the material evidence, nor has it taken into consideration the demeanour of the witnesses, which was taken note of by the trial court.

learned Counsel submitted that the various reasons mentioned by the trial court as to why the witnesses examined on the side of the plaintiffs

cannot be believed, were not considered by the lower appellate court. When the judgment of the trial court was mainly on the basis of the evidence

on record, the lower appellate court should have been slow in interfering with the finding of the trial court. learned Counsel further argued that the

lower appellate court has failed to consider the material evidence in this case.

11. As against the said submissions of learned Counsel for appellants, learned Counsel for respondents submitted that u/s 100, C.P.C., this Court

should be slow in interfering with the finding of fact.

12. In this case, the lower appellate court has reheard the entire evidence and the entire findings. Under the above circumstances, the powers of

this Court are limited, and there is no ground to interfere u/s 100, C.P.C., is the contention of respondent's counsel.

13. Before further going to the evidence in this case, I only consider a recent decision of the Supreme Court regarding the powers of this Court u/s

100, C.P.C.

14. In *Mehrunnisa (Smt) and Others Vs. Visham Kumari (Smt) and Another*, , from paragraph 14, their Lordships have considered the earlier

judgment and have held that if a material piece of evidence was not taken into consideration which has a direct bearing on the issue, that will be a

valid ground for interference u/s 100, C.P.C. Paragraphs 14 to 18 of the judgment read thus:

The judgments cited by the learned senior counsel for the respondent on the scope of Section 100, C.P.C, are possible in the circumstances of this

case. In *J.B. Sharma Vs. State of Madhya Pradesh and Another*, , this Court while considering the scope of Section 100, C.P.C, observed thus:

It will thus be seen that the first appellate court while recording the finding acted on an assumption not supported by any evidence and further foiled

to consider the entire document on the basis of which the finding was recorded. The High Court was, therefore, justified u/s 100 of the CPC to set

aside the finding.

In *Dilbagrai Punjabi Vs. Sharad Chandra*, , again this Court while considering the scope of Section 100. C.P.C. held as follows:

It is true that the High Court while hearing the appeal u/s 100 of the CPC has no jurisdiction to reappraise the evidence and reverse the conclusion

reached by the first appellate court, but at the same time its power to interfere with the finding cannot be denied if when the lower appellate court

decides an issue of fact a substantial question of law arises. The court is under a duty to examine the entire relevant evidence on record and if it

refuses to consider important evidence having direct bearing on the disputed issue and the error which arises is of a magnitude that it gives birth to

a substantial question of law, the High Court is fully authorised to set aside the finding.

To the same effect, another judgment of this Court in *Sundra Naicka Vadiyar (dead) by LRs. and another Vs. Ramaswami Ayyar (dead) by his*

LRs., , this Court observed as follows:

A perusal of the impugned judgment of the High Court shows that there were good reasons for treating the finding on the question of possession

recorded by the first two courts to be vitiated. Apart from the reasons given by the High Court, it appear to us that ignoring some of the documents

which were vital for deciding the question of possession also vitiated the finding

on the question of possession recorded by the trial court as well as the first appellate court.

Recently also in Kochukakkada Aboobacker (Dead) by L.Rs. and others Vs. Attah Kasim and others, , this Court again observed on the scope of Section 100, C.P.C., as follows:

The appellate court had not considered these documents in a proper perspective and the effect of those documents on the rights of the parties.

Accordingly, the learned Judge reluctantly had reconsidered the evidence and, in our view, quite rightly since it is not a mere appreciation of evidence but drawing inferences from the admitted documents. Since proper construction of the documents and inferences have not legally been drawn by the appellate court, the High Court gone in detail and recorded the finding.

In the light of pronouncements of this Court and for the reasons given by the High Court, namely, that the lower appellate court has failed to take into account document necessary for giving a finding on the issue of bona fide requirement, we are of the view that we cannot find fault with the High Court in interfering with the reversing judgment of the lower appellate court. Accordingly, the appeal fails and it is dismissed. However, there will be no order as to costs.

Since in the above decision the earlier decisions have also considered, I do not want to make a reference to the earlier decisions on this point.

15. The question to be considered is, whether any material evidence has been omitted to be considered.

16. While narrating the facts, I have already said that the suit property is a poramboke land, and both plaintiffs and defendants are claiming possession. It is not disputed that the first defendant applied for assignment. Normally, assignment is granted only to a person who is in physical possession. An enquiry is conducted in accordance with Rules after due publication. Reports are obtained from Subordinate Officers and thereafter orders are passed on the application. Therefore, the finding of the Revenue Authorities regarding the factum of possession is a material piece of evidence which requires consideration by civil court also. It may not be binding. But, before civil court, it is a relevant piece of evidence which requires consideration.

17. The defendants applied before the Tahsildar and also before the Collector for assignment of the very same subject matter of the suit. The

Tahsildar, through enquiry, came to the conclusion that the defendants are in possession. It was also found that the Karnam of the Village is

attempting to create documents to show that P.W.2 has right over the property and that he is cultivating the land. A further enquiry was conducted

by the Tahsildar and it was found that the entries made by the Karnam were false. The Tahsildar warned the Karnam not to repeat such acts.

Naturally, the persons affected are P.W.2 and plaintiffs. Immediately they filed an appeal before the District Revenue Officer and obtained stay of

all further proceedings before the Tahsildar. Simultaneously they also filed this civil suit and obtained an ex parte order of injunction. Copy of that

order was submitted before the Revenue Divisional Officer, and on that basis, all further proceedings even in the appeal, were stayed till the

disposal of the suit. Ex.B-3 is the order of the Tahsildar, wherein it is stated that the first defendant alone is in possession of the scheduled

property, and "B" Memo had to be issued to him. It was against that order, the appeal was preferred before the Revenue Divisional Officer, and

further proceedings were stayed pursuant to the interim order passed by the District Munsif's Court. What happened subsequently is also relevant

in this case.

18. The plaintiffs, during trial, wanted all the proceedings before the Tahsildar also to be produced before the civil court. On the basis of summons

issued, the Tahsildar also filed the documents. It is seen that the Revenue Divisional Officer called for a Report from the Tahsildar as to the real

state of affairs. The Tahsildar submitted his report to the Revenue Divisional Officer immediately. Even though the records were brought at the

instance of the plaintiffs, the same were not marked, since it was against the case. But the trial court took into consideration the above documents

also and came to the conclusion that the defendants also and came to the conclusion that the defendants alone are in possession, and not the

plaintiffs. In his report, it is said that the Revenue Inspector of Thiruthuraipoondi enquired the matter and has sent a report on 9.10.1980 that

village level enquiry showed that it was Suriyamoorthy alone who was in possession and he has sowed seeds in 1 acre, 32 cents in R.S.No.52/4.

When the Karnam had not booked his name in the Adangal, he was directed to rectify the Register. Paragraphwise remark was also given by the Tahsildar, wherein it was reiterated that in regard to 1 acre, 32 cents, the only person in possession is the first defendant and not others. Regarding the claim of the plaintiffs and their predecessor, it was reiterated that it was not in respect of the plaint schedule property. Even though this document was before the trial court, plaintiffs did not choose to mark the same. But the trial court has taken the same into consideration, because part of it was marked as Ex.A-20.

19. Factum of possession is very material in assignment proceedings. Only when the plaintiffs were found to be not in possession, they filed the suit and obtained an ex parte order of injunction. They filed an appeal before the revenue authorities and further proceedings before the Tahsildar were also stayed.

20. The Karnam against whom strictures were passed by the Tahsildar, was examined as P.W.3 in the suit. The trial court has held that he is a man who can never be believed, and he is a tool in the hands of P.W.2, a big landlord in that locality, under whom the plaintiffs are working. I do not find even one sentence by the lower appellate court about the assignment proceeding before the Tahsildar and why the lower appellant court cannot accept the reasoning of the trial court. This is a material thing which the lower appellate court has failed to consider.

21. This Court can also take note of the subsequent events, not on the basis of any additional evidence, but on the basis of admitted facts, namely, that the appeal filed by the plaintiffs before the Revenue Divisional Officer was also dismissed, holding that they are not in possession and they are not entitled to get any assignment of patta. That appeal was dismissed as per order dated 30.5.1982. While the appeal was pending before the lower appellate court, a subsequent event was also taken note of by the lower appellate court.

22. If a factum of possession is agitated before one authority, it has to consider that aspect for granting the relief in the proceedings before it. That will have a material bearing in the result of a civil suit, especially when the land in question is a poramboke land. The Government, in its sovereign power, is entitled to consider any person for granting assignment in respect of its

land. Possession is considered as one of the material points which enables a person to get assignment. That was the matter in issue before the Revenue Authorities. Even though they may not be binding on civil courts, they are decisions which should be considered by civil courts.

23. As I said already, it is the case of the plaintiffs that they purchased the property on the basis of oral from two persons, namely, Sheik

Mohammed and Syed Mohammed, on 4.10.1979. When P.W.1 was examined, he changed the story about the oral sale. According to him, the

property was purchased from one Yunus, who was in possession. The reason for changing the version was that from 1979, B memo was issued in

the name of one Yunus. Naturally, P. W.2, the landlord of that locality was asked to speak about Yunus, particularly when he was related to him,

and how he came into, possession. We must understand that P.W.2 was also an applicant for assignment. He was also interested in getting

possession, and he also admitted that all the plaintiffs are his servants. The evidence of P.Ws.1 and 2 was, therefore, rightly discarded by the trial

court.

24. The evidence of the Karnam was rightly discarded by the trial court, because he was only a tool in the hands of P.Ws.1 and 2. Regarding the

documentary evidence, the trial court has categorically found that most of the documents are subsequent to the institution of the suit, and that too,

on the basis of ex parte order of injunction. In this connection, it may also be noted that immediately prior to institution of the suit, criminal

complaint was filed by the first defendant alleging trespass by the first plaintiff and also causing injury to the first defendant. P.W.1 admitted that

there was a criminal case against him at that time. Finally he was acquitted. When the trial court has minutely considered the oral evidence adduced

on the side of the plaintiffs cannot be believed, let us see how the lower appellate court has considered the matter.

25. In the penultimate paragraph of its judgment, after extracting the evidence of the witnesses, the lower appellate court has given its finding as

follows:

So, the lower appellate court has mainly relied on Exs.A-4 to 19 and 21 and, also on the evidence, of P.Ws.3 and 4. The trial court has discarded

the evidence of those witnesses, and the documents have been eschewed from

consideration on the ground that they are after suit. As I said already, the lower appellate court has not taken into consideration the proceedings before the Tahsildar and Revenue Divisional Officer, even in one sentence. In this case, for the factum of possession, oral evidence is material. If the trial court has taken a view about the witnesses, the lower appellate court should be slow in interfering with the same. To fortify this, I will refer only to a early decision of the Supreme Court reported in Sarju Pershad Vs. Raja Jwaleshwari Pratap Narain Singh and Others, . Para 7 and a portion of para 15 of that judgment are relevant for our purpose, and they are as follows:

The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such case, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is and it is nothing more than a rule of practice that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact : vide Lord Atkin's observations in K.C. Macdonald v. Fredlatiner AIR 1929 P.C. 15 : 112 I.C. 375. The gist of the numerous decisions on this subject was clearly summed up by Viscount Simon in Watt v. Thomas (1947) A.C. 484 : (1947)1 All E.R. 582 and his observations were adopted and reproduced in extenso by the Judicial Committee in very recent appeal from the High Court of Madras : vide Veerasami v. Talluri Narayya AIR 1948 EC. 32 : ILR 1949 Mad. 487. The observations are as follows:

But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the

witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.

Here was a case where the controversy related to a pure question of fact which had to be determined by weighing and appraising of conflicting oral testimony adduced by the parties. It cannot be denied that in estimating the value of oral testimony, the trial Judge, who sees and hears the witnesses, has at) advantage which the appellate court does not possess. The High Court was wrong in thinking that it would detract from the value to be attached to a trial Judge's finding of fact if the Judge does not expressly base his conclusion upon the impressions he gathers from the demeanor of witnesses. Vide, the observation of Lord Carson in *Netherlandscho Hadel v. R.M.P. Chettiar Firm* AIR 1929 P.C. 202 : 7 Rang.

498. The duty of the appellate court in such cases is to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial court arrived at or whether there is an element of improbability arising from proved circumstances which in the opinion of the court outweighs such finding. Applying this principle to the present case, we do not think that the High Court was justified in reversing the finding of the trial Judge on the question of attestation of the document...

26. While extracting the evidence of the witnesses, the lower appellate court has also got a duty to see whether the remarks made by the trial court about the demeanour of the witnesses is correct or not. The lower appellate court has not done this in this case. Even though the lower appellate court has got the right to re-appreciate the evidence, it has also got a duty to why it is not accepting the findings of the trial court, and why it believes the evidence of certain witnesses which has been discarded by the trial court. A mere narration of the evidence of witnesses alone is not sufficient and that is not the only duty of the lower appellate court.

27. On the questions of law (extracted above), I answer the same as follows :
The jurisdiction of civil court is not ousted in respect of Government

land so long as the right of the Government is not question. A trespasser cannot have any title in respect of any Government land and the oral sale

relied on by the plaintiffs is also not valid. The lower appellate court was wrong in accepting the evidence of the Karnam (P.W.4), who has been

disbelieved in a simultaneous proceeding in respect of the very same property. The judgment of the lower appellate court is liable to be interfered

with for the reasons stated above.

28. In the result, the Second Appeal is allowed. The judgment of the lower appellate court is set aside. The suit O.S.No.361 of 1980 shall stand

dismissed. The trial court's judgment is restored. Appellants are entitled to their costs in all the three courts.