

(2002) 09 MAD CK 0161
In the Madras High Court
Case No : S.A. No. 943 of 1990

Thangarajapandian

APPELLANT

Vs

Sreekrishnaperumal, Selvaraj, Sivasubramanian, Chinnapoo
Nadar, State of Tamil Nadu and Chinnathangam

RESPONDENT

Date of Decision : 12-09-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80, 80(2)

Citation : (2002) 09 MAD CK 0161

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : Anandavalli, for P. Ananthakrishnan Nair, for the Appellant; S. Sivashanmugham, Government Advocate for Respondent 5 and O.K. Sridevi, for Respondent 6, for the Respondent

Final Decision : Dismissed

Judgement

K. Sampath, J.—The plaintiff in O.S.No.68/81 on the file of the Additional District Munsif, Nagercoil, is the appellant in the second appeal. He filed the suit for declaration of his possession in respect of A and B Schedule properties and for a permanent injunction restraining the defendants from interfering with his possession and enjoyment.

2. The case in the plaint is as follows:

In Tamaraikulam Village in Old S.No.1106 an extent of 1 acre 49 cents belonged to the plaintiff's father and his brothers. There was a partition in 1112 M.E. among the brothers. The extent of 1 acre 49 cents was divided into five plots. One cent was set apart for water spring and for public use. The plaintiff's father got plots, viz. 2 and 3. The allotment is set out in the plaint plan. He got 26.250 cents being plot No.3 and 23.093 cents being plot No.2 and after effecting mutation in the records, he was in enjoyment of the same and after him, the plaintiff is in enjoyment, plot No.3 as S.No.1106/5 and plot No.2 as S.No.1106/4, the corresponding new survey numbers being 474/7 and 473/2

respectively. Some mistake was committed at the time of resurvey. The Resurvey Authorities without looking into the revenue records, the plaintiff's documents and kist receipts and his enjoyment and without notice to him, conducted resurvey. The resurvey was against law and is therefore not valid and it will not bind the plaintiff. In the resurvey, in plot No.3 S.No.474/7 - 9.5 are, is shown. This should be 23.465 cents. On actual land the plaintiff is in enjoyment of 26.250 cents. The property belonging to defendants 1 to 3 is plot No.1, which is to the east of the plaintiff's plot No.3. The resurvey number is 473/3. As per the partition deed, defendants 1 to 5 are entitled to 21.5 cents. But, as per resurvey they had been given 22.230 cents. Plot No.4 is on the eastern side of plot No.3 and that belongs to defendants 1 to 5, in that the extent is shown as 27.843 cents. Plots 4 and 5 have been included in new survey Nos.474/5 and 474/6. By mistake 2.785 cents have been shown in S.Nos.473/3, 474/5 and 474/6. Out of this 2.785 cents, 750 sq.links are shown as A Schedule property. 2.035 cents are shown as B Schedule. Defendants 1 to 5 have no right in 2.785 cents. They are trying to take advantage of the mistake committed in the resurvey and attempting to forcibly enter and occupy the suit property. In these circumstances, the suit came to be filed. In view of the urgency, no notice u/s 80 was given to the sixth defendant. The plaintiff has obtained permission u/s 80(2) of the CPC from the Court for dispensing with the notice.

3. The defence set up was as follows:

The plaintiff has not impleaded the proper and necessary parties. The suit is also barred by limitation.

It is true that a partition took place in 1112 M.E. The suit plan is not correct. As per the partition deed for plot No.3 21-1/4 cents have been given. For plot No.2 23.093 cents have been given. It is not correct to say that the plaintiff is entitled to 26.250 cents in plot No.3. As per the partition deed, a common pathway should have been formed. It is situate between the houses of the plaintiff and the defendants. It has not been shown in the plaint plan. After deducting the extent set apart for the pathway, plots 2 and 3 belonging to the plaintiff contained correct extents. The plaintiff is attempting to occupy the pathway. If the pathway is removed, it will not be possible for these defendants to get out of their house. There is no alternative pathway. After the partition each of the parties had been in enjoyment of the portions allotted to them by fencing the same. These defendants do not know anything about the survey. Plot No.1 belonged to the first defendant and his brother Palavesamuthu Nadar. There was a division on 26-12-1949 and in terms of that division, Perumal Nadar got 51/16 cents and Palavesamuthu Nadar got 16-1/4 cents. After Palavesamuthu Nadar's death, his son Selvaraj sold an extent of 8 cents to one Chinnathangam Nadar. The rest is in possession of the second defendant. Plot No.4 belongs to the first defendant, his brother Palavesamuthu Nadar and Ramalingam Nadar. The extent is 27-3/4 cents. In the partition dated 26-12-1949, 11-3/4 cents were given to the first defendant, 16-1/4 cents to Ramalingam Nadar. Defendants 4 and 5 are

the sons of Ramalingam Nadar. Defendants 4 and 5 had colluded with the plaintiff and filed the suit. The first defendant had purchased 25-1/2 cents and 1/16 cent from Isakkiadimai Nadar in 1102 M.E. The water spring is in that property. Plot No.4 purchased from Isakkiadimai Nadar is a single block. The plaintiff had never been in possession of A and B Schedule properties. Patta stands in the name of the first defendant. It is not correct to say that the defendants are occupying A and B Schedule properties. The plaintiff attempted to occupy the pathway and with that object, he destroyed the eastern fence. The plaintiff had already filed O.S.No.872/80 in respect of the pathway to the water spring.

4. The 6th defendant Government filed a written statement stating that the resurvey had been properly done, boundary was clearly marked and that the plaintiff was not in possession of A and B Schedule properties. The resurvey had also become final.

5. The 7th defendant was impleaded at a later stage. He adopted the written statement of defendants 1 to 3.

6. On the above pleadings, the trial Court framed the necessary issues and on the oral and the documentary evidence, held against the plaintiff and by judgment and decree dated 30-4-1987 dismissed the suit. The plaintiff filed appeal in A.S.No.23/88 before the Sub Court, Nagercoil. The learned Subordinate Judge, by judgment and decree dated 15-11-1989 confirmed the decision of the trial Court and dismissed the appeal.

7. It is as against that, the present second appeal has been filed. At the time of admission, the following substantial question of law was framed for decision in the second appeal:

"Whether the findings on the question of existence of pathway are sustainable when there is no evidence at all to support the case relating to pathway?"

8. The 7th defendant is a purchaser from defendants 1 to 3. Defendants 1 to 3 filed a written statement. The first defendant died pending suit and defendants 2 and 3 remained ex parte. It would appear that the 2nd defendant, who was the first respondent in the second appeal, also died pending second appeal. However, whatever interest defendants 1 to 3 might have had in the suit property, has passed on to the 7th defendant and therefore, the death of the second defendant pending second appeal, does not stand in the way of the second appeal being decided on merits.

9. The sum and substance of the plaintiff's case is as follows:

To start with, there was a partition in 1112 M.E among the plaintiff's father and his brothers. The partition is evidenced by Ex.A-4 document. A Schedule is shown as ABCD in the plaint plan and B Schedule as EFG. As per the Commissioner's report, the total area of A Schedule is 1-1/4 cent and B Schedule 510 sq.links while as per the plaint A Schedule is 750 sq.links and B

Schedule is of an area of 2 cents and 35 sq.links. As per Ex.A-4 partition, the 2nd and the 3rd plots were allotted to the plaintiff's father while as per the partition deed, the plaintiff is entitled to 23.093 cents in S.No.1106/4 and 26.250 cents in S.No.1106/5. But, after resurvey, the extents have got reduced and in these circumstances, the plaintiff is entitled to have the balance extents declared to be his and recovery of possession of the same from the 7th defendant.

10. According to the 7th defendant, as per the partition deed after deducting the area set apart for pathway, the balance extent is very much available with the plaintiff and he can have therefore no grievance. In case the suit A and B Schedule properties are declared to be the properties of the plaintiff, the access will be lost to the 7th defendant.

11. It is specifically recited in the partition deed that the parties should provide for passage for use by the various sharers and for use of the spring water in S.No.474/5 also proper passage has to be provided. According to the 7th defendant, the passage is so provided for the A and B Schedule properties and the plaintiff wants to take advantage of the alleged lack of notice in the resurvey proceedings and claim the A and B Schedule properties as his absolute properties. It is also to be noted that the plaintiff had filed O.S.No.872/80 against the 7th defendant alleging that he had closed the spring in S.No.474/5 and for restoration of the same. Both the Courts below have found that there was indeed a passage laid out as envisaged in Ex.A-4 partition.

12. A Commissioner was appointed and he has filed a detailed report and a plan. The Courts below have relied on the Commissioner's report and plan for holding against the plaintiff and dismissing the suit. The Commissioner in his report has stated as follows:

"The northern side pathway of resurvey No.474/7 is cactus fenced continuous on both sides, the age of the fence being 15 years old. Similarly, the southern side pathway of resurvey No.474/7 is cactus fenced continuous on both sides and the age of the fence is about 5 years."

The Commissioner filed his report on 30-4-1986. The suit is of the year 1981.

13. The Commissioner has also found that there are 6 portia trees in a straight line along FB in his plan, which is the eastern boundary of the plaintiff's property. The age of the portia trees is given as 15 years. The A Schedule property claimed by the plaintiff is to the east of this FG line. The plaintiff himself in his oral evidence has given the age of the portia trees as 40 years. The Commissioner also did not find any fence to the east of FG. At the same time, the Commissioner finds that about 12 links to the east of points FL, there is a fence along BK and from the point K up to the point J, there is a granite wall and there is an entry provided at point H with a door. Near the point H, there are two stone pillars. In one stone pillar there are 2 hinges for placing shutters and doors over them. The Commissioner did not find any shutter or door. From the point H to the point C there is a granite wall. There is an opening at FB and another

opening at GC. This would clearly show as rightly found by the Courts below that the suit A Schedule property, which is shown as FB, JH and CGL in the plaint plan was only a passage for the use of all the sharers and that it had been so formed pursuant to the clause found in Ex.A-4 partition. The plaintiff's witness also admits in his evidence that the temporary fence along LG (the line along which the 6 portia trees stand) was removed just prior to the suit in 1981 and that the fence had been there for over 10 years prior to that. He further admits that the northern passage north to point B has been in existence for 15 to 20 years and a passage had also been in existence on the southern side. If that is the position, then the claim of the plaintiff that in resurvey he lost the A and B Schedule properties, falls to the ground.

14. It is also found by both the Courts below that if A and B Schedule properties are to be declared to be the plaintiff's properties, then the access to the defendants' property would be totally lost as there is no alternative pathway. The finding reached by the Courts below that the plaintiff had deliberately removed the fence existing along FG line and made a claim with regard to A Schedule property. Similarly, the Commissioner finds that along the line EF on the northern side, there are two varachi trees and one tamarind tree, which were found to be two years old at the time of the Advocate Commissioner's visit. This would also give the lie direct to the case of the plaintiff that in the resurvey he lost the property AEF shown as B Schedule in the plaint. Though the plaintiff put forward a case that the defendants had excess lands, he did not attempt to substantiate the same by having measurements taken of the lands of the defendants. The Courts below have rightly concluded that by reason of the resurvey, the defendants has not got any extra property and the plaintiff has not lost any portion of his properties. The passage or the pathway had been formed as per the directions found in the Ex.A-4 partition.

15. Consequently, I hold that the findings on the question of existence of pathway by the Courts below are sustainable on the materials available and the substantial question of law is answered accordingly. The second appeal fails and the same is dismissed. However, there will be no order as to costs.