

Madras High Court

S. Ramesh Babu S/O P.V. Srinivasan vs R. Bhaskar S/O Ramu And ... on 3 March, 2003

Equivalent citations: 2003 (1) CTC 676, (2003) 1 MLJ 722

Author: A Ramamurthi

Bench: A Ramamurthi

ORDER A. Ramamurthi, J.

1. The plaintiff in O.S. No. 14/2000 on the file of I Additional District Munsif, Coimbatore has preferred the present revision petition aggrieved against the order dated 25.9.2000 allowing C.M.A. No. 76/2000 on the file of the I Additional District Judge-cum-Chief Judicial Magistrate of Coimbatore reversing the order dated 30.6.2000 in I.A. No. 21/2000 on the file of the I Additional District Munsif, Coimbatore.

2. The case in brief for the disposal of the revision is as follows: The revision petitioner/plaintiff filed the suit for permanent injunction against the defendants. He also filed I.A. No. 21/2000 under Order XXXIX Rules 1 and 2 C.P.C. for ad-interim injunction pending disposal of the suit. He took the suit property on lease from the second defendant on 9.12.99 for non-residential purpose, for a period of 11 months. The monthly rent payable is Rs.1,000/- and an advance is also paid. He is manufacturing foundary chemicals and building materials. The foundary is situated at Perianaickenpalayam. The suit property was taken on lease to stock the foundary and building materials. It is situated on the eastern site of north south Kalingarayan Street abutting the main road measuring 97 feet X 12 feet totally 1164 sq.ft. On the north of the suit property, there is a 4 feet passage to reach the rear side of the suit property.

3. The first defendant is a tenant under the second defendant. The first defendant is using the premises as godown to stock parcels and packets. The first defendant had access from the main road to the premises to the 4 feet passage. The plaintiff is not causing any hindrance to the ingress and egress to the 4 feet passage. The first defendant is operating omni buses from Coimbatore and he is a rich and influential person. The second defendant is also hand in glove with the first defendant and interfering in the enjoyment of the plaintiff. The first defendant is not entitled to use the property to gain ingress or egress to his rented premises situated on the rear side. The first defendant is now trying to take the buses inside the property and openly proclaimed that he would some how dispossess the plaintiff from the suit property. If the plaintiff is forcefully dispossessed, he would be put to much loss and hardship. The plaintiff has got prima-facie case and balance of convenience is in his favour.

4. The first defendant filed a counter statement and denied the various averments. The second defendant is the owner of the property bearing Door No. 32, Kalingarayan Street, Ram Nagar, Coimbatore, consisting of 10 cents of land and shed measuring 1500 sq.ft. The entire premises was leased out by the second defendant to him and he is in possession and enjoyment since 3.5.95 running a godown and parking his vehicles on a monthly rent of Rs.5,250/-. Differences arose between D 1 and D 2 and as a result of which the second defendant attempted to evict the first defendant from the premises. In fact, the first defendant already filed O.S. No. 2494/1999 to protect his possession against the illegal attempt of the second defendant in evicting him. He also filed I.A.

No. 3084/99 for interim injunction. The suit was filed by him on 3.12.99. The second defendant and his wife are the defendants in the suit filed by the first defendant. They also entered appearance on 10.12.99. The second defendant also filed two applications in that suit, in I.A. No. 3252/1999 for appointment of an Advocate-Commissioner and in I.A. No. 32228/1999 for an order of interim injunction against D 1 herein in respect of the properties covered in the present suit. An Advocate-Commissioner was appointed and he visited the property on 20.12.99 and also filed a report. D 2 also filed a counter in I.A.3084/1999 wherein there is no whisper by D 2 about the alleged lease to plaintiff on 9.12.99. The plaintiff is only the brother-in-law of D 2 and he has been set up to file the suit as well as the application. The alleged lease putforth by the plaintiff is false and a fabricated one. There is no lease, nor the plaintiff is in possessions and enjoyment of the suit property. In fact, D 2 in the counter statement filed in I.A. No. 3082/1999 had admitted that the suit property is used by D 1 for parking his buses. He could not have leased out a portion of the property to the plaintiff on 9.12.99. The Commissioner had also stated in the report that in the stockyard, there are no foundary and building materials.

5. The entire passage measuring 98 feet X 17 feet is an access in which D 1 is parking his vehicles. The contention that only an extent of 4 feet X 98 feet has been ear-marked as an access by D 1 is false. There is no cause of action for the plaintiff to file the suit. The plaintiff is not entitled to any discretionary order on the basis of the alleged lease. The plaintiff is not in possession of the suit property and as such the plaintiff had no prima-facie case. He has come to Court with unclean hands and as such the petition is liable to be dismissed.

6. D 2 filed a counter statement supporting the case of the plaintiff.

7. The Trial Court on the basis of Exs. A 1 to A 21, Exs.B1 to B 3 and after hearing the parties, allowed I.A. No. 21/2000. Aggrieved against this, D 1 preferred C.M.A. No. 76/2000 on the file of the I Additional District Judge, Coimbatore and the learned Judge after hearing the parties allowed the appeal, set aside the order passed by the Trial Court and dismissed I.A. No. 21/2000 and aggrieved against this the petitioner/plaintiff has come forward with the present revision petition.

8. Heard the learned counsel for the parties.

9. The points that arise for consideration are:

(i) Whether the plaintiff has got prima-facie case and the balance of convenience is in his favour ?

(ii) Whether the order passed by the lower appellate Court is proper and correct?

(iii) to what relief ?

10. There is no dispute that the property bearing Door No. 32, Kalaingarayan Street, Ram Nagar, Coimbatore consisting of 10 cents of land and a shed measuring 1,500 sq.ft. belonged to the second defendant. The plaintiff now claims that he had taken on lease the suit property measuring 97 feet east-west and 12 feet north-south, totally 1164 sq.ft as stockyard from the second defendant.

According to the plaintiff the balance of area alone was leased out to the first defendant by the second defendant and the first defendant was having access only through 4 feet passage. But this being so, the first defendant attempted to interfere in the possession and enjoyment of the plaintiff and therefore, he was constrained to file the suit and he also filed a petition for temporary injunction pending disposal of the suit. The Trial Court allowed the application filed by the plaintiff, whereas the lower appellate Court reversed the said finding and dismissed the petition.

11. The burden is upon the plaintiff/revision petitioner to establish that he has got a prima facie case and the balance of convenience is in his favour.

12. The learned counsel for the revision petitioner contended that the lower appellate Court ought to have seen that he is a tenant under the second defendant by virtue of Ex. A 1 - lease deed dated 9.12.99. He has been using the property for storing foundary chemicals and building materials. The first defendant is running a travel office and he was allowed to use only 4 feet passage from north to south to reach his premises. The suit property is different from the property covered in the earlier suit filed by the first defendant. Exs. A 4 to A 6 show that the plaintiff had been running the foundary in Perianaickenpalayam. Exs. A 15 to A 18 show that the building materials have been covered in the property. Exs. A 7 to A 12 will prove payment of monthly rent of Rs.1,000/-. The first defendant has not chosen to produce the lease deed and as such an adverse inference can be drawn against him under Section 114 of the Evidence Act. The reception of additional documents by the lower appellate Court filed by the first defendant is not proper and correct. The first defendant after the disposal of the C.M.A. filed another suit O.S. No. 2399/2000 before the Principal District Munsif cum Magistrate and obtained interim injunction which was subsequently suspended.

13. It is admitted that the first defendant already filed O.S. No. 2494/99 claiming the relief of permanent injunction relating to the entire property measuring 10 cents and shed measuring 1,500 sq.ft. The second defendant and his wife are the parties in that suit. They have entered appearance in that suit and filed counter to the interim injunction on 10.12.99. It is pertinent to point out that there is no whisper in the counter filed by the second defendant in O.S. No. 2494/99 that the suit property measuring 97 feet x 12 feet was even leased out to the plaintiff herein. In fact, the plaintiff herein has filed a suit for permanent injunction based upon Ex. A 1- lease deed said to have been executed by the second defendant in his favour on 9.12.99. If really Ex. A 1 had come into existence on 9.12.99, then the second defendant would not have failed to mention the same in the counter filed by him on 10.12.99. More over, the plaintiff is none other than the brother-in-law of the second defendant. When the first defendant already filed a suit regarding the entire property claiming that he is in possession of and enjoyment of the property, it appears that the second defendant had executed the lease deed on 9.12.99 to the plaintiff and the present suit has been filed.

14. An Advocate Commissioner was already appointed in the earlier suit and he had inspected the property and noticed that no materials had been stored in the stockyard as claimed by the plaintiff. Now the foundary of the plaintiff is said to be at Perianaickenpalayam. The absence of any materials in the stockyard is one more circumstance to show that the plaintiff has no prima-facie case. The contention of the plaintiff as well as the second defendant that the first defendant is entitled to have a passage of only 4 feet to use his property could not be true. In fact, the second defendant in the

counter statement filed already in the other suit admitted that the buses of the first defendant are parked in the property. It is not possible for any one to take the buses in the passage measuring 4 feet. It therefore follows that the entire property could have been only under the enjoyment of the first defendant and because of the misunderstanding between the first defendant and the second defendant, now the second defendant had set up the plaintiff who happened to be his brother-in-law to file a suit on the basis of Ex. A 1. Hence, it is clear that the plaintiff is not having the balance of convenience also. The location of the property as well as other materials clearly indicate that the first defendant alone is in possession and enjoyment of the entire property and only to prevent D 1 from having ingress and egress to the property, now the plaintiff had been set up by the second defendant based on Ex. A 1.

15. The learned counsel for the revision petitioner contends that the lease deed has not been produced by the first defendant and as such adverse inference can be drawn against him. The burden is only upon the petitioner to prove his case and he cannot take advantage of the weakness in defence. In fact, the first defendant already filed O.S. No. 2494/99 for permanent injunction relating to the entire property and he could have filed the lease deed in that suit. The learned counsel for the first defendant also relied on 1998 M L J Reports 567 (CHELLATHURAI AND FIVE OTHERS V. PERUMAL NADAR) that in a suit for injunction, it is the duty of the plaintiff to prove that he continued to be in possession on the date of the suit. Only when evidence on both sides are even title to the property will have some relevance. Merely because the defendant has failed to prove his case, it does not follow that the plaintiff is in possession.

16. Reliance is also placed on AIR 1920 PRIVY COUNCIL 84 (DAMISETTI RAMACHENDRUDU AND OTHERS V. DAMISETTI JANAKIRAMANNA AND OTHERS) that the presumption indicated in illustration to Section 114 of the Evidence Act cannot displace a contrary inference supported by adequate evidence.

17. I am of the view that the lower appellate Court had correctly appreciated the contentions of the parties. The question whether the subsequent document will be hit by Section 52 of the Transfer of Properties Act can be considered only at the time of trial of the suit. There is no difficulty in coming to the conclusion that the plaintiff has failed to establish a prima-facie case and the balance of convenience is also not in his favour. Hence, the points are answered accordingly.

18. For the reasons stated above, the revision petition fails and is dismissed. The Trial Court is directed to expedite the trial of the suit as early as possible. No costs. Consequently, C.M.P. No. 10810/2001 is also dismissed.