Madras High Court
Arulmighu Sri.Subramaniaswami ... vs Thiruchendur Panchayat Union on 6 March, 2008

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 06/03/2008

CORAM
THE HONOURABLE MR.JUSTICE G.RAJASURIA

S.A.No.584 of 2000
and
M.P(MD)No.1 of 2008

Arulmighu Sri.Subramaniaswami Thirukovil
through its Joint Commissioner/Executive
Officer, Thiruchendur.

.. Appellant/Appellant/
Defendant

Vs

Thiruchendur Panchayat Union
through it's Commissioner,
Thiruchendur.

..Respondent/Respondent
Plaintiff

Prayer

Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 28.09.1999 in A.S.No.311 of 1997 on the file of the learned Subordinate Judge, Tuticorin in confirming the judgment and decree dated 18.08.1997 in O.S.No.868 of 1995 on the file of the learned Additional District Munsif, Thiruchendur.

!For Appellant ... Mr.T.Srinivasa Raghavan

^For Respondent ... Ms.Vijayakumari Natarajan

:JUDGMENT

This second appeal is focussed as against the judgment and decree dated 28.09.1999 in A.S.No.311 of 1997 on the file of the learned Subordinate Judge, Tuticorin in confirming the judgment and decree dated 18.08.1997 in O.S.No.868 of 1995 on the file of the learned Additional District Munsif, Thiruchendur.

2. The parties are referred to hereunder in the same order as they were arrayed before the trial Court.

3. Niggard and bereft of details, the case of the plaintiff as stood exposited from the plaint could be portrayed thus:

The plaintiff is Thiruchendur Panchayat Union. The suit properties are eight buildings as described in the schedule of the plaint. Ex.A1, G.O.Ms.No.337 dated 19.03.1971 conferred right of ownership on the plaintiff relating to the suit properties. As per Ex.A9, possession was handed over by the Ex.District Board to the plaintiff. While so, the defendant herein requested the plaintiff to hand over the building so as to enable it to run a girls' college temporarily till they could construct a building for that purpose. However, without using the suit properties for girls college, they started using it as an old age home. Whereupon, Ex.A2, the lawyer's notice was issued by the plaintiff to the defendant, calling upon the latter to hand over the possession of the building, for which Ex.A3 reply was given by the defendant. Hence, the plaintiff filed the suit for declaration and for consequential relief of recovery of possession of the suit properties.

4. Impugning and challenging, denying and refuting the allegations/averments in the plaint, the defendant filed the refutatory written statement; the gist and kernel of it would run thus:

The plaintiff is not the owner of the suit properties. In the 'A' Register, which emerged in the year 1947, the suit properties are referred to as the properties of the defendant Devasthanam. Simply because Ex.A4, the letter was to the effect as though the defendant Devasthanam wanted to purchase the suit properties, it would not confer title over the land. The Government constructed building for Industrial Training School at Veerapandianpattanam and handed over possession of that building to the defendant Devasthanam. The defendant is taking steps to get patta in its favour. The suit buildings are within the premises of the defendant Devasthanam, which by enjoying the suit properties for over the statutory period acquired prescriptive title to it. Accordingly, the defendant prayed for the dismissal of the suit.

5. The trial Court framed the relevant issues and during trial, the Development Officer of the plaintiff himself examined as P.W.1 and Exs.A.1 to A.11 were marked. On the side of the defendants, one Muthanantham was examined as D.W.1 and Ex.B.1 was marked.

6. The trial Court ultimately decreed the suit.

7. Being aggrieved by and dissatisfied with the Judgment and decree of the trial Court, the defendant preferred the first appeal, whereupon the first appellate Court confirmed the Judgment and decree of the trial Court. However, during the pendency of the first appeal, I.A.No.242 of 1999 was filed by the defendant for receiption of document, viz., Extract of 'A' Register relating to the year 1947. But that I.A. was also dismissed by the first appellate Court along with the appeal.

8. Challenging the Judgments and decrees of both the Courts below, the defendant filed this second appeal on the grounds interalia thus: Both the Courts below fell into error in deciding the matter contrary to law and evidence and that too without understanding the scope of the case. The Courts below failed to hold that the suit properties belonged to the defendant. The Courts below relied on the Ex.A1, the G.O.Ms.No.337, without properly appreciating the significance of it. The additional documents filed before the first appellate Court would prove the existence of the pilgrim shed there and that the defendant Devasthanam has been in continuous possession and enjoyment of the said area and thereby acquired adverse possession also.

9. Ex.A6, the resolution passed by the defendant, Ex.A7, the entry in the plaintiff's property Register and Ex.A11, the property tax demand in favour of the plaintiff will not confer any title. Accordingly, the defendant prayed for setting aside the Judgments and decrees of both the Courts below and for dismissing the original suit.

10. The following substantial question of law were framed by my learned Predecessor at the time of admitting this second appeal: "Is not the judgment of the Courts below vitiated due to the failure of the appellate Court in not admitting the relevant and vital document at the appellate stage, which has an impact on the claim of the plaintiff in the suit?"

11. Heard both sides.

12. During the pendency of this second appeal, M.P(MD)No.1 of 2008 was filed by the appellant/defendant for reception of additional documents, for which counter also was filed on the side of the respondent/plaintiff.

13. Relating to M.P(MD)No.1 of 2008 is concerned, the learned counsel for the appellant/defendant would submit that subsequent to the filing of the suit, very many changes took place and as on date the eight buildings referred to in the plaint do not exist on ground, whereas a big toilet block is existing, which has been constructed with the approval of the Government and relating to it, the additional documents filed have to be admitted.

14. Whereas the learned counsel for the respondent/plaintiff by placing reliance on the counter filed, would submit that before the second appellate Court, so to say, this Court no additional documents of this nature could be filed, unless it is in the form of compromise; the additional evidence cited on the side of the appellant/defendant cannot be entertained by this Court for the reason that those documents are not admitted by the respondent/ plaintiff and in such a case the contentious documents and evidence cannot be entertained at the second appellate stage.

15. Since, both sides are having no consensus relating to the subsequent developments relating to the suit property, the Court directed them to argue on the merits of the case as requested by the learned counsel for the respondents/plaintiff herein.

16. The learned counsel for the appellant/ defendant would argue that despite the fact that this is a suit for declaration of title over the suit property and for the consequential relief of recovery of possession, both the Courts below were not justified in mainly relying upon Ex.A4, the letter written by the Executive Officer of the defendant; independent of Ex.A4, the plaintiff was duty bound as per law to prove its title over the immovable property and that too when the defendant challenged the title of the plaintiff and set up prescriptive title in favour of the defendant.

17. He would also develop his arguments by drawing the attention of this Court to I.A.No.242 of 1999 which was dismissed by the first appellate Court that the first appellate Court ought not to have rejected the extract of 'A' Register of 1947, which would go a long way to prove as to how the plaintiff was wrong in claiming title over the suit property.

18. Whereas the learned counsel for the respondent/plaintiff would submit that Ex.A4 attracts Section 58 of the Indian Evidence Act; it is a clear case of admission on the part of the defendant, only as an afterthought and by having a volte face, it started disputing the title of the plaintiff; admitted facts need not be proved and accordingly both the Courts below properly relied on Ex.A4, which clearly evidence the admission on the part of the defendant; simply because the defendant as an afterthought changed his version, the plaintiff was not duty bound legally to adduce evidence relating to the ownership of the plaintiff over the suit property.

19. The learned counsel for the respondent/ plaintiff also submitted that this Court while exercising its power as a second appellate Court cannot reappreciate the evidence and come to a different conclusion even arguments sake it is taken that the findings recorded by both the Courts below are based on erroneous appreciation of factual evidence. To fortify and buttress his point, he cited the decision of this Court in Manivanna Gounder v. Pachaiappa Gounder reported in 2006(5)CTC 639. An excerpt from it would run thus: "The Courts below have thoroughly considered the evidence on record and by applying the right principles of law have recorded concurrent findings that the suit property is not the separate property of the plaintiff but it is the property purchased from the income derived from the joint family necleus and there is absolutely no error in the reasonings of the Courts below. This Court while exercising power under section 100 of the Code of Civil Procedure cannot re-appreciate the evidence and come to a different conclusion, unless the findings recorded by the Courts below are not based on record or the same are perverse.

14. The Apex Court in the decision rendered in the case of Thimmaiah and Others v. Ningamma and another, 2000 (7) SCC 409 in paragraph 13 has observed as follows:

"13. But at the same time, this Court has noted that the High Court has no jurisdiction to entertain a Second Appeal "on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be". In other words, if there is some evidence and the appreciation of the evidence is erroneous, a Second Appeal will not lie".

and in the same decision it has been further observed that the High Court is not entitled to reassess the evidence and arrive at a different conclusion.

15. In the decision in M. Nadar Kesavan Nadar v. Narayanan Nadar Kunjan Nadar, 2000 (10) SCC 244 the Apex Court has laid down as follows: "Even if the finding of fact was wrong, in our opinion this finding of fact could not be disturbed specially when the High Court has not come to the conclusion that the same was not perverse not was based on no evidence."

16. Therefore, I see no reason to differ from the reasonings of the Courts below and no question of law much less any substantial question of law arises for consideration in the above Second Appeal".

20. Before I commence my discussion on the merits of the second appeal, I would like to advert to the aforesaid law point raised by the learned counsel for the respondent/defendant regarding the power of the second appellate Court.

21. It is a trite proposition of law that the second appellate Court while exercising its power under Section 100 of CPC cannot reappreciate the evidence. It should confine itself to the law point and that too, pertaining to the substantial question of law involved in the matter and not on the factual findings arrived at by the Courts below. The first appellate Court is the last Court of facts. Put simply, there is absolutely no quarrel with the proposition. I have to consider as to whether any perversity is in the Judgments and decrees of both the Courts below and it should also be seen as to whether both the Courts below have understood the scope of the suit and the legality of the evidence placed before it. With this background I would like to analyse this matter.

22. To the risk of repetition without being tautologous, I would like to refer to the prayers in the plaint, which are for declaration of title over the suit property and for the consequential relief of recovery of possession of it. At once it is obvious that the onus probandi is on the plaintiff to prove its title over that immovable property. The contention of the plaintiff is that once in the form of Ex.A4, there is a categorical admission that the plaintiff is the owner of the suit property by the defendant, then there is no question of the plaintiff adducing evidence over and above Ex.A4, whereas the learned counsel for the appellant/defendant would correctly submit that a title to an immovable property should be established by clinching evidence before the Court concerned; and mere relying on the documents like Ex.A4, the communication, would not confer title on the plaintiff. Section 58 of the Indian Evidence Act, which is being relied on by the plaintiff, is extracted here under for ready reference:

"58. Facts admitted need not be proved.- No fact need not be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions".

(emphasis supplied)

23. A mere reading of Section 58 of the Indian Evidence Act would clearly demonstrate that Section 58 cannot be pressed into service in the facts and circumstances of the case. Ex.A4 is not one covered by Section 58 of the Indian Evidence Act. Section 58 of the Indian Evidence Act contemplates that there should be "an agreement to admit" between the parties that certain type of evidence would be admitted during trial. In this connection, the learned counsel for the appellant/plaintiff would cite the decision of the Hon'ble Apex Court in Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati reported in AIR 1965 Supreme Court 364. An excerpt from it would run thus: "22. It is true that in divorce case under the Divorce Act of 1869, the Court usually does not decide merely on the basis of the admissions of the parties. This is a rule of prudence and not a requirement of law. That is because parties might make collusive statements admitting allegations against each other in order to gain the common object that both desire for personal reasons. A decision on such admissions would be against public policy and is bound to affect not only the parties to the proceedings but also their issues, if any, and the general interest of the society. Where, however, there is no room for supposing that parties are colluding, there is no reason why admissions of parties should not be treated as evidence just as they are treated in other civil proceedings. The provisions of the Evidence Act and the Code of Civil Procedure provide for Courts accepting the admissions made by parties and requiring no further proof in support of the facts admitted.

23. Section 58 of the Evidence Act inter alia provides that no fact need be proved to any proceeding which the parties thereto or their agents agree to admit at the hearing or which by any rule of pleading in force at the time they are deemed to have admitted by their pleading. Rule 5 of O. VIII, C.P.C., provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleadings of the defendant, shall be taken to be admitted except as against a person under disability.

24. Both these provisions, however, vest discretion in the Court to require any fact so admitted to be proved otherwise than by such admission. Rule 6 of O. XII of the Code allows a party to apply to the Court at any stage of a suit for such judgment or order as upon the admissions of fact made either on the pleadings or otherwise he may be entitled to, and empowers the Court to make such order or give such judgment on the application as it may think just. There is therefore no good reason for the view that the Court cannot act upon the admissions of the parties in proceedings under the Act.

25. Section 23 of the Act requires the Court to be satisfied on certain matters before it is to pass a decree. The satisfaction of the Court is to be on the matter on record as it is on that matter that it has to conclude whether a certain fact has been proved or not. The satisfaction can be based on the admissions of the parties. It can be based on the evidence, oral or documentary, led in the case. The evidence may be direct or circumstantial". (emphasis supplied)

24. No doubt, the cited case is relating to matrimonial matter, even then the ratio decedendi could be rightly be relied on and there can be no doubt over it. The underlined portion in the aforesaid extract by me, would amply indicate and highlight, the Hon'ble Supreme Court, as interpreted by me

only, posited the legal position. The factual circumstances are entirely different here. Sections 17 to 23 of the Indian Evidence Act refer to admission. But it has to be seen as to whether Ex.A4 as argued by the learned counsel for the respondent/plaintiff will constitute estoppel. Estoppel is a concept contemplated under Section 115 of the Indian Evidence Act and it is also extracted here under for ready reference:

"115. Estoppel.- When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".

25. I would like to highlight here that the theory of estoppel cannot be pressed into service in this case as it is apparent that a mere reading of the Section would highlight that if at all because of that Ex.A4, the plaintiff had changed their position, then the question of pressing into service the concept 'estoppel' as contemplated under Section 115 of the Indian Evidence Act would arise. As has been already spotlight by the learned counsel for the respondent/defendant that there is no embargo for the defendant to correct himself from their commitment in Ex.A4. Ex.A4, no doubt is the communication sent by the appellant/defendant Devasthanam to the plaintiff requesting them to sell the suit property. Subsequently, in reply to Ex.A2 the legal notice of the plaintiff, in Ex.A3, the defendant clearly and categorically placing reliance on the aforesaid additional document, which was rejected by the first appellate Court wrongly, so to say, the relevant 'A' Register of the year 1947, took up the plea that out of oversight alone Ex.A4 was sent, but in stricto sensu, the defendant is the owner of the suit property. This has happened well before the filing of the suit itself and in the written statement also such a plea was taken by the defendant.

26. The defendant took up the plea that the plaintiff is not the owner of the suit property. While cross-examining PW1 also, there are clear suggestions to the effect that the plaintiff is not the owner of the suit property. In such a case, the defendant cannot be pinned down. No doubt, Ex.A4 can rightly be relied upon by the plaintiff only to the limited extent, so to say, to show the conduct as to how in Ex.A4, they admitted, subsequently they turned turtle and took an antithetical plea in Ex.A3 as well as in the written statement and also during the trial. But by no stretch of imagination it could be countenanced that the plaintiff was absolved from the responsibility of proving its title by producing clinching evidence before the civil Court. Hence, I am of the considered opinion that placing reliance on Ex.A4 alone, the plaintiff was not justified in praying for a decree. The plaintiff is expected to adduce evidence to prove its title over the suit properties. My mind is redolent with the maxim "Omnia Presumuntur Contra Spollatorem" and the relevant porition of famous treatise "Broom's Legal Maxims (Tenth Edition)" is extracted here under: "if a man, by his own tortious act, withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted. Where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him".

27. It is a trite proposition of law that best evidence available should have produced before the Court. In this case, had really the plaintiff's case was a genuine one, it could have produced

documentary evidence to prove its title clinchingly.

28. The learned counsel for the respondent/ plaintiff would place reliance on Ex.A1, G.O.Ms.No.337. The perusal of Ex.A1 would at once indicate that no survey number has been mentioned therein and it refers to a building only. Hence, the relevant portion of the said G.O. is extracted here under for ready reference:

In the G.O. first read above, it was ordered that the Industries Department of the Government should take over and maintain the Industrial Schools of the Ex. District Boards of Tirunelveli, Thanjavur and Coinmbatore. Accordingly the Ex. District Board Industrial School at Tiruchendur was taken over by the Industries Department and convered as Industrial Training Institute, as per the orders issued in G.O. second read above.

2. Consequent on the construction of separate hostel building for the trainees of Industrial Training Institute Tiruchendur and shifting of the hostel to the new building from the Ex. District Board building the Ex. District Board Building which was used as hostel building for the trainees of the Industrial Training Institute. Tiruchendur has fallen vacant. The question has arisen as the whom the Ex. District Board Building should be handed over.

3. Consequent on the Ex. District Board Building not being required by the Industrial Training Institute, Tiruchendur, the orders in G.O.Ms.No.1671 Rural Development and Local Administration dt. 08.10.1960 have become infructious and the building shall automatically vest with the Panchayat Union Council, Tiruchendur under section 13 (V) of the Tamil Nadu Panchayats Act 1958 (Tamil Nadu Act XXXV of 1958). The Government therefore direct that the Ex. District Board building be handed over to the Panchayat Union Council, Tiruchendur free of cost".

What the G.O.Ms.No.337 dated 19.03.1971 would highlight, is that the then Ex.District Board should hand over the building to the Panchayat as latter happened to be the successor.

29. The learned counsel for the respondent/ plaintiff would submit that statutorily the land belonged to the Ex.District Board, automatically got vested on the Panchayat. If that be so, it is the bounden duty of the plaintiff to prove that land belonged originally to the Board and statutorily it got vested with the Panchayat. There should have been clinching evidence on these aspects, but absolutely there is no evidence. Both the Courts below relied only on Ex.A4 coupled with Ex.A1 and A9 and held that the defendant after admitting the ownership of the plaintiff over the suit property was not justified in resiling from it.

30. To the risk repetition, I will indicate that every litigant before coming to the Court is entitled to take a stand and also correct such stand. The learned counsel for the respondent/ plaintiff has argued that if the defendant is allowed to have prevaricative stands, then there would be no possibility of rendering justice relying upon admission. I would make it clear that prevaricative stands can be taken to prove the conduct of the parties, but the core question arises here as to whether that defect in the defendant's plea or stand or conduct would enure to the benefit of the plaintiff to exonerate itself from the responsibility of proving title over the immovable property

independently and positively. It is a trite proposition of law that the plaintiff cannot try to achieve success in the litigative battle by picking holes in the case of the defendant. It is therefore axiomatic and apparent that the onus is on the plaintiff to prove his title independently that he is the owner by adducing evidence both oral and documentary.

31. The aforesaid vital law points were not considered by both the Courts below and they never addressed themselves to such legal factors. But simply both the Courts below caught the wrong end of the stick. Even though in Ex.A3 and in the written statement as well as during cross examination, the defendant challenged the title of the plaintiff, nonetheless it has not chosen to adduce evidence in that regard. The defendant's attempt to file additional document viz., the extract of 'A' Register relating to the year 1947 was wrongly rejected by the first appellate court. The first appellate Court, should have considered the document relating to the title and that too in a title suit of this nature. In a title suit, both parties are entitled to adduce evidence relating to title. It was prematured for the first appellate Court to observe as though possession of the defendant was admitted and that such additional document was a surplusage. The defendant's attempt was to prove that even in 1947 defendant had been in possession as owner as per revenue records. In such a case, the first appellate Court wrongly rejected it. The first appellate Court relied upon admission theory and simply rejected the additional document to be filed. In view of my discussion supra, a fortiori both the Courts below committed a serious legal error in misdirecting themselves by relying upon Exs.A1, A4 and A9 only and such an approach actually amounts to perversity in dealing with the case on the part of both the Courts below.

32. Ex.B1 is the communication sent by Tahsildar to the District Collector and a copy of it was marked. The learned counsel for the respondent/ plaintiff would submit that the plaintiff was not a party to it and it would not in any way affect the rights of the plaintiff. The learned counsel for the appellant/defendant would place reliance on Ex.B1 as well as the cited unmarked document, which was rejected by the first appellate Court and contend that those are all documents in support of the defendant's theory. In Ex.B1, only two buildings are referred to, whereas in the suit property eight buildings are referred to. In the unmarked document, the entire survey No.RS182/2A is contemplated and in Ex.B1, the survey number is contemplated as 182/2b. But in the plaint, absolutely no survey number is found mentioned. Ex.B1 relates to an extent of 0.26.5 Ar. Hence, I am of the considered opinion that both the parties should be given opportunity to adduce evidence relating to their respective rights and clarify the position and accordingly the substantial question of law is answered.

33. Relating to the arguments of the learned counsel for the respondent/plaintiff to the subsequent developments, I am at a loss to understand, when the defendant is pinning its faith on their plea that the government itself is supporting their cause, it is not known why the Government has not directed the plaintiff accordingly. Hence, I leave open that issue in view of my discussion supra.

34. In the result, the second appeal is allowed, setting aside the judgments and decrees of both the Courts below and the matter is remanded back to the trial Court for both sides adducing additional evidence relating to the title to the suit properties. Both the parties shall appear before the trial Court on 02.04.2008. I make it clear that the trial Court untrammeled and uninfluenced by any of

the observations made by this Court in this Judgment, shall decide the lis on merits. However, in the facts and circumstances of the case, there is no order as to costs. In view of the Judgment passed in the second appeal, M.P(MD)No.1 of 2008 need not be allowed and it is closed.

35. The additional documents sought to be filed before this Court are ordered to be returned to the defendant. The additional document in I.A.No.242 of 1999 of the first appellate Court shall be sent to the trial Court along the trial Court dossiers.

36. The Registry is directed to send the records immediately.

smn To

1. The Subordinate Judge, Tuticorin.

2. The Additional District Munsif, Thiruchendur.