

Vasanth and ors. Vs. Rathinasami and ors.

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Court : Chennai

Decided On : Apr-22-1988

Reported in : (1988)2MLJ192

Appellant : Vasanth and ors.

Respondent : Rathinasami and ors.

Judgement :

ORDER

Srinivasan, J.

1. This appeal has been preferred by the plaintiffs in O.S. No. 455 of 1986, Sub Court, Thiruchirapalli, against an order dismissing their application for injunction restraining defendants 2 to 6 from described in schedules 'A' to 'D' in the plaint.

2. The appellants put forward the following case in the plaint: The suit properties described in schedules 'A' to 'E' of the plaint, excepting a few items, belonged ancestrally to one Sangalimuthu Kalathii Vendrar who died on 8-5-1986. He had two wives. The Junior wife died in 1964 and the senior died in 1984. The first plaintiff is the only daughter through the second wife while plaintiffs 2 and 3 are the daughters of his predeceased daughter through the first wife. The 1st defendant is another daughter through the first wife. The plaintiffs and the first defendant are the only heirs of the deceased propositus. The plaintiffs are entitled to 2/3rd share and the 1st defendant is entitled to the remaining 1/3rd share. They are in joint

possession of all the properties. Defendants 2 to 6 are the children of one Diraviyarn Ammal belonging to Koothadi caste who was a mistress of Sangilimuthu, but not exclusively kept. They are falsely claiming rights in the suit properties and are threatening to interfere with the possession of the plaintiffs. Even since the death of Sangilimuthu, the plaintiffs have been demanding of the first defendant to effect an amicable division who is taking up an evasive attitude. Sangilimuthu seems to have executed some sham and nominal documents with reference to E schedule properties which continued to be in his possession till his death. Sangilimuthu was personally cultivating the 'A' schedule nanja lands till his death. Hence, a preliminary decree for partition into three equal shares and allotment of two such shares to the plaintiffs with a direction to the first defendant to account for the income realised by her subsequent to suit should be passed in addition to a decree restraining the defendant 2 to 6 from interfering with the plaintiffs and 1st defendant's peaceful possession and enjoyment of the suit properties.

3. Along with the plaint, the appellants filed I.A. No. 648 of 1986 for an injunction restraining defendants 2 to 6 from interfering with the plaintiffs' peaceful possession and enjoyment of the suit 'A' to 'D' schedule properties till the disposal of the suit. In the affidavit filed in support of the application it was alleged that the said defendants were threatening to dispossess them and the first defendant since the previous day by force and unless injunction was granted they would be put to great loss and hardship.

4. The respondents herein who are defendants 2 to 6 filed a counter affidavit in the application stating that all the properties were the separate properties of Sangilimuthu and not his ancestral properties. The counter went on to state as follows: Diraviyam Ammal, the mother of the respondents, was also married by Sangilimuthu and that she was the second wife while the mother of the 1st plaintiff was the third wife. The marriage between Sangilimuthu and Diraviyam took place in 1932 in accordance with Hindu Law and custom. Sangilimuthu executed a settlement deed on 21-1-1963 setting the entire 'E' schedule property on defendants 2 and 3. It was duly acted upon. On 18-4-1985, Sangilimuthu executed a will and registered it whereby 1 acre 691/2 cents in item No. 7, item No. 8 and

item No. 12 of the 'A' schedule were bequeathed to the 6th defendant. An extent of 4 cents in item No. 7 of 'A' schedule was sold under a registered deed dated 17-4-1985 by Sangilimuthu to the third defendant. Thus items 7, 8 and 12 of 'A' schedule did not belong to Sangilimuthu at the time of his death. The 4th defendant is actually residing in the house described as item 1 of 'C' schedule. Plaintiffs 2 and 3 are residing at Thanjavur only. Sangilimuthu was living with the third defendant who was always cultivating the lands. All the lands are in the possession of defendants 3 and 4. Hence, the injunction application should be dismissed.

5. The appellants marked seventeen documents on their side and the respondents marked thirty six documents in support of their claim. The learned Additional Subordinate Judge passed an elaborate order discussing the documentary evidence. He held that prima facie, the respondents appeared to be in possession after the death of Sangilimuthu. He also held that prima facie the respondents proved to be the children of Sangilimuthu and that they were co-owners with the plaintiffs and that first defendant with respect to many of the suit properties. On these findings, the court held that the plaintiffs were not entitled to an order of injunction, as prayed for, by them and dismissed the application.

6. It is the said order which is challenged in this appeal. It is argued by learned Counsel for the appellants that the specific case of the respondents that the marriage between their mother and Sangilimuthu took place in 1932 stood disproved by Exs.A-11, A-13, A-15 and A-17. Ex.A-11 is a discharged promissory note dated 11-8-1951 executed by one Kalimuthu Mooppan in favour of Diraviyam Ammal describing her as the daughter of Arumugham and not as the wife of Sangilimuthu. Ex.A-13 is a birth certificate for the second defendant wherein the father's name is not mentioned at all. Ex.A-15 is a sale deed dated 8-11-1934 in favour of Sangilimuthu by Diraviyam Ammal described as the daughter of Saidambal. Ex.A-17 is the vaccination register describing the respondent as the children of Diraviyam Ammal. According to learned Counsel the four documents referred to above prove that there could not have been any marriage between Sangilimuthu and Diraviyam Ammal in 1932 or at any time. According to learned Counsel, when documents of earlier years overwhelmingly negative the case of

the respondents, the court below was wrong in placing reliance on some documents of recent origin to hold that the respondents had prima facie made themselves out to be the children of Sangilimuthu, He contended that, the suit having been filed within three months after the death of Sangilimuthu, possession should be presumed to be with the lawful heirs, viz., the plaintiffs and the 1st defendant and the respondents who have no legal claim whatever should not be allowed to interfere with their possession.

7. Per contra, learned Counsel for the respondents argued that the documents relied on by the appellants have not been proved to relate to the mother of the respondents and that authentic and undisputed documents including, registered deeds to which Sangilimuthu was himself a party prove their claim as the legitimate children of Sangilimuthu and that the respondents had been in possession and enjoyment along with Sangilimuthu even during his lifetime. Learned Counsel contended that the appellants have not proved their possession on the date of suit and they are not entitled to injunction during the pendency of the suit.

8. Both in the trial court and in this Court, the appellants have been focussing their attention more on the question whether the respondents are the children of Sangilimuthu than on the question of possession of the properties on the date of suit. Even in the plaint, preference is made to the birth certificate of the 2nd defendant (Ex.A-13) and the discharged promissory note of Kalimuthu Mooppan (Ex.A-11). That exercise is repeated in the affidavit filed in support of the application for injunction. As the relationship of the plaintiffs and the first defendant with late Sangilimuthu is not in dispute, it has naturally become necessary for the respondents to substantiate their claim to the property by producing as many documents as possible. Thus, the interlocutory application for injunction has been converted into a miniature suit and the court below has conducted a trial within the trial. Neither the parties nor the court below remembered that in an application for injunction restraining interference with the plaintiffs possession, the most crucial question is whether the plaintiff is in possession on the date of suit and the other questions depended on the answer to that question. There is a general misconception that in every application for injunction the court should be satisfied

about the existence of a prima facie case, the necessity for Court's interference and the balance of convenience. Very often prima facie case has been wrongly understood as prima facie proof of title. It is forgotten that a prima facie case does not mean anything more than that there is a serious question to be tried and there is a probability of success if the allegations of fact, made by the party are proved. In an application under Order 39, Rule 1(c) C.P.C., the prima facie case but haste be proved is that the plaintiff is in possession. The rule was introduced specifically in the code in order to enable the court to maintain the status quo during the pendency of the proceedings. Even before the introduction of the rule, Courts were preserving the status quo under inherent powers. In a case falling under Rule 1(c), it is meaningless to consider the question of prima facie title for it is well-known that even a trespasser in possession could protect his possession against whole world excepting the real owner. Hence, in an application for injunction restraining the defendant from interfering with the possession of the plaintiff, it is the primary duty of the plaintiff to prove his possession on the date of suit.

9. Hence, in this case, I do not propose to consider any of the arguments advanced on both sides which pertains to the title, to the properties. Any observation of mine may have its weight at the time of the final disposal of the suit however much I direct the Court below to dispose of the matter without being influenced thereby. For the same reason, I hold that the findings rendered by the Court below though labelled 'prima facie' shall be ignored and treated as non est at the trial. The trial court shall dispose of the suit on the basis of the entire evidence placed before it at the conclusion of the trial.

10. Now taking up the question whether the appellants have proved their possession by prima facie evidence, it is seen that they have miserably failed to do so. A careful reading of the plaint will disclose the fact that the plaintiffs were not in possession on the date of suit. Paragraph 14 of the plaint reads thus:

After the death of Sangilimuthu Kalathil Vendrar the possession of the suit properties is in law and fact is joint in plaintiffs and 1st defendant as co-owners and must be in law deemed to be so in law and fact. On that footing this suit for partition is filed.

If the plaintiffs are in factual possession, they need not have invoked the aid of a deeming provision in law. Secondly, if they are in possession, there is no necessity for them to be demanding of the first defendant to effect an amicable partition ever since the death of Sangilimuthu. That shows that they have not been able to get hold of any part of the income. Thirdly, they have prayed for a direction to the first defendant to render an account for the income. That prayer is on the basis that the 1st defendant is in perception of the profits. The repeated reference to Sangilimuthu having been in possession till his death in the plaint and the reliance placed on entitlement to possession in law are pointers to the absence of factual possession with the plaintiff.

11. In the affidavit filed in support of the application for injunction, the following averments found in paragraph 13 are rather significant:

Plaintiffs 2 and 3 are staying in the village in C schedule house after the death of Sangilimuthu Kalathil Vendirar, but their husbands are employed in Tanjore.

A bare reading of it makes it unbelievable.

12. The documents filed by the appellants, in the court below do not help them to prove their possession of the properties after the death of Sangilimuthu. Exs.A-1 to A-7 relate to a period prior to Sangilimuthu's death. So are Exs.A-9 and A-10. Ex.A-8 is the solitary kist receipt dated 25-7-1986 for fasli 1395. It evidences payment by the husband of the first defendant in the name of Sangilimuthu. Thus, there is absolutely no evidence at this stage to prove the possession of the plaintiffs.

13. On the other hand, the documentary evidence produced by the defendants show that they had been in possession and enjoyment along with Sangilimuthu for several years prior to his death. They range from 1973 to 1986.

14. Hence, the conclusion of the Courts below that the appellate are not entitled to an injunction as prayed for by them has to be upheld. But having regard to the fact that even according to the case of the defendants, the plaintiffs and the 1st defendant will be entitled to 3/8th share in all the suit properties excepting items 7,

8 and 12 of the 'A' schedule and the 'E' schedule items, it is necessary in the interests of justice to direct the respondents to deposit a portion of the income in the trial court during the pendency of the suit. If the case of the plaintiffs, as set out in the plaint, is fully accepted by the Court, the respondent may not be entitled to any share in any of the properties. If on the other hand, the case of the respondents as put forth in their counter affidavit is accepted fully, the plaintiffs and the first defendant will, together, be entitled to 3/8th share' in items 1 to 6, 9 to 11, 13 and 14 of 'A' schedule, 'B' schedule, 'C' schedule and 'D' schedule properties. Hence, it is just and proper to direct the respondents to deposit one half of the income in court.

15. With a view to fix the amount to be deposited, I directed both parties to furnish the details of income. As expected, neither party has come out with correct particulars. While the appellants have gone to the higher extreme and estimated the total income to be Rs. 94,000 from November, 1986 upto March, 1988, the respondents have touched the lower extreme and stated the nett income to be Rs. 9,985. The respondents have also referred to an outstanding liability of Rs. 40,000. In view of the huge disparity between the particulars of the income furnished by the parties, I direct tentatively, without deciding on the correctness of either of the statements, the respondents to deposit in the trial court a sum of Rs. 10,000 (Rupees ten thousand only) every year as representing one half of the income till the disposal of the suit. The first deposit of Rs. 10,000 should be made by the respondents on or before 31-7-1988. Thereafter, every year a similar amount should be deposited on or before 31st of July: The amount shall be deposited to the credit of the suit. The trial court shall pass appropriate orders regarding the disbursement of the amount of the time of passing a decree in the suit.

16. The appeal is dismissed subject to the above directions. There will be no order as to costs.

17. This appeal having been posted this day for being mentioned in the presence of the said Advocate, the court the made following order.

This matter having been posted today for being mentioned, this Court passed the following order:

As and when the amount is deposited as per the order of this Court, the learned Subordinate Judge, Thiruchirapalli, will invest the same in Fixed Deposit initially for a period of three years in the State Bank of India, Thiruchirapalli.

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