(2009) 09 MAD CK 0225

Madras High Court

Case No: S.A. No. 1329 of 1995

Barbers reptd. by their Representatives, Gopalakrishnan and Pavadaisamy		APPELLANT
	Vs	
Kalyanasundaram		RESPONDENT

Date of Decision: Sept. 10, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 8

Hon'ble Judges: M. Jaichandren, J

Bench: Single Bench

Advocate: S. Sounthar, for the Appellant; A. Dhiraviyanathan, for the Respondent

Final Decision: Dismissed

Judgement

M. Jaichandren, J.

This second appeal has been filed against the judgment and decree, dated 2.3.1995, made in A.S. No. 205 of 1993, on the file of the District Court, Nagapattinam, reversing the judgment and decree, dated 30.7.1993, made in O.S. No. 108 of 1989, on the file of the Sub Court, Mayiladuthurai.

2. The plaintiffs in the suit are the appellants in the present second appeal. The plaintiffs had filed the suit for declaration and for injunction. In the plaint filed in the suit, in O.S. No. 108 of 1989, it has been stated that the suit property is a pond called `Ambattan Kuttai", with an extent of 31,087 Sq.Ft., surrounded by a live fence on all four sides, in T.S. No. 399 in Pulian Street, Pattamangalam, Mayiladuthurai. It has been further stated that the plaintiffs and the others, belonging to the Barber community, living in Pulian Street, have been using the pond to carry on their occupation for over five generations. Every year the plaintiffs and the others belonging to their community were taking away the fish caught by them from the pond. The pond which had been given to the ancestors of the plaintiffs, as a

consideration for carrying on their occupation, has continued to be in their enjoyment till the filing of the suit. Therefore, the pond has been named as "Ambattan Kuttai". However, there are no documents relating to the plaintiffs'' rights, in respect of the said pond. It is only a practice that has been followed for hundreds of years, in Tanjore District.

3. It has been further stated that the plaintiffs and their ancestors have been using the pond and its adjacent lands, by growing various trees and by using their produce. The plaintiffs are carrying on their occupation of hair cutting for the people of the village. The pond is maintained for not only the benefit of the plaintiffs, but also for the common benefit of the villagers. While so, the father of the plaintiffs, namely, Jaganatha Pandithar, had submitted a petition to the District Collector, on 19.9.1961, to grant patta, in respect of the pond, to the members of the plaintiffs'' community.

4. It has been further stated that the defendant, who is working in an insurance company, had encroached upon the suit property, along with his men and had attempted to build a house. Therefore, the plaintiffs had lodged a complaint with the revenue authorities, as well as with the police. In such circumstances, the plaintiffs had filed the suit praying for the reliefs of declaration and permanent injunction.

5. In the written statement filed on behalf of the defendant it has been stated that the suit property is a poramboke pond and it is not called as "Ambattan Kuttai", as claimed by the plaintiffs. It is false to claim that the plaintiffs and the members of their community alone are having the right of catching fish from the pond. Further, the claim of the plaintiffs that certain rights had been given to the plaintiffs and their ancestors, as a consideration for carrying on their operation of barbers in the village concerned, had been denied. The District Collector had, in fact, refused to grant patta, as claimed by Jaganatha Pandithar, the father of the plaintiffs. The defendant had further claimed that he is an ex-service man belonging to Adi Dravidar community. The defendant had stated that the pond has not been used as a pond and since there is no way for the water to reach the pond only certain wild varieties of plants have grown in the area. Further, since the area has been converted into housing plots, the defendant had submitted a petition to the District Collector for granting of patta to the defendant in the suit property. It has also been stated that the plaintiffs had removed the house built by the defendant in the suit land. The plaintiffs do not have any legal right to file the suit, as it is a Government poramboke and the suit is liable to be dismissed for making false claims and for not impleading the Government, as a party to the suit.

6. In view of the averments made on behalf of the plaintiffs, as well as the defendants, the trial Court had framed the following issues for consideration:

1) Whether the plaintiffs have fishing rights and the right to use the suit pond for carrying on their occupation and whether they are entitled to get permanent injunction based on the same?

2) Whether the suit has been improperly filed as it has been done in a representative capacity?

3) What other reliefs the plaintiffs are entitled to?

7. The trial Court had decreed the suit by its judgment and decree, dated 30.7.1993, holding that the plaintiffs are entitled to the reliefs as prayed for therein. The claims made by the defendant had not been believed by the trial Court. The trial Court had come to the conclusion that the documents filed, in support of the claims made by the defendant, have been created for the purpose of the suit. From the statements made by the defendant, in his complaint, dated 5.8.1989, marked as Ex.B-3, to the police authority concerned, at Nagapattinam, the trial Court had found that the defendant had stated that he had put up a hut in a portion of the suit property, since he has no other place to live. However, from the document marked as Ex.B-2, dated 17.10.1989, it is found that the petition submitted by the defendant, dated 11.10.1989, requesting for assignment of a portion of the suit property, in favour of the defendant, had been rejected by the District Collector, Thanjavur, stating that there is a prohibition by the State Government to make assignments in areas relating to water bodies. Therefore, the claim of the defendant that he had put up a hut even before his request had been rejected, on 17.10.1989, cannot be accepted. The trial Court had also held that Exhibits B-7 to B-9, which are photographs showing certain constructions, cannot support the claim of the defendant that he had put up a hut and that he has been living in the suit property, prior to the year, 1989. Further, since the plaintiffs have been in enjoyment of the suit property from the year, 1961, as seen from Ex.A-1, the defendant could not have been living in the suit property by putting up a hut in the year, 1985. From Ex.A-5, the trial Court had found that the plaintiffs have been in enjoyment of the suit property from the year, 1950.

8. In the written statement filed by the defendant he had claimed that both the plaintiffs, as well as the defendant are encroachers in the suit property. Since the suit property belongs to the Government the plaintiffs cannot claim a better right in it. However, there is no evidence adduced on behalf of the defendant, in support of such a claim. Further, the trial Court had also found that, in Exhibits A-1 and A-5, marked in support of the claims made by the plaintiffs, the suit property has been described as "Ambattan Kuttai". There is no denial of the description of the suit property as "Ambattan Kuttai" by the defendant, either during his chief examination or during his cross examination. Further, during the cross examination the defendant had stated that he has no patta in respect of the suit property and that the Government had not granted any permission to put up a hut to live in a portion of the suit property. Further, he had accepted that he had not paid any tax in that

regard. Even though the defendant had claimed that he had built a house in a portion of the suit property, in the year 1985, on the oral assurance given by the Tahsildar concerned, he had not chosen to examine the Tahsildar as his witness, nor had he made such a claim in his written statement filed in the suit. Further, he had admitted, during the cross examination, that he had no evidence to show that he has been living in the suit property for nearly five years, as claimed by him.

9. From the evidence of the plaintiffs'' witnesses the trial Court had come to the conclusion that there was a pond, in T.S. No. 399, described as "Ambattan Kuttai" and that it belonged to the village community. Therefore, the claim of the defendant that it is a `Grama Poramboke'' cannot be true. From the description of the property in the sale deed, dated 14.5.1950, marked as Ex.A-5, relating to T.S. No. 400, it could be seen that the suit property, in T.S. No. 399, was known "as Pariyari Kuttai". Further, the trial Court had also found from the evidence of one Komalavalli, wife of Vadivel Pillai, examined as P.W.4, that the water from the pond, in T.S. No. 399, had been used for cultivation of vegetables, in T.S. No. 400, which lies adjacent to the pond known as "Periyari Kuttai". It was also found that Jaganatha Pandithar, the father of the plaintiffs, had made a request to the District Collector, Thanjavur, requesting for the granting of a patta in his favour, in respect of T.S. No. 399. The said petition, dated 19.9.1961, is marked as Ex.A-1. Ex.A-4, dated 31.7.1989, is a petition submitted by the people living in Pulian Street, to Revenue Divisional Officer, stating that the suit property is in the enjoyment of the plaintiffs and that the defendant and his men are attempting to encroach into the said property. The Trial Court had further found from the adangal copy of the Town Land Survey Register, marked as Ex.B-4, that T.S. No. 399, has been described as a "Kuttai" and that it belongs to the Government.

10. Further, it has also been seen that the request of the defendant in his petition, dated 11.10.1989, for assignment of a portion of the "Kuttai", in T.S. No. 399, to an extent of 0.71 cents, had been rejected by the District Collector, Thanjavur, by his proceedings, dated 17.10.1989, marked as Ex.B-2. Thereafter, the defendant had filed an appeal to the Special Commissioner and Commissioner for Land Administration, who had also rejected the request of the defendant, by his order, dated 8.5.1990, marked as Ex.B-5. In such circumstances, the trial Court had come to the conclusion that the plaintiffs had sufficiently substantiated their claims by way of evidence and that the claims made by the defendant were not sustainable. Therefore, the trial Court had granted the reliefs, as prayed for by the plaintiffs, by its judgment and decree, dated 30.7.1993, made in O.S. No. 108 of 1989.

11. Aggrieved by the judgment and decree of the trial Court, dated 30.7.1993, made in O.S. No. 108 of 1989, the defendant had filed an appeal, in A.S. No. 205 of 1993, on the file of the District Court, Nagapattinam. The first Appellate Court had framed the following points for consideration:

1) Whether the plaintiffs and those belonging to their community have the right to use the pond and to catch fish from the pond, as claimed by them and if so, are they entitled to the relief of declaration, as prayed for by them?

2) Whether the plaintiffs are entitled to the relief of permanent injunction against the defendants

3) Whether the necessary parties have been impleaded in the suit?

12. In the first appeal filed before the first Appellate Court it had been noted that in the Government documents the suit property is shown as "Kuttai Poramboke". While so, it is for the plaintiffs to prove that they have the right for fishing and for using the pond since they are belonging to the barber''s community. The First Appellate Court had held that even though the suit, in O.S. No. 108 of 1989, had been filed, under Order 1 Rule 8 of the Civil Procedure Code, in a representative capacity, only two brothers are shown as plaintiffs. There is nothing to show that the others belonging to the barber''s community have authorised the plaintiffs to file the suit in a representative capacity. It has also been noted that the plaintiffs have not shown that there are others who are belonging to the said community living in the suit property.

13. The first Appellate Court had also noted that Ex.A-1, dated 19.9.1961, is only a xerox copy of a petition given by Jaganatha Pandithar, the father of the plaintiffs, requesting for patta to be given in his name. The said request had been rejected stating that the suit property, in respect of which the patta has been requested, is classified as a poramboke land. The first Appellate Court had also come to the conclusion that after the coming into force of the Inam Abolition Law there cannot be an inam, as claimed by the plaintiffs. The claim of the plaintiffs that the suit property, in T.S. No. 399, has been shown as "Pariyari Kuttai" in the description of the boundaries relating to T.S. No. 400, which was the subject matter of the sale deed, dated 14.5.1950, marked as Ex.A-5, cannot be considered as sufficient evidence to come to the conclusion that T.S. No. 399 is a pond known as "Ambattan Kuttai", meant for the use of the barber''s community of the village, as claimed by the plaintiffs.

14. Even otherwise from the revenue records it is seen that the suit property is shown as government poramboke. The first Appellate Court had also found that all the plaintiffs'' witnesses have been stating that the defendant has no right to encroach into the suit property and to build a house therein. However, they have not stated in clear terms that the plaintiffs are the only persons who could use the property as a matter of right. Even though it may be clear from the documents marked by the defendant, in support of his claims that there has been an attempt by the defendant to encroach upon the suit property, it cannot have any evidenciary value in favour of the plaintiffs to support their claims that they have the fishing rights in the suit property and that their rights have been recognised since they

belong to the barber''s community. Further, when the plaintiffs are making specific claims, with regard to their rights in the suit property, which is shown as a Government Poramboke in the revenue records, the Government ought to have been added as a party to the suit, as it is a necessary party. Further, the first Appellate Court had also noted that the trial Court had come to the conclusion that the plaintiffs have certain rights in the suit property only based on the reason that the suit property had been known as "Ambattan Kuttai". It is clear that the suit had been filed by the plaintiffs only in their personal interest and that the suit has not been filed in a representative capacity, on behalf of the community of barbers. If the claims made by the plaintiffs were true the Government would have issued `B'' memos against them, since the suit property is a government poramboke. Therefore, the first Appellate court had come to the conclusion that the plaintiffs have not shown, by sufficient evidence, that they are in enjoyment of the suit property. Further, the first Appellate Court had come to the conclusion that the suit cannot be maintained without adding the necessary parties, since the State Government, which is a necessary party to the suit, had not been impleaded. In such circumstances, the first appellate Court had reversed the judgment and decree of the trial Court, made in O.S. No. 108 of 1989, dated 30.7.1993.

15. Aggrieved by the judgment and decree of the first appellate Court, dated 2.3.1995, made in A.S. No. 205 of 1993, the plaintiffs in the suit had filed the present second appeal raising the following substantial questions of law:

1. Whether the lower Appellate Court is correct in dismissing the suit on the ground of non-joiner of Government?

2. Whether title of the Government in the suit property would be upheld merely on the basis of the entries in the survey records?

3. Whether the lower appellate Court has ignored the provisions of Section 84 of the Panchayat Act in dismissing the suit?

16. The learned Counsel for the appellants had submitted that the judgment and decree of the first Appellate Court is against law, and the weight of evidence and the probabilities of the case. The lower Appellate Court, having found that the defendant had no right over the suit property, ought to have confirmed the judgment and decree of the trial Court. When the plaintiffs were only claiming for the recognition of their customary rights, the lower Appellate Court ought not to have reversed the findings of the trial Court, without properly appreciating the evidence available on record. The observation of the lower Appellate Court, with regard to the Inam Abolition Act, is unwarranted and erroneous. The lower Appellate Court had failed to appreciate the documentary evidence, in Ex.A-5, dated 14.5.1950, wherein the suit property had been mentioned as "Pariyari Kuttai". The lower Appellate Court had erred in dismissing the suit for the non-joinder of necessary parties, namely, the Government, even though the claim of the plaintiffs

were substantially against the defendant. The learned Counsel had also submitted that the lower Appellate Court had failed to appreciate the evidence of the plaintiffs'' witnesses, who were independent witnesses and it is only the trial Court which could note the demeanour of the witnesses. There is no discussion by the first Appellate Court, with regard to the evidence of P.W.1 to P.W.5, examined on behalf of the plaintiffs. The first Appellate court had reversed the judgment and decree of the trial Court without properly considering the evidence and without independently analysing such evidence. 17. The learned Counsel for the appellants had relied on the judgment, reported in N.S. Kuppuswamy Odayar and Another Vs. The Panchayat Narthangudi and Others, , wherein, it has been held that the mere fact that a particular piece of land has been described as poramboke, in the resettlement register, will not by itself establish the title of the Government in the land in question. 18. The learned Counsel for the appellants had also relied on the decision, reported in Karuppa Devar v. Kaluva Thevar 2002 (1) CTC 338, to show that the first Appellate Court had come to a wrong conclusion that the Government was a necessary party to the suit and that the suit was not maintainable for non-joinder of the Government. 19. The learned Counsel appearing on behalf of the respondent had submitted that the first Appellate Court had rightly come to the conclusion that the reliefs sought for by the plaintiffs in the suit, in O.S. No. 108 of 1989, cannot be granted. The first Appellate Court was correct in coming to the conclusion that the suit was not maintainable for non joinder of necessary party, namely, the State Government. Further, the plaintiffs had not shown as to how they had filed the suit in a representative capacity. Further, the learned Counsel for the respondent had stated that the decisions cited by the learned Counsel for the appellants are not applicable to the facts and circumstances of the present case, as the plaintiffs are seeking a declaratory relief of customary rights, in respect of the suit property, which is a poramboke land, without impleadng the necessary party, which is the state Government. 20. In view of the submissions made by the learned Counsels appearing for the appellants, as well as the respondent, and on a perusal of the records available, this Court is of the considered view that the first Appellate Court had come to the right conclusion in reversing the judgment and decree of the trial Court, dated 30.7.1993, made in O.S. No. 108 of 1989. When the plaintiffs had filed the suit for a declaratory relief to recognise their customary rights in the suit property, it is for them to prove, by sufficient evidence, that they have been enjoying such rights for a considerable length of time. Further, the plaintiffs had failed to show that they had filed the suit in a representative capacity, under Order 1 Rule 8 of the Civil Procedure Code, for themselves and on behalf of the other members of their community. When it is clear from the Government records that the suit property is a Government Poramboke the plaintiffs ought to have impleaded the Government, as a party to the suit. Non impleading of a necessary party is fatal to the maintainability of the suit. Further, it is found that Jaganatha Pandithar the father of the plaintiff had requested for a patta being granted to him in respect of the suit property. However, the request had been rejected on the ground that the

suit property is a Government Poramboke. While so, it is not open to the plaintiffs to claim customary rights of fishing and of using the pond, which is said to be known as "Ambattan Kuttai", in the suit property, without impleading the Government as a party. When the plaintiffs have stated that the suit property is for the common use of the members of the barber''s community, as well as the other villagers, there cannot be a declaratory relief granted in favour of the plaintiffs, as prayed for by them in the suit. In such circumstances, this Court does not find sufficient cause or reason for interfering with the judgment and decree of the first Appellate Court, dated 2.3.1995, made in A.S. No. 205 of 1993. Hence, the second appeal stands dismissed. No costs.