

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 08.01.2015
Pronounced on : 13.01.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.450 of 2006

A/M.Navaneetheswara Swamy Thirukoil

Rep. by its Executive Officer

Sikkal

Nagapattinam

.. Appellant/Plaintiff

-Vs-

1. State of Tamil Nadu

Rep by District Collector

Collectorate : Nagapattinam

2. Director of Agriculture

Agriculture Department

Chepauk, Chennai-5

3. Addl. Director of Agriculture

Addl. Director of Agriculture

Office, Nagapattinam

4. Deputy Director of Agriculture

Agriculture Office

Public Office Road

Vallipalayam

Nagapattinam

.. Respondents/Defendants

Second Appeal filed under Section 100 of C.P.C against the judgment and decree of the District Judge, Nagapattinam dated 11.03.2005 made in A.S.No.39 of 2004 confirming the judgment and decree of the Principal Subordinate Judge, Nagapattinam dated 16.04.2004 made in O.S.No.61 of 2003.

For Appellant : M/s.Srinath Sridevan and
T.K.Baskar

For Respondents : Ms.M.Jayasree
Govt. Advocate (CS)

JUDGMENT

The plaintiff in the original suit O.S.No.61 of 2003 on the file of Principal Subordinate Judge, Nagapattinam is the appellant in the second appeal. The defendants in the suit are the respondents in the second appeal. The appellant/plaintiff temple comes under the control of the Hindu Religious and Charitable Endowment Department and it is represented by its Executive Officer.

2. The appellant/plaintiff temple owns 268.10 Acres of wet land and 23.48 Acres of dry land (total extent 291.58 Acres) in Sellur Village, Nagapattinam Taluk. The entire extent of 291.58 Acres was taken on lease by the Government (Agriculture Department) for running a seed development farm in the year 1982. The agreed rent was Rs.33,512/- (at the rate of Rs.125/- per acre) + 305.635 Quintals of paddy or its market value, as per the price fixed by the Government for the wet lands and Rs.2,000/- for the dry lands. The initial lease period was five years. But the Agriculture Department continued its possession till the end of March 2001. On 01.11.2000, the Government proposed to close the seed farm and surrender the lands to the appellant/plaintiff by the end of March 2001. The offer to surrender the lands was intimated to the temple by a notice dated 01.11.2000. Meanwhile several encroachments were found to have been made during the lease period. Hence the appellant/plaintiff temple declined the offer and insisted upon re-delivery of the entire land in the same condition in which it was delivered to the Agriculture Department at the inception of the lease. The same was done by issuing a reply notice dated 25.01.2001. In addition to the said insistence, the appellant/plaintiff temple also made a demand, in the said reply notice, for payment of rent for the entire land for the faslis 1409 and 1410. The Agriculture Department, which is represented by the respondents herein, initially denied their liability to pay rent for the entire extent for the above said faslis on the ground that the appellant/plaintiff temple could have accepted the surrender of major portion of the land leased out to the Agriculture Department, barring comparatively a smaller extent in the occupation of the encroachers and demanded payment of rent/damages in respect of the encroached portions alone. However, subsequently the Agriculture Department paid the rent for the entire fasli except for the fasli 1409. Since the land was not surrendered to the temple in the same condition in which it was leased out to the Agriculture Department, the appellant/plaintiff temple was constrained to file the suit O.S.No.61/2003 on the file of the Sub Court, Nagapattinam praying for a decree against the respondents herein/defendants directing payment of a sum of Rs.4,13,332.50P towards the rent for the faslis 1410 and 1411 with subsequent interest and cost.

3. The suit was resisted by the respondents herein/defendants contending that the seed farm was closed with effect from 31.03.2001 and the Agriculture Department came forward to surrender the land,

but the appellant/plaintiff temple refused to take possession pointing out that a portion of the land had been encroached upon by third parties and demanding that the land should be restored to its original condition in which the land was handed over to the Agriculture Department at the inception of the lease by removing the encroachments made by the third parties, so as to enable the appellant/plaintiff temple to accept delivery of possession; that out of 291.58 Acres, only an extent of 12.22 Acres was under the encroachment and the rest of the extent was ready for delivery to the appellant/plaintiff temple; that the appellant/plaintiff temple was unsuccessfully persuaded by the respondents to get possession of 279.36 Acres with the promise that in respect of the balance extent (12.22 Acres) the encroachments would be evicted and then handed over to the temple; that the temple could have accepted the same and claimed rent for the undelivered portion alone which bore a minor proportion to the entire extent of land and that since the appellant/plaintiff temple was not prepared to accept the above said reasonable offer made by the respondents and since no cultivation was done after 31.03.2001, the appellant/plaintiff temple was not entitled to claim rent for the period subsequent to 31.03.2001. Based on the said plea made in the written statement, the respondents/defendants prayed for dismissal of the suit.

4. Necessary issues were framed and the trial court conducted a trial in which, one witness was examined as PW1 and 22 documents were marked as Exs.A1 to A22 on the side of the appellant/plaintiff temple, whereas one witness was examined as DW1 and 15 documents were marked as Exs.B1 to B15 on the side of the respondents herein/defendants. The learned trial judge, after considering the pleadings and evidence in the light of the arguments advanced on both sides, allowed the suit in part with cost and granted a decree directing the respondents to pay a sum of Rs.2,03,611.25 representing the rent for fasli 1410 alone, together with a subsequent interest on the said amount from the date of plaint till realisation at the rate of 6% per annum. The learned trial judge expressed a view that the dispute was one of ego clash between two Government departments and that the temple ought not to have insisted upon removal of the encroachers and re-delivery of the entire extent of the property leased out to the Government (Agriculture Department), when the Government came forward to surrender major portion of the property together with a promise to deliver the remaining extent after removing the encroachers. On the basis of the said finding alone, the learned trial judge chose to decree the suit in respect of the claim for rent for fasli 1410 alone and negatived the claim for rent for the next fasli, namely fasli 1411. The judgment of the trial court was pronounced and the said decree was passed on 16.04.2004.

5. As against the disallowed portion of the claim, the appellant/plaintiff preferred an appeal in A.S.No.39/2004 on the file of the lower appellate court, namely the District Court,

Nagapattinam. The learned Principal District Judge, Nagapattinam, by judgment and decree dated 11.03.2005 dismissed the above said appeal with cost confirming the judgment and decree of the trial court dated 16.04.2004 made in O.S.No.61/2003 in all respects.

6. As against the said judgment and decree of the lower appellate court (District Court, Nagapattinam) dated 11.03.2005 made in A.S.No.39/2004, the appellant/plaintiff temple has preferred the present second appeal on various grounds set out in the Memorandum of Grounds of Second Appeal.

7. In line with the mandate provided in Section 100 of the Code of Civil Procedure, three questions were identified and formulated at the time of admission of the second appeal as Substantial Questions of Law involved in the second appeal. They are as follows:

1. Whether a surrender of a portion of the leasehold premises is a valid surrender in the eye of law?

2. Whether Section 108 of the Transfer of Property Act has any application to a lease to the Government?

and

3. Whether the lessee who has allowed the suit premises to be encroached upon is not liable to pay rent for the premises until the encroachers are removed?

8. The arguments advanced by Mr.Srinath Sridevan, learned counsel for the appellant and by Ms.M.Jayasree, learned Government Advocate appearing for the respondents were heard. The materials available on record were also perused.

9. The facts leading to the filing of the second appeal have been narrated supra. Hence it shall be unnecessary to repeat it. It is not in dispute that a total extent of 291.58 Acres (268.10 Acres of wet land and 23.48 Acres of dry land) in Sellur Village, Nagapattinam Taluk belonging to the appellant/plaintiff temple was taken on lease by the Government in the year 1982 for the use of the Agriculture Department for setting up a seed farm. A copy of the lease deed has been produced and marked as Ex.B12. Though the property was leased out initially for a period of five years, subsequently the lease was extended for five years and then up to 30.06.2000 as found from the clauses incorporated in Ex.B12. However, even after the expiry of the lease period, the Agriculture Department, represented by the respondents herein, continued to hold the land till 31.03.2001 and came forward to surrender the land by 31.03.2001 by issuing Ex.A1-Notice dated 01.11.2000. The said notice was replied by the appellant/plaintiff temple by a reply dated 25.01.2001, a copy of which has been marked as Ex.A3, refusing to

take possession contending that the entire extent leased out to the Agriculture Department of the Government should be surrendered after removing the encroachments, since the Agriculture Department during the lease period allowed such encroachments to be made.

10. Thereafter, the respondents/defendants, insisted that the appellant/plaintiff should take back the possession of the major extent of the leasehold land except a smaller extent, which was under encroachment. But such a request was turned down by the appellant/plaintiff and it demanded surrender of the entire extent of land in the condition as it was leased out to the Government Agriculture Department. As it was not done till the end of fasli 1411 and the rent for faslis 1410 and 1411 were not paid, the appellant/plaintiff temple approached the trial court with the suit for recovery of Rs.4,13,332.25 being the rent for those two faslis. The respondents/defendants representing the Agriculture Department were making promises to remove the encroachments by evicting the encroachers and hand over the encroached portions also. Till 2004 encroachments were not removed and possession was not handed over to the appellant/plaintiff temple. Only in the year 2004, encroachments were removed and the possession of the entire property was handed over to the appellant/plaintiff temple. Though possession of the entire property was handed over to the appellant/plaintiff in the year 2004 corresponding to fasli 1413, we are not concerned with the period subsequent to fasli 1411, as the suit was filed claiming rent for the faslis 1410 and 1411 alone and no prayer for recovery of rent for the subsequent faslis had been made. The corresponding period, as per the English Calendar for fasli 1410, shall be from July 2000 to June 2001. The seed farm was closed and the property was offered to be surrendered as per Ex.A1-Notice and Ex.A2-letter dated 31.03.2001. As such, the claim of the appellant/plaintiff temple for payment of rent for the fasli 1410 was accepted by the trial court as well as the lower appellate court and the respondents were not aggrieved by the judgment and decree for the recovery of the rent for fasli 1410. It shall be obvious from the fact that the respondents did not file any appeal or cross objection against that part of the decree directing them to pay Rs.2,03,611.25 representing the rent for the fasli 1410.

11. So far as the next fasli, namely fasli 1411 (corresponding to the period from July 2001 to June 2002) is concerned, the claim of the appellant/plaintiff temple was rejected by both the courts below, on the premise that before the beginning of fasli 1411, the respondents/defendants offered to surrender the land and it was the appellant/plaintiff temple, which unjustifiably refused to accept the surrender of the land leased out to the Government (Agriculture Department), on the premise that there were encroachments and demanded that the property should be delivered in the same condition, as it was handed over to the Agriculture Department at the inception of lease, after removing the encroachments made during the lease

period. Both the courts below accepted the contention of the respondents/defendants that the offer to surrender part of the land taken on lease by the Government (Agriculture Department) would absolve it from making payment of rent for the subsequent period, when such offer was rejected by the appellant/plaintiff temple. In this regard, the courts below relied on Section 108 of the Transfer of Property Act, 1882 to hold that the appellant/plaintiff temple was not justified in refusing to take possession of the major portion of the land when sought to be surrendered and in insisting upon surrender of the entire land after removal of the encroachments.

12. Section 108 of the Transfer of Property Act deals with the rights and liabilities of lessor and lessee. Section 108(m) of the said Act reads as follows:

"(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left;"

Sub section (q) reads as follows:

"(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property."

13. Section 111 of the Transfer of Property Act deals with the determination of lease. Sub sections (e) and (f) of the said section deal with the surrender of the leasehold land as a mode of determination of lease. The modes contemplated under the said sub sections are by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them (e) or by implied surrender (f), then the same shall amount to determination of lease.

14. Section 116 deals with the effect of holding over. It says if a lessee or under-lessee of property remains in possession after the determination of the lease granted to the lessee and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed

from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106.

15. A conjoint reading of Sections 106, 108, 111 and 116 of the Transfer of Property Act, 1882 will make it clear that though the lessee wants to determine the lease by surrendering possession, such surrender should be strictly in accordance with sub clause (m) and (q) of Section 108 of the Transfer of Property Act. If the offer to surrender is not in conformity with Section 108(m), the lessor shall be justified in refusing to accept the surrender and insisting upon the lessee to pay the rent till complete and proper surrender of the land in terms of Section 108(m) shall be effected. It is one thing to say that the lessor, in order to save time and in order to mitigate the loss that may be occasioned to the lessor and the lessee could have validly and legally accepted the surrender of a portion of the land and treated the lessee to be bound by the terms of the lease in respect of the rest of the lands, in the event of lessee agreeing to surrender a portion of the land and it is another thing to state that the lessor is bound to accept surrender of a part of the property leased out. There is no such obligation cast on the lessor. Such a course is open to the lessor and it is an option, which could be either exercised by the lessor or declined by the lessor when the lessee comes forward to surrender only a part of the land. The proportion of the area withheld to the area offered to be surrendered shall be immaterial. The law enacted by the Parliament by way of Section 108(m) makes it obligatory on the part of the lessee to restore the property to good condition as it was at the time when the lessee was put in possession.

16. When the property was sought to be surrendered by issuing Exs.A1 and A2 - notices, the appellant/plaintiff temple pointed out the wrong committed by the lessee by allowing a portion of the property to be encroached upon by third parties. The respondents were also put on notice under Ex.A3 that they should surrender the entire land leased out to the Government (Agriculture Department) after removing the encroachments and hand over the entire property in the very same condition in which the property was leased out to the Agriculture Department. Even after such insistence by the appellant/plaintiff, the respondents/defendants took more time to clear the encroachments and surrender possession of the entire land to the lessor, namely the appellant/plaintiff temple.

17. It is pertinent to note that the encroachments were admittedly removed and the surrender of the property was made only in the year 2004 during the pendency of the suit and till the date of such surrender, the respondents have not paid the rent. As the rent for the period subsequent to fasli 1411 is not the subject matter of the suit, it is unnecessary to deal with the question whether the respondents are liable to pay rent for the period subsequent to fasli 1411 till the actual date of surrender. Suffice to point out that

till the end of fasli 1411 encroachments were not removed and possession was not delivered free from encroachments and hence the appellant/plaintiff is entitled to a decree for recovery of the rent for Fasli 1411 also.

18. When the land taken on lease by the lessee is not sought to be surrendered in the same condition as it was at the inception of the lease, the lessor shall be entitled to refuse to accept the surrender unless there shall be a consensus that part of the land can be surrendered and when part of the land is sought to be surrendered the lessor cannot refuse to accept such a surrender. In the absence of such an agreement, the offer to surrender only a portion of the leasehold land shall not be a valid surrender causing determination of the lease in respect of the entire leasehold property or at least in respect of the portion sought to be surrendered. The position shall be different if the lessor accepts surrender of part of the land and recognises the continuation of the lease in respect of the remaining portion of the land. Hence this court comes to the conclusion that the offer made by the respondents herein/defendants, namely Government (Agriculture Department) to surrender 279.36 Acres alone, with a promise to surrender the remaining land after removing the encroachers was not a valid surrender and it was rightly declined by the appellant/plaintiff temple without exercising the right of waiver inhered in it. The first substantial question of law is answered accordingly in favour of the appellant/plaintiff and against the respondents/defendants.

19. Nowhere in the Transfer of Property Act, it has been stated that leases of immovable properties by or in favour of the Government shall not be covered by Chapter V of Transfer of Property Act, 1882 consisting of Sections 105 to 117. Even Section 108 of the Transfer of Property Act does not either expressly or impliedly exclude the leases of immovable property created either by or in favour of the Government. Therefore, there cannot be any valid contention that Section 108 of the Transfer of Property Act has no application to a lease in favour of the Government. The second substantial question of law is thus answered in favour of the appellant and against the respondents/defendants.

20. When the lease has not been terminated in accordance with law and even in case if the lessee continues in possession after termination of the lease by efflux of time, till possession is delivered in the manner known to law, the lessee shall be liable to pay rent. Even a lessee whose lease has been terminated in accordance with the provisions of the Transfer of Property Act shall be liable to pay damages for use and occupation till actual possession is delivered. In this case, though the period of lease as per the lease deed had expired, the Government/Agriculture Department continued as a lessee holding over and it was paying the rent till the end of fasli 1409. The offer made by the Agriculture Department to surrender

only a portion of the land by 31.03.2001 was rightly declined by the appellant/plaintiff temple in the communication sent to the appellant/plaintiff temple by the officials of the Agriculture Department. In the written statement filed in the suit they have admitted in categorical terms that 12.22 acres of land out of the total extent of 291.58 Acres taken on lease by the Agriculture Department from the appellant/plaintiff temple had been encroached upon by third parties and that proceedings were being taken for the removal of the encroachments. However, during the course of the trial, an attempt was made to give a go by to such an admission by adducing evidence through DW1 to the effect that even before the creation of the lease in favour of the Government/Agriculture Department, the encroachments were there and that therefore the Agriculture Department/Government could not be compelled to remove the encroachments as a condition for effecting termination of the lease by surrendering possession of the leasehold land. Such an attempt was totally against the admission made by the respondents in their communications addressed to the appellant/plaintiff temple and also their defence plea made in the written statement. Though the courts below have rightly rejected the said contention, which was developed during the course of trial, they committed an error in holding that the appellant/plaintiff temple was to be blamed for not accepting the surrender of a major portion of the leasehold land and seeking proportionate rent for the minor portion over which there were encroachers. The very approach made by the courts below is improper and the same show the prejudice with which the problem was approached by the courts below. Since it has been clearly established through evidence adduced on the side of the appellant/plaintiff and also by the admission made by the respondents/defendants that there were encroachers over 12.22 Acres, which came to be made after the Agriculture Department took the land for lease and that they had initiated proceedings for removal of the encroachments, the respondents representing the Agriculture Department were liable to pay the rent for the leasehold land until the same was surrendered in the very same condition in which it was leased out to the Agriculture Department free from encumbrances i.e. after removal of the encroachments. Hence the respondents/defendants are very much liable to pay the rent for fasli 1411 also, before the end of which the property was not surrendered validly. The third substantial question of law is answered accordingly in favour of the appellant and against the respondents/defendants.

21. The necessary consequence shall be that the finding of the courts below to the effect that the respondents were not liable to pay the rent for the fasli 1411 and the appellant/plaintiff was not entitled to recover the rent for the said fasli is perverse and the same is liable to be interfered with and reversed. The resultant position shall be that the appellant/plaintiff shall be entitled to a decree for recovery of rent for both faslis 1410 and 1411.

22. So far as the quantum of rent is concerned, there is no dispute. Hence the decree of the trial court, which was confirmed by the lower appellate court, is bound to be modified by directing the respondents/defendants to pay a sum of Rs.4,13,332.35P being the rent for the faslis 1410 and 1411 together with a subsequent interest on the said amount from the date of plaint till realisation at the rate of 6% per annum. In the facts and circumstances of this case, this court deems it appropriate to hold that the appellant/plaintiff shall be entitled to the cost throughout.

In the result, the second appeal is allowed and the judgment and decree of the Principal Subordinate Judge, Nagapattinam dated 16.04.2004 made in O.S.No.61 of 2003 as confirmed by the lower appellate court (Principal District Judge, Nagapattinam) by his decree and judgment dated 11.03.2005 made in A.S.No.39 of 2004, is modified by directing the respondents/defendants to pay a sum of Rs.4,13,332.35P together with a subsequent interest at the rate of 6% per annum on the said amount from the date of plaint till realisation. The appellant/plaintiff temple shall also be entitled to cost throughout.

asr/-

-s/d-

Assistant Registrar(LA)

Dt:10/2/2015

True Copy

Sub-Assistant Registrar

To

1.The Principal District Judge, Nagapattinam

2.The Principal Subordinate Judge, Nagapattinam

3.The Section officer, सत्यमेव जयते
V.R.Section, High Court,
Madras.

+ 1 cc to Mr.Srinath Sridevan, Advocat SR 2238

+ 1 cc to the Govt.Pleader High Court, Madras 2184

jp(co)
prk27/2

Judgment
in S.A.No.450 of 2006