

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 25.10.2016

Judgment pronounced on : 04.11.2016

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

S.A. No.71 of 2008

M.P.No.1 of 2008

and

M.P.No.2 of 2014

1.C.Balakrishnan
2.T.Chandra Hasen

... Appellants

Vs.

Arulmighu Vishwanathaswamy Temple
Rep. by its hereditary Trustee
Bava Chockkappa Mudaliar
Kulikkarai Village, Gudavasal (Tk),
Thiruvavarur Dt.

... Respondent

For Appellants	:	Mr.N.C.Ashokkumar
For Respondent	:	Mr.S.Devanathan

PRAYER : Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree passed in A.S.No.2 of 2007, dated 21.07.2007 passed by the Learned Subordinate Judge, Thiruvavarur reversing the Judgment and Decree passed in O.S.No.298 of 2000, dated 29.07.2003 on the file of District Munsif Court, Thiruvavarur.

J U D G M E N T

The defendant in the suit is the appellant before this Court. The suit was filed by one Bava Chokkappa Mudaliar as hereditary Trustee of Arulmighu Viswanathaswamy Temple in Kulakarai Village, Thiruvarur District, seeking possession, mandatory injunction and permanent Injunction in respect of the suit property.

2. The relief of declaration and mandatory injunction was granted and permanent injunction was dismissed on the ground that the defendant has already completed the construction on the encroached portion of the suit property and therefore the relief of permanent injunction is redundant. The appeal filed by the defendant was dismissed by the first Appellate Court confirming the judgment and decree of the trial Court.

3. The aggrieved defendant, who is the appellant before this Court, challenges the Order of the Court below on the following substantial questions of law :-

(a) Whether the Courts below have properly appreciated the law relating to locus standi of the person who has filed the suit for recovery of possession without getting any permission from the Commissioner, Hindu Religious and Charitable Endowments (H.R. & C.E.) Department under the Tamil Nadu Act 22 of 1959?

(b) Whether the Courts below have properly appreciated the legal principle relating to doctrine of acquiescence on the facts and circumstances of this case while granting a decree which amounts to demolishing a portion of the house?

(c) Whether the Courts below have properly considered the material evidence in the case on the question of maintainability of the suit and on the question of adverse possession?

4. When the matter was taken up for final hearing, the counsel for the respondent submitted that the O.S.No.298 of 2000, which is now the subject matter of the appeal was allowed by the trial Court on 29.07.2003 which was challenged by the appellants herein in A.S.No.99 of 2003. The first Appellate Court set aside the judgment and decree passed on 29.07.2003 and remitted the matter back for retrial. The trial Court on remand retried the suit and allowed the suit partially on 18.08.2006 on the following lines :-

(a) Declared that the Plaintiff temple is the absolute owner of the suit property.

(b) Directed the defendants to deliver the possession of the property within two months after removing superstructure put up thereon;

(c) Dismissed the relief of permanent injunction against the defendants/appellants.

(d) Directed the defendants to pay the proportionate costs.

5. The learned counsel for the respondent raised a preliminary object on the ground that while preferring the Second Appeal before this Court, the appellant has submitted the certified copy of the judgment and the decree of the trial Court dated 29.07.2003 passed in O.S.No.298 of 2000 before remand instead of the judgement and decree dated 18.08.2006 passed after remand. Therefore the very maintainability of the appeal is questionable.

6. To rectify the error, the appellant has taken out an application M.P. No.2/2014 to receive the judgment and decree dated 18.08.2006 as an additional document passed in O.S.No.298 of 2000 on the file of District Munsif, Thiruvarar and to condone the defect in proper presentation. This Court on hearing the parties and their rival submissions directed the Registry to seek the records of Sub Court, Thiruvarur within a period of one week and carry out necessary corrections, which was found not only in the decree in O.S.No.298 of 2000 but also the first Appellate Court decree A.S.No.2 of 2007. The counsel for the appellant admits that due to inadvertence the certified copy of the earlier decree dated 29.07.2003 was filed and Immediately after noting the defect, steps have been taken to rectify the same.

7. This Court on scrutiny of the records, finds that the error is actually in the printed copy of the decree. There is no deliberate omission on the part

of the appellant. The certified copy of the trial court decree passed on 18.08.2006 after remand is very much on the record. The first Appellate Court has also gone into the fact and discussion of the trial Court judgment, dated 18.08.2006 and has rendered its verdict in A.S.No.2 of 2007 on 21.07.2007. Therefore, there is no prejudice cause to the respondent herein by non-filing of the certified copy of the decree passed in O.S.No.298 of 2000, dated 18.08.2006, while presenting the Second Appeal.

8. With these finding on the preliminary objection, this Court ventures to find out whether there is any substantial question of law available to sustain this Second Appeal.

9. The case against the appellant is that the suit property belongs to Arulmighu Vishwanathswamy Temple, Kulakarai, Thiruvavarur district. The ancestors of Bava Chockkappa Mudaliar were administering the temple and the property hereditarily, since 1930. While so, the appellant trespassed into the suit property and continue to put up permanent structure in the said land. Therefore, Bava Chockkappa Mudaliar as the hereditary Trustee of Arulmighu Vishwanathswamy Temple has preferred suit for declaration, mandatory injunction for removing the super structure put up by the appellant and for permanent injunction restraining the appellants from interfering the peaceful

possession. The trial Court, while allowing the relief of declaration and mandatory injunction declined permanent injunction on the premise that the appellant have already put up permanent structure on the suit land and therefore grant of mandatory injunction to remove the super structure is sufficient and the relief of injunction is redundant, in the light of the above observation other relief were granted.

10. To arrive at the said findings, the trial Court has relied upon EX.A1, dated 20.12.1930 in which the suit property finds a place in the “C” schedule. For the said suit property one Mr.Vaithyalinga Mudaliar followed by Gopalasamy Mudaliar, who is the eldest male descendant were appointed as the Managers to carry out the charitable performance listed in “D” schedule of the Ex.A1. Bava Chockkappa Mudaliar, S/o.Gopalasamy Mudaliar, who is the male decent of Vaithyalinga Mudaliar has preferred the suit and at the time of filing the suit, his application to the H.R. & C.E. Department to declare him as hereditary Trustee, was pending. Later the department has declared him as the hereditary Trustee of the plaintiff temple on 04.10.2004 and the order is also marked as Ex.A26. Therefore, relying upon these documents both the Courts have held Bava Chockkappa Mudaliar has locus standi to maintain the suit on behalf of the temple as its hereditary Trustee.

11. The main contention of the appellant counsel is that Ex.A26 was subsequent to the suit therefore it cannot be looked into. This contention is one of the substantial question of law formulated by this Court at the time of admission. Since, this question goes to the root of the case, this Court considers to look into the legal aspects involved in it first.

12. The suit is filed in the name of Arulmighu Vishwanathswamy Temple, Kulakarai represented by Bava Chockkappa Mudaliar as its hereditary Trustee. Exs.A9 and A10, which are prior to the suits, disclose the fact that the plaintiff temple is maintained by hereditary Trustee. The Assistant Commissioner of H.R. & C.E., Nagapattinam and the Commissioner of H.R. & C.E., Chennai had correspondence with the hereditary Trustees of the plaintiff temple, even prior to filing of the suit. It is not the case of the appellant that Bava Chockkappa Mudaliar is not the descendent of Vaithyalinga Mudaliar or the son of Gopalasamy Mudaliar. In the deposition of PW1, it has been elucidated that the plaintiff temple was administered by Gopalasamy Mudaliar, the father of Bava Chockkappa Mudaliar and after the demise of Gopalasamy Mudaliar, his elder son Bava Kalyanasundara Mudaliar was administering the temple and on demise of Bava Kalyanasundara Mudaliar, Bava Chockkappa Mudaliar administering the temple as per Ex.A1. While so, just because there was no formal declaration by H.R. & C.E. Department that Bava Chockkappa Mudaliar

is the hereditary Trustee of the plaintiff temple, it will not affect the maintainability of the suit.

13. Even otherwise, it is well settled principle of law that idol is a juristic person and it has to act through human agencies. Therefore, in the interest of Idol, even worshipper can sue and protect the rights and interest of the idol. While so, there is no reason to question the maintainability of the suit on the ground that Bava Chockkappa Mudaliar was not declared as the hereditary Trustee of the plaintiff temple at the time of filing the suit. More so, when it is not disputed that the plaintiff temple is a hereditary temple and the forefathers of Bava Chockkappa Mudaliar were maintaining the temple. Both the Courts below have rightly held that the suit is maintainable.

14. The learned counsel for the appellant made his second limb of submission that even if Bava Chockkappa Mudaliar is considered to be hereditary Trustee, he cannot file a suit without prior permission of the H.R. & C.E. department and in support of this argument he relied upon the judgment of the **2003-1-L.W.386 in the matter of Sri Arthanareeswarar of Tiruchengode by its present Executive Officer, Sri Sabapathy**. By referring this judgment, the learned counsel for the appellant submitted that the said suit is not maintainable for want of prior permission of the Commissioner, H.R.

& C.E. for the sake of better understanding the portion of the judgment relied by the counsel for the appellant is extracted below :-

“20. Insofar as the Executive Officer's suit is concerned, it is seen that 'Executive Officer' has been defined under Section 6(2) of the H.R. & C.E. Act. According to this definition, Executive Officer is a person who is appointed to exercise such powers and discharge such duties appertaining to the administration of a religious institution as are assigned to him by or under the Act or the Rules framed thereunder. 'Trustee' has been defined under Section 6(22) of the Act as any person or body in whom the administration of a religious institution is vested. Section 45 of the Act deals with the appointment and the duties of an Executive Officer. Sub-section (2) to Section 45 says that the Executive Officer shall exercise such powers and discharge such duties as may be assigned to him by the Commissioner. The proviso says that only such powers and duties as appertaining to the administration of the properties of the religious institution shall be assigned to the Executive Officer. The powers and duties of the Executive Officer shall be defined by the Commissioner. Section 28 of the Act empowers the trustee of every religious institution to administer its affairs and to apply the funds and properties of the institution. He shall be entitled to exercise all powers incidental to the provident and beneficial administration of the religious institution.

21. In this case, the Executive Officer, in his chief-examination as

P.W.1, has stated that for the purpose of filing the suit, he sought permission from the Commissioner and got the order under Ex.A.12. On a perusal of Ex.A.12, dated 24.06.1970, it is seen that instructions were issued to the Executive Officer and the Board of Trustees to obtain legal opinion to enforce the charges mentioned in the settlement deed dated 1.11.1897 executed by one Thiru Venkatachala Gounder and his wife. A copy of these instructions was issued to the Executive Officer as well as to the Chairman, Board of Trustees. The above instructions did not authorise the Executive Officer to file a suit. As a matter of fact, the instructions were addressed to both the Executive Officer as well as to the Chairman, Board of Trustees in order to obtain legal opinion in reference to the enforcement of the settlement deed. Thereafter, the Inspector, H.R. & C.E. Department held an enquiry on 01.10.1971 on the petition by T.P. Ardhanari Padayachi (the first plaintiff in the Community's suit). Ex.B.107 is the report of the Inspector dated 24.1.1972 wherein he has stated that he found on his enquiry, that from the date of the gift/settlement deed dated 1.11.1897, no such Nandavanam and its performance was conducted. It was further noted that in reference to this property, there was already an enquiry by the Commissioner on 26.5.1970 and an order dated 24.6.1970 had been passed directing the concerned to take legal opinion. From the above, it is clear that the Executive Officer is not the authority competent to initiate legal proceedings and that he had not been assigned with the power of filing a suit. It is only the Board of Trustees in existence at that time which was competent to initiate the legal proceedings. The trustees are not made parties to the suit and therefore, the finding insofar as

the Executive Officer's suit is concerned, that it is filed without authority has to be upheld.

22. *The suit by the villagers - B.K.MUKHERJEA'S "The Hindu Law of religious and Charitable Trust" states as follows :*

"An idol is a juristic person in whom the title to the properties of the endowment vests. But it is only in an ideal sense that the idol is the owner. It has to act through human agency, and that agent is the Shebait, who is, in law, the person entitled to take proceedings on its behalf. The personality of the idol might, therefore, be said to be merged in that of the Shebait.

(2) Where, however, the Shebait refuses to act for the idol, or where the suit is to challenge the act of the Shebait himself as prejudicial to the interests of the idol, then there must be some other agency which must have the right to act for the idol. The law accordingly recognises a right in persons interested in the endowment to take proceedings on behalf of the idol."

Thus, the legal position is that even a worshipper can sue when cause of action is due to trustee acting adversely. The suit by the worshippers is maintainable. However, this will be subject to our finding whether trust had indeed been created and come into effect.

15. Thus on readings of paragraphs 21 and 22 together, it is very clear that the restriction of getting prior permission from the Commissioner of H.R.

& C.E. before filing the suit is applicable only to Executive Officer defined under Section 6(9) of the Act, who are appointed by the Commissioner as per Section 45 of the Act and exercise such powers and discharge such duties as may be assigned by the Commissioner, whereas the hereditary Trustee, who fall under the definition of Section 6(11) of the H.R. & C.E. Act, discharge their religious obligation while representing the temple unlike the Executive Officers appointed by the Commissioner to discharge their official function.

16. Regarding Ex.A26, the appointment of Bava Chockkappa Mudaliar as hereditary Trustee of the plaintiff temple by the Order of the Commissioner, dated 04.10.2004, this Court has no second opinion regarding the admission of this document and reliance made by the Courts below. The Courts cannot close his eyes to the fact that Ex.A-26 though came into existence only on 04.10.2006, which is subsequent to the filing of the suit, it is the culmination of the proceedings initiated by Bava Chockkappa Mudaliar seeking recognition as hereditary Trustee, prior to initiating the suit Ex.A-26 is only a formal declaration of a Civil right by the authority competent to do so. Even in the absence of such declaration, it does not mean that Bava Chockkappa Mudaliar is not an hereditary Trustee or the idol of the plaintiff Arulmighu Vishwanathswamy Temple a juristic body should be left without any human agency to represent and to protect its interest.

Section 63 of H.R. & C.E. Act reads as under :-

“Joint Commissioner or Deputy Commissioner to decide certain disputes and matters. - Subject to the rights of suit or appeal hereinafter provided, the Joint Commissioner or the Deputy Commissioner, as the case may be, shall have power to inquire into and decide the following disputes and matters.

- (a) Whether an institution is a religious institution;*
- (b) Whether a trustee holds or held office as a hereditary trustee”*

17. The learned counsel for the appellant submitted that Ex.A.26 declaring Bava Chockkappa Mudaliar as hereditary Trustee was passed pending appeal under Section 63 as found in the Appellate Court. Therefore, it should be considered as a document subsequent to the suit and Bava Chockkappa Mudaliar describing him as hereditary Trustee even before such declaration by HR & CE de-suits him.

18. Section 63 of H.R. & C.E. Act mainly comes into play when enquiry to decide certain disputes and matter arise. One such matter enumerated in Section 63 is where a trustee holds or held office as hereditary Trustee. Thus, the Order passed under Section 63(b) have both retrospective and prospective effect. Therefore this argument of the learned counsel for the appellant has no legs to stand.

19.Regarding the adverse possession claimed by the appellant the Courts

below have rightly rejected since the appellant could not establish his open, continuous and peaceful possession of more than 12 years. Contrarily taking note of the Commissioner's report, the Courts below have held that the appellant has trespassed into the land recently and has put up the construction inspite of objection made by the plaintiff. Further Ex.A6 "Ä"register of the suit land of Survey No.23/5, Ex.A7 "Ä"register of the suit land of Survey No.23/6, Ex.A4 and A5 Chitta and Adangal for Survey No.23/5. all goes to show that the suit land is in possession and enjoyment of the respondents and not with the appellant. For continuous possession and enjoyment of the suit property for more than 12 years, mere oral evidence contrary to revenue records is not sufficient to support the case of the appellant to prove adverse possession.

20. Therefore the substantial question of law formulated regarding locus standi of Bava Chockkappa Mudaliar and want of permission from the Commissioner, H.R. & C.E. are held to be unsustainable.

21. For the foregoing reasons, this Court finds no reason to entertain the Second Appeal.

22. In the result, the Second Appeal is dismissed with costs.
Consequently connected Miscellaneous Petitions are closed.

04.11.2016

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To
The Subordinate Judge,
Thiruvarur.

G.JAYACHANDRAN, J.

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