

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 15.06.2017

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

SA.No.311/2017 and CMP.No.7447/2017

Mr.T.Pandurangan

..

Appellant / Defendant

Versus

Sri Kannabiran Temple,
represented by its Hereditary Trustee
M.Jayaram.

..

Respondent /Plaintiff

Prayer: Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree dated 05.11.2016 made in A.S.No.291 of 2010 passed by learned I Additional Judge City Civil Court, Chennai confirming the Judgment and Decree dated 31.01.2008 in O.S.No.1513 of 2001 passed by learned V Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.C.Umashankar

For Respondent : Mr.R.Manickavel

JUDGMENT

The defendant, who had lost before the Courts below, are the appellant herein.

2 The respondent / plaintiff / Temple filed a suit in O.S.No.1513 of 2001 on the file of the V Assistant City Civil Court, Chennai, against the appellant / defendant, praying for the relief of delivery of vacant possession of the 'B' Schedule property ad-measuring to an extent of 1020 sq.ft situated in Door No.25, Chinnakuzhanthai Street, Maduma Nagar, Sembium, Perambur, Chennai-600011.

3 It is the case of the respondent/plaintiff/temple that the temple is coming within the purview of Tamil Nadu Hindu Religious Charitable and Endowments Act and it is administered by one Thirupanalwar Sabbai and the temple is in existence from time immemorial and land belonged to the temple, was purchased through a registered Sale Deed dated 02.11.1933, registered as Doc.No.1722/33, in the name of Kannabiran temple and the adjacent land was purchased in the name of the Trustees of the Thirupanalwar Sabbai, through a registered Sale Deed dated

14.07.1959, (Ex.A1). The respondent/plaintiff/temple would further aver that five Trustees representing the said Sabbai were administering the temple during their lifetime and after their demise, one of the legal heirs of the trustee M.Jayaraman, was administering the temple as a Trustee. The temple was renovated and reconstructed by the Thirupanalwar Society and poojas are conducted for the Deity "Lord Krishna". It is further stated by the respondent/plaintiff/temple that in the schedule mentioned property, three tenants are occupying different portions of the temple and the appellant / defendant is occupying a Thatched Shed measuring 25x12 sq.ft. ('B' schedule property) and it was let out to him by Thirupanalwar Sabai on the basis of his request and demand made vide his letter dated 01.07.1988 (Ex.A2) and vide Agreement/letter dated 24.10.1989 ('B' Schedule property) was let out in his favour (Ex.A3), on monthly rent of Rs.35/- and the said rent was paid by him upto January 1996 and thereafter, he has failed to pay the ground rent in spite of repeated demands. The respondent/plaintiff/temple would further aver that the defendant has also extended a portion in his occupation without any authority, unauthorizedly and highhandedly and as a result, the devotees found it extremely difficult for "Program" (Walking space around the temple) as there was no passage and on account of blocking of the passage, repeated request made by the respondent/plaintiff/temple to remove the encroachment was not considered. The appellant / defendant is due and liable to pay a sum of Rs.2030/- as arrears of ground rent and a Legal Notice dated 29.09.2000 (Ex.A4) was issued to the appellant/defendant calling upon him to vacate and deliver the possession of the 'B' Schedule property and a sum of Rs.2,000/- has also been offered as a compensation in respect of the Thatched shed put up by him. Though, the appellant / defendant acknowledged the receipt of said notice, failed to send any reply nor complied with the terms of the said notice by delivering the possession of the "B" Schedle property and therefore, the above said suit was filed.

4 The appellant/defendant filed a written statement denying the averments / allegations made in the plaint and would contend that M.Jayaraman is not the Heridatary Trustee and also the temple is also not under the control of Hindu Religious and Charitable Endowment and denied the suggestion that the adjacent land was purchased by Thirupanalwar Sabbai under Ex.A1 dated 14.07.1999. The appellant/defendant would further contend that the rough sketch attached to the plaint does not contain correct description and in the absence of authenticated revenue records, rough sketch cannot be relied upon. The appellant/defendant also took a stand that there is absolutely no relationship between the temple's property with the defendant and the Agreement (Ex.A3) dated 24.10.1989 is a fabricated one and the genuineness of the same is also disputed and it is also in contrary to the

provisions of the Hindu Religious and Charitable Endowment Act.

5 In sum and substance, it is the stand of the appellant/defendant that he is not in occupation of the land belonging to the temple and as such, he is not a tenant in the temple and never paid rent as allotted and also took a stand that the suit has not been properly valued for the purpose of paying separate court fee and prays for dismissal of the suit.

6 The Trial Court on consideration of pleadings, have framed the following issues:-

- Whether the plaintiff is entitled to recovery of 'B' Schedule property from the defendant?
- Whether the plaintiff is entitled to decree for arrears of land?
- Whether the plaintiff is entitled to damages?
- To what other relief the plaintiff is entitled to?

7 During the Course of Trial, the plaintiff viz., Mr. Jayaraman examined himself as PW.1 and one Mr. P.G. Ramachandran, the President of Social Welfare Panchayat Association and who is also a resident of the locality known about the familiarity of the temple, was examined as P.W.2. The plaintiff has also marked Exs. A1 to A6.

8 The defendant examined himself as DW.1 and marked Exs. B1 and B2 - Notices issued under Section 7 and 5 of the Tamil Nadu Land Encroachment Act, 1909.

9 The Trial Court on a consideration of pleadings and appreciation of oral and documentary evidences, had decreed the suit as prayed for, vide judgment and decree dated 31.01.2008. The defendant aggrieved by the decree of the suit filed an appeal in A.S.No.291/2010 on the file of learned 1st Additional Judge, City Civil Court, Chennai and vide judgment and decree dated 06.08.2014, the Lower Appellate Court has dismissed the appeal filed by the defendant thereby, confirming the judgment and decree passed by the Trial Court.

10 The defendant aggrieved by the same, filed the Second Appeal in S.A.No.918 of 2014 on the file of this Court.

11 This Court had dealt with the Second Appeal and found that the respondent/plaintiff did not discharge his burden that the defendant is in occupation of a portion of the property in S.No.16 which is 'B' Schedule property and therefore, expressed its opinion that the matter has to be remanded to the Lower Appellate Court and also allowed CMP.Nos.830/2012 and

1305/2013 filed by the appellant in AS.No.291/2010 to receive additional documents and to appoint Advocate Commissioner and in the event of Commissioner's Report revealing that the defendant is in possession of S.No.16, he shall vacate the portion and in further that if the defendant is found to be in occupation of S.Nos.17 and 18 which are plaintiff's land, the plaintiff / Temple cannot have any objection for him to continue to occupy the same for the reason that it is for the Panchayat or Government to remove the encroachment.

12 After remanding CMP.No.1305/2013, the Advocate Commissioner was appointed and as per the said report, Advocate Commissioner opined that the defendant is not in possession of S.No.16 and he is in occupation of land in S.Nos.17 and 18. The plaintiff / temple filed CMP.Nos.1012 and 1013/2015 before the Lower Appellate Court and praying for relief of setaside and scrap the report of the Advocate Commissioner dated 28.08.2015 and to reissue the warrant in terms of the order passed by this Court in S.A.No.918/2017. The Lower Appellate Court vide order dated 29.09.2015 has dismissed the C.M.P.No.1012/2015 for scrapping the Commissioner's report and however, allowed C.M.P.No.1013/2015, ordering the reissue of commission warrant to the very same Advocate Commissioner with a direction to inspect the suit property and to measure it as well as the adjacent properties with the help of a qualified surveyor and to submit his report as to whether the defendant is in occupation of any portion of property situated in S.No.16 and whether he is in occupation of survey Nos.17 and 18 and he was also directed to verify whether there is any change in S.No.16 and new Survey Number has been assigned for the land which will also be taken into consideration for measuring the property.

13 Accordingly, the Advocate Commissioner for whom the reissue of warrant has been given, declined to take up the assignment and therefore, another Advocate Commissioner was appointed and he has submitted his report dated 23.02.2016 (Ex.C2 series). The Advocate Commissioner in C2 series found that on inspection of extract of land register issued by the office of Tahsildar, Perambur Taluk, it is found that S.No.16 was earlier divided into four part. Subsequently, new survey number was assigned to them i.e. S.No.10,15,16,17 respectively which is evident from the Town Survey register which is being maintained by the Tahsildar office, Perambur Taluk and the date on which change has been made in the Survey Number was not known to the Tahsildar office. The said documents lies within the central survey office and confirmation is noted to that effect. The Advocate Commissioner further found that the Schedule 'A' property lies in new S.No.17, which is earlier in S.No.16 part as per the Town Survey register and on inspection of the property, it is found that the defendant claim to be in

occupation of the portion that is marked as S.Nos.17 part and 18 part in the sketch given by the surveyor and a hut put up in the said portion.

14 Additional documents were also filed and were marked as Ex.B3 to B6.

15 The Lower Appellate Court had formulated the following points for determination:

- Whether the suit is not maintainable and defective as filed by the plaintiff since it is admitted by them that the temple is under control of HR&CE and proper resolution?
- Whether the suit filed by the plaintiff relying upon Ex.A3 which is not pleaded in the plaint and contrary to law and pleadings especially order 6 of C.P.C?
- Whether the plaintiff is entitled for the relief of recovery of possession and compensation?
- What relief to the appellant / defendant is entitled?

16 The Lower Appellate Court on going through the oral and documentary evidence has found that the appellant/defendant had admitted in his cross examination about the signature under Ex.A3 which is the rental agreement letter pad sheet of President of Social Welfare Panchayat Association and which was signed by him as well as then president P.G.Ramachanderan (PW2). The Lower Appellate Court also taken note of the fact that the defendant who has examined himself as DW1 has admitted in his cross examination that he was aware of 3097 sq.ft. land purchased by plaintiff/Temple in the year 1933 and he has also seen the Sale Deed and given a request under Ex.A2 to lease out the land for cycle shop and on the basis of letter 25x12 feet extent of temple land was allotted and he had put up thatched hut and agreed to pay Rs.35/- as monthly rent. The Lower Appellate Court has also taken note of the fact that the defendant has filed an additional proof affidavit and took a stand as per the Exs.B1 and B2, the land in question can be construed as a temple land for the reason that the notice has been issued for encroachment of Government land and therefore, held that in the light of the submission of Ex.A2 and A3, cannot take a contra stand.

17 The Lower Appellate Court also taken note of the Commissioner's Report and held that the appellant is in occupation of portion of land in S.No.17 belong to the plaintiff temple and this portion was mentioned as 17 part which was not specifically marked in surveyor plan 2 and 4 and as such

plaintiff / Temple is entitled for recovery of portion in respect of 17 part marked in "abcd" in Surveyors plan 2 in Exs.C1 series and therefore, dismissed the appeal vide judgment and decree dated 05.11.2016. The defendant aggrieved by the judgment and decree passed by the Lower Appellate Court in dismissing the appeal and

thereby confirming the judgment and decree passed by the Trial Court, has filed Second Appeal.

18 In the memorandum of grounds of appeal the following substantial questions of law are arise:-

- Whether the Appellate Judge is right in confirming the judgment and decree of the trial court without any basis or evidence?
- Whether lower court has appreciated the oral evidence in consonance with documentary evidence in a manner known to law?
- Whether the Courts below are right in decreeing the suit filed by the plaintiff without any documentary evidence with regard to title/ownership as prescribed under the provisions of the Transfer of Property Act and the Civil Procedure Code and whether the Courts below are right in decreeing the suit contra to the evidence of PW1?
- Whether the findings and observations of the Courts below are perverse against the well laid principles?
- Whether the Lower Appellate Court has properly appreciated the scope of Order 6 Rule 2 of C.P.C with regard to pleadings and that too appreciating a document namely Ex.A3 which was not pleaded in the plaint?
- Whether the Lower Appellate Court right in confirming the Judgment of the trial Court without appreciating the additional documents which was dated 11.04.2008 i.e., after the judgment of the trial court?
- Whether the Courts below are right in relying upon Exs.A-1 to A-3 and Ex.B1 to Ex.B2 with regard to the jural relationship of landlord and tenant between the plaintiff and the defendant?
- Whether the Courts below are right in decreeing the suit in favour of the plaintiff adjacent to the land in S.No.16, Sembium Village when the appellant herein is not having possession of the suit land?
- Whether the 1st Appellate Court is right in giving a finding that the plaintiff and a panchayat association mentioned in Ex.A3 is one and the same when it is not even pleaded in the plaint?
- Whether the plaintiff has satisfied the Courts

below with regard to identification and localization of the property in question?

- Whether the Courts below have properly appreciated the reports filed by the Advocate Commissioner in a proper prospective?

19 Mr.C.Umashankar, learned counsel appearing for the appellant/defendant has invited the attention of this Court to the Impugned judgment passed by the Courts below as well as the typed set of documents containing oral and documentary evidence and would contend that the burden lies heavy on the respondent / plaintiff/temple to locate the property and also to prove and establish that the appellant / defendant is in occupation of the land belonging to the temple and it has miserably failed to do so. It is the further submission of the learned counsel appearing for appellant / defendant though, the Lower Appellate Court has relied upon the survey plan in Ex.C1 series, and plan contained in the "A and B" and there is no "C and D" and in the light of Exs.B1 and B2 notices issued under the provisions of Tamil Nadu Land Encroachment

1908, land in question cannot be declared to be the land belonging to Temple and the said material aspect has been completely overlooked by the Lower Appellate Court.

20 It is also the submission of the learned counsel appearing for the appellant that the the 2nd Advocate Commissioner's Report also indicated that the date on which the exact change as to the survey number has been made in the survey register is not known to the office of Tahsildhar and the records are with the Central office and no steps have been taken to summon the same from the Central Record Office to find out as to whether the alteration in survey numbers have been given and since the said burden is cast upon the respondent /plaintiff / temple to prove the same, it had failed to do so and it cannot be said that the appellant/defendant is in occupation of the said temple property and would further add that for the respondent / plaintiff to prove that he is in occupation of 120 feet of land belong to them, the defendant is ready to vacate and deliver the portion of the property and hence, prays for interference.

21 Per contra, R.Manickavel, learned counsel appearing for the respondent / decree holder / temple would contend that originally the Courts below had recorded concurrent findings and indicated the defects of the defendant and therefore, defendant filed in S.A.No.918/2014 on the file of this Court and it was remanded vide judgment dated 12.02.2014 with a direction to appoint Advocate Commissioner to localise

the property and the 1st Advocate Commissioner under Ex.C1 found that defendant is not in possession of S.No.16 but in S.No.17 part and 18 part, aggrieved by the same, the plaintiff / temple filed a C.M.P.Nos.1012 and 1013 of 2015 to scrap the Commissioner's report and appoint another Advocate Commissioner to inspect and measure the property and the petition to scrap the Commissioner report was dismissed and however, the petition to appoint another Advocate Commissioner was allowed and though, the Lower Appellate Court appointed the very same Advocate Commissioner, he was not inclined to accept the warrant and therefore, another Advocate Commissioner was appointed and he has submitted his report marked as Ex.C2 series wherein upon verification of the Town Survey Register maintained in the Tahsildhar Office, Perambur Taluk, S.No.16 was earlier divided into four parts and New S.Nos.10,15,16 and 17 were assigned and since, the defendant in occupation of S.No.16, the Lower Appellate Court has rightly ordered the recovery of possession in occupation of the said survey number. Since, the findings are concurrent in nature and no substantial questions of law raised for consideration in this Second Appeal and prays for dismissal of the Second Appeal with exemplary cost.

22 This Court paid its rival submission and also perused the material placed before it.

23 It is a settled position of law that the plaintiff has to succeed by standing on its own legs and to succeed in its endeavour and it is open to the defendant to take an inconsistent plea. However, once there is an admission on the part of the defendant, it cannot be taken back.

24 The appellant / defendant who examined himself as DW.1, had admitted that he made a request under Ex.A2 to the President of Thirupanalawar Sabbai, Social Welfare Panchayat Association and it was accepted under Ex.A3 - letter head of Social Welfare Panchayat Association. The portion of the land belonging to the Temple admeasuring 25x12 sq.ft. leased out in favour of the appellant / defendant for a period of eleven months on a monthly rent of Rs.35/- with an advance of Rs.70/- per month. The defendant who has examined himself, initially on 24.02.2005 has accepted the same and would further depose that he has also seen that he was aware that the land was purchased for the Temple and he was also processing the same. Therefore, subsequently filed an additional proof of affidavit dated 26.11.2007 and in the cross examination, he has given a complete go by to the earlier testimony. In the considered opinion of this Court, once the defendant admits certain facts, at a later point of time, it is not open to disown or go back on the said testimony. This Court, while disposing the S.A.No.918/2014 filed by the defendant by remanding the matter has directed, the Lower

Appellate Court to appoint an Advocate Commissioner for the purpose of identifying and localizing the property and the 1st Advocate Commissioner has indicated that the defendant is not in possession of Survey No.16 but is in possession of the land in survey Nos.17 part and 18 part. For the purpose of appointing another Advocate Commissioner and to scrap the report of 1st Advocate Commissioner, the plaintiff filed C.M.P.Nos.1012 and 1013 of 2015 and the Lower Appellate Court has dismissed the petition for scrapping the report, but however, allowed the petition for appointment of Advocate Commissioner and though, for the purpose of reidentification, warrant was re-issued to the same Advocate Commissioner, he has declined to accept and another Advocate Commissioner was appointed and he has also submitted his report under Ex.C2 series along with the plaint, and it is relevant to extract the same:-

".....8.It is submitted that on inspection of extract of the land register which was issued by Tahsildar office, Perambur Taluk it is found that S.No.16 was earlier divided into four part and subsequently new survey Number was assigned to them i.e Survey No: 10,15,16,17 respectively which is evident from the Town survey register which is being maintained by the Tahsildar office, Perambur Taluk.

9.It is submitted that on inspection and verifying with the sketch given by the Tahsildar office it is found that the schedule A property lies in the New S.No.17 which was earlier S.No.16 part as per the town Survey register.

10.It is submitted that the date on which exactly the change as to the survey number has been made is not known to the Tahsildar office and they need certain document which lies in the central survey office to state and confirm the same.

11.It is submitted that on inspection of property it is found that the respondent herein claims to be in occupation of portion that is marked as 17 part and 18 part in the sketch given by the surveyor. And a hut is also put up in the said portion."

25 The respondent / plaintiff / Temple prays for recovery of 'B' schedule property which is allotted in S.No.16, Sembium Village and according to the 2nd Commissioner's report

dated 23.12.2017 (Ex.C2 series) from the Town Survey Register maintained by the office of the Tahsildhar, Perambur Taluk, S.No.16 was earlier divided into four parts and subsequently assigned New S.Nos. 10,15,16,17 respectively and from the sketch given by the Tahsildhar office, the schedule 'A' property lies in the New S.No.17 which was earlier S.No.16 as per the town Survey register. Thus, the S.No.16 which lies in S.No.17 as per the 'B' Schedule property for which delivery of possession is sought, the defendant is in occupation of 120 feet of land in S.No.16 and in the light of the observation made by this Court in Paragraph Nos.12 and 13 of SA.No.981/2014 vide judgment dated 12.02.2015, the appellant / defendant is bound to deliver possession of the 'B' Schedule property which is in his occupation. Learned counsel appearing for the appellant/defendant made a valiant attempt in trying to convince the Court that the property in occupation is altogether a different property namely the Government poromboke land in which the appellant/ defendant has encroached upon and as such the decree for delivery of possession cannot be given. It is also pertinent to point out at this juncture that though in the written statement, the defendant has altogether denied Exs.A2 and A3, however, in the course of his evidence as DW1, he has admitted about the request made under Ex.A2 and granting of the same under Ex.A3 and therefore, he is not entitled to take back the said admission.

26 In the considered opinion of this Court, the findings recorded by the Lower Appellate Court is based upon proper appreciation of oral and documentary evidence and also in the light of judgment of remand passed by this Court in S.A.No.918/2014 dated 12.02.2015. There is no perversity attached to the said findings.

27 This Court, on an independent application of mind is of the considered view that there are no questions of law leave alone the substantial questions of law arise for consideration in the Second Appeal.

28 In the result, Second Appeal is dismissed confirming the judgments and decrees passed by the Courts below and however, there shall be no order as to cost. Consequently, the connected miscellaneous petition is dismissed.

-s/d-

Assistant Registrar (CCC)

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Sub-Assistant Registrar

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To

1. I Additional Judge,
City Civil Court, Chennai
2. V Assistant Judge,
City Civil Court, Chennai

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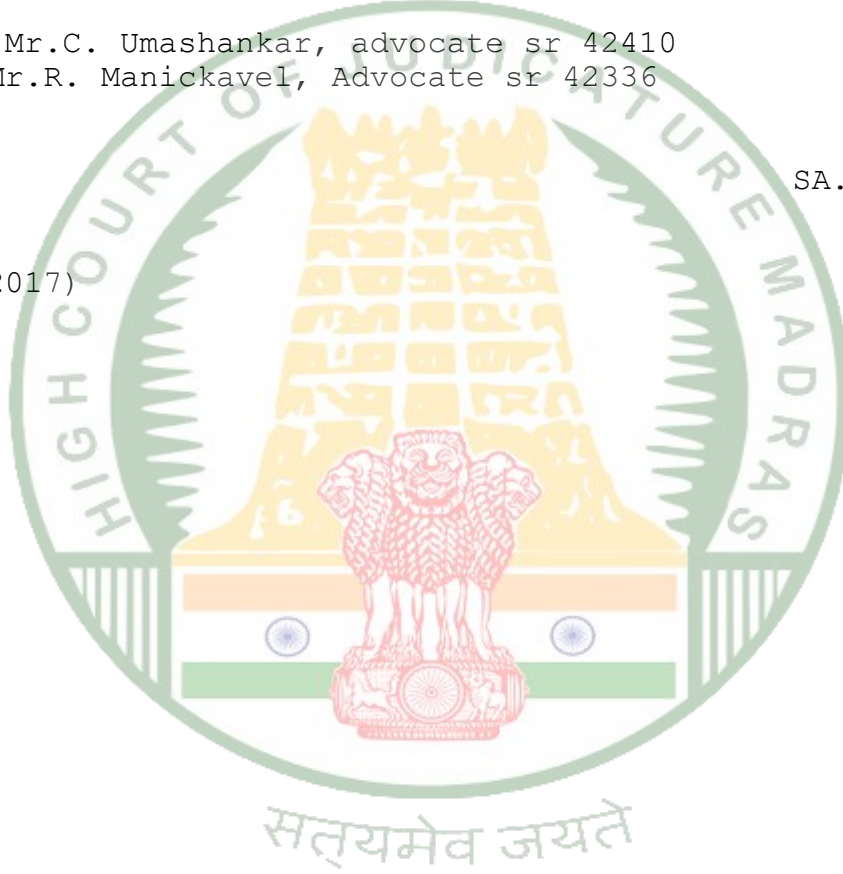
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