

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.07.2017

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P.No.1382 of 2007

Nagarathar Sangam,
rep. by its President,
No.20, Nila East Street,
Nagapattinam.

... Petitioner/1st Defendant

vs

1.Haji Abubackar Maraikair Trust,
rep. by its President Jaila Nachiar,
No.72, Nila East Street,
Nagapattinam.

V.Ibrahim Marai Kail @ Asath died
amended vide order of this court dated
06.08.2013 made in M.P.No.01/13 in
C.R.P.No.1382 of 2007.

2.K.N.Kaanathal
3.Malammal @ Lakshmi
4.Muthamil Selvam
5.Balasubramanian
6.Nabisa Nachiyar
7.Kathiaja Nachiyar
8.Esak Maraikair
9.Asia Mariam
10.Sathik Maraikair
11.Kasim Maraikair
12.Julaika Nachiyar
13.Abubukar Maraikair

.. Respondents/Petitioners

Revision filed under Article 227 of Constitution of India
against the order dated 12.10.2006 passed in W.O.P.No.4 of 2003
on the file of the Subordinate Judge, Nagapattinam.

For Petitioner : M/s.T.R.Rajaraman

For Respondents : No Appearance for
respondents 1 to 4 & 6

For Petitioner : M/s.T.R.Rajaraman

Respondents 5, 7 to 12
Given up.

ORDER

This revision has been filed by the petitioner against the order dated 12.10.2006 passed in W.O.P.No.4 of 2003 on the file of the Subordinate Judge, Nagapattinam. The first respondent is the petitioner and the petitioner herein is the first respondent in W.O.P.No.4 of 2003.

2. W.O.P.No.4 of 2003 has been filed by the first respondent under Section 95 and 83 of the Wakf Act, 1995 before the Sub-Court, Nagapattinam, seeking delivery of possession of the petition "B" schedule mentioned property and to pay future profits till delivery of possession and also directing the respondent therein to pay a sum of Rs.1.00 lakh being the cost of the teak and other woods that were removed by them from petition "B" schedule property.

3. In the petition, the first respondent alleged that T.S.No.1754 in Malaieswaran North Lane, Nagapattinam, described in schedule "A" belongs to the first respondent trust, which was created by Haji Abubucker Maraikair. Haji Abubucker Maraikair and his wife Kathija Beevi were the trustees till their life time and after their life time, their son Vanjore Maraikair and daughter Lathifa Beevi became joint trustees. When Vanjore Maraikair denied the right of Lathifa Beevi, she instituted a suit in O.S.No.45 of 1971 before the Sub-Court, Nagapattinam, which was decreed in favour of Lathifa Beevi. As against the decree, Vanjore Maraikair preferred an appeal in A.S.No.575 of 1972 and pending appeal Lathifa Beevi died and her legal heirs were impleaded. Jaila Nachiar is the eldest heir of Lathifa Beevi. Later, the appeal came to be dismissed by the appellate Court. Thereafter, Vanjore Maraikair and Jaila Nachiar became joint trustees and managed the trust. Vanjore Maraikair died on 29.4.1997 leaving his son Ibrahim Maraikair and later he had also become joint trustees. Pending petition, Ibrahim Maraikair died and his legal heir were impleaded as respondents 7 to 14 in W.O.P.No.4 of 2003.

4. According to the first respondent, Abubucker Maraikair dedicated his property in T.S.No.1755 situated at Neela East Street, Nagapattinam. Since the income from the said property was very low and in order to facilitate more income to the trust, he as the trustee on one part and owner of the schedule "A" as another part, exchanged the properties by exchange deed

dated 30.06.1956. As a trustee, Abubucker Maraikair took possession of the petition "A" schedule property in T.S.No.1754 and since then the property was in enjoyment as trust property and the income derived from the said property was used for performing charities.

5. While things stood thus, Ibrahim Maraikair illegally sold a portion of the petition mentioned "A" schedule property to the petitioner under sale deed dated 06.03.2000 as if it is a private property of Abubucker Maraikair. Ibrahim Maraikair sold 8106 square feet, leaving 579 square feet on the south. According to the first respondent, the sale was effected not only by Ibrahim Maraikair but also other brothers and their heirs of the trustees. Since the property is the trust property, the same cannot be sold by the trustees. According to the first respondent, the portion sold was described as schedule "B" in the schedule of property and the petitioner herein was in possession of the "B" schedule property. It is also stated that the petitioner removed valuable teak wood and other materials from the house that situated in "B" schedule property despite objection made by the first respondent. Hence, the petitioner has filed the petition seeking the aforesaid relief.

6. Refuting the averments in W.O.P.No.4 of 2003, the petitioner herein has filed counter stating that the petitioner was the bona fide purchaser under valid consideration. Since tenants inducted in the property were committed default in paying rents and on the request of vendors of the property, the petitioner settled the amount to the tenants and vacated them from the property and thereafter only, "B" schedule was sold to him. The petitioner had not taken away Rs.1.00 lakh valuable teak woods as alleged by the first respondent. The petitioner had purchased the property with a dilapidated house worth about Rs.35,000/-. According to the petitioner, since Jaila Nachiar claimed that the petition mentioned property is her own property, leaving her share of 579 square feet, the remaining 8106 square feet was purchased by the petitioner from the other sharers.

7. It is stated in the counter that Jaila Nachiar entered into an agreement to sell her 579 square feet to one Arivukadavul for Rs.1.00 lakh and had handed over possession of the same to him. After purchase, Arivukadavul had constructed RCC building in the said property. It is stated that when the petitioner received notice in W.O.P.No.4 of 2003, immediately he contacted the first respondent as well as Ibrahim Maraikair, who were informed that they obtained order dated 25.10.1992 from the Wakf Board, Trichy to deal with the property. It was also informed by Ibrahim Maraikair that pursuant to the order of the Wakf Board, Jaila Nachiar and himself partitioned the property.

Since there were disputes between Jaila Nachiar and Ibrahim Maraikair qua purchase of another property in lieu of petition mentioned property and also in order to escape from the action to be taken by the Wakf Board, Jaila Nachiar had filed W.O.P.No.4 of 2003 belatedly.

8. It is stated that Jaila Nachiar very well aware of the proceedings initiated by the petitioner to vacate tenants from the "B" schedule property. According to the petitioner, Jaila Nachiar has no right to initiate the present proceedings, as she had been allotted 579 square feet towards her share and the same has already been sold by her to one Arivukadavul. The petitioner and other purchasers have put up construction in the "B" schedule property by spending Rs.5.00 lakhs each. According to the petitioner, after purchase, he had published a general notice in Dhina Malar daily on 22.5.2002 itself calling for objections if any from anybody. If the first respondent was really interested in safeguarding the property, she would have raised an objection at that time. But the first respondent has not raised any objection and kept silent. According to the petitioner, there was no bona fide in the petition filed by the first respondent and prayed for dismissal of the same.

9. In the counter filed by Ibrahim Maraikair, it is stated that the property mentioned in the petition was not the property of the trust and the property in question was not covered under the trust deed dated 07.12.1939. According to Ibrahim Maraikair, qua petition mentioned property, partition took place between the first respondent and other sharers. In the partition, 600 square feet was allotted to the share of Jaila Nachiar and possession was also handed over to her. It is also stated that the first respondent has no right to file W.O.P.No.4 of 2003 and prayed for dismissal of the same.

10. Before the trial Court, Jaila Nachiar was examined as P.W.1 and Exs.P1 to P17 were marked. On the side of the petitioner herein, five witnesses were examined and Exs.R1 to R9 were marked. It is seen that two more exhibits were also marked during examination of witnesses.

11. Upon consideration of the oral and documentary evidence, the trial Court allowed the petition filed by the first respondent and directed the petitioner to hand over possession of the petition mentioned property within a period of three months and also to pay Rs.50,000/- towards removal of teak woods from "B" schedule property. In respect of future profits, the trial Court directed the first respondent herein to work out the remedy separately. Aggrieved by the order of the trial Court, ordering delivery of vacant possession, the petitioner has filed the present revision.

12. Despite service of notice to respondents 1 to 4 and 6, nobody entered appearance. Respondents 5, 7 to 12 were given up in the revision.

13. I heard Mr.T.R.Rajaraman, learned counsel for the petitioner and also perused the materials available on record.

14. The learned counsel for the petitioner submitted that the trial Court failed to see that Jaila Nachiar representing the trust as a co-trustee was acting against the interest of the so called trust, which was clearly proved from her admission, whereby she had not claimed any relief for 579 square feet under the possession of one Arivukadavul. He would submit that the petition filed by the first respondent was not maintainable as prayed for without seeking the relief of mandatory injunction for the removal of the construction. According to the learned counsel, the order of the trial Court is perverse, patently erroneous and against the settled principles of law. He would further submit that in fact the trial Court failed to analyse the evidence of both sides in proper perspective and prayed for setting aside the order of the trial Court.

15. The grievance of the first respondent before the trial Court was that deceased Ibrahim Maraikair had sold the "B" schedule property to the petitioner without having any right over the same and he had sold the property as if it is a private property of his father Abubucker Maraikair. According to the first respondent, since the property was trust property, Ibrahim Maraikair and others have no vested right to sell the same.

16. For proper appreciation, it would be necessary to extract the schedule of property stated in W.O.P.No.4 of 2003, which reads as under:

"A" SCHEDULE

Nagapattinam registration District, Nagapattinam Town, Malaieswaran North Lane T.S.No.1754, Ward No.3, Block No.20, Total extent of 8685 Square feet.

Bounded

On the East of Malaieswaran North Lane.

On the West of Packri Chettiyar and Abubucker Maraikair house and kollai.

On the North of Neelambal house and kollai.

On the South Munusamy Pillai house and kollai and Neelayathachi Amman Garden.

"B" SCHEDULE

Nagapattinam registration District, Nagapattinam Sub-registry, Nagapattinam Town, Malaieswaran North Lane, T.S.No.1754, Ward No.3, Block No.20, extent of 8106 Square feet.

Bounded

On the East of Malaieswaran North Lane and remaining portion in a schedule.

On the west of Packri Chettiyar and Abubucker Maraicaire house and kollai.

On the North of Neelambal House and kollai.

On the South of petition "A" Schedule portion and Neelathachi Amman Garden."

17. The trial Court, in its order, observed that the petition mentioned property belongs to the trust and the same was proved by the first respondent and, therefore, the sale in favour of the petitioner is not a valid one. The trial Court has also recorded that the sale effected in favour respondents 1, 3 to 6 in W.O.P.No.4 of 2003 was not binding on the trust and that they cannot claim any right over the property. Like wise, the sale effected by Ibrahim Maraikair in favour of the petitioner was not binding on the trust. The trial Court has also observed that despite knowing the fact that the property belongs to the trust and despite pendency of the proceedings, the petitioner and other respondents without having valid right and title have put up construction in the property and therefore, the petitioner and the other respondents have to hand over possession of the property to the first respondent.

18. The learned counsel for the petitioner mainly pointed out that the first respondent had not sought any relief qua 579 square feet said to have been allotted to Jaila Nachair. On a perusal of the order of the trial Court, it is seen that the trial Court had failed to state anything about 579 square feet, which according to both parties forms part of the "A" schedule.

19. According to the petitioner, in the partition that took place between the parties, Jaila Nachiar was allotted 579 square feet and later, Jaila Nachiar sold the same to one Arivukadavul for valid consideration. Though the said contention was denied by the first respondent, nothing has been produced to show that 579 square feet was actually with the trust.

20. As rightly argued by the learned counsel for the petitioner, the first respondent, who was representing the

trust, as a co-trustee was acting against the interest of the trust, which was clearly proved by way of the silence maintained by the first respondent qua claiming any relief in respect of 579 square feet, which was stated to be now under the possession of one Arivukadavul. It is pertinent to point out that the first respondent admitted that there had been a pucca construction in 579 square feet, which would show that 579 square feet is the separate property.

21. It is the say of the petitioner that the admission of the first respondent would prove that the property purchased by the petitioner was the portion allotted to Ibrahim Maraikair under the partition. Contrary to the said submission, the first respondent has not produced any material to show that the "B" schedule property purchased by the petitioner was not the property allotted to Ibrahim Maraikair and it is the property of the trust.

22. The case of the first respondent before the trial Court was that since the property belongs to the trust and the trust deed does not contain any clause for selling the property, Ibrahim Maraikair, his brothers and their heirs have no right to sell the petition mentioned property to the petitioner and the other respondents, as the case may be.

23. In the petition, it has been stated that Abubucker Maraikair dedicated his property in T.S.No.1755. Since he found the income from the said property was very low and in order to facilitate more income to the trust, Abubucker Maraikair as the trustee in one part and owner of schedule "A" as another part, exchanged the properties by a deed of exchange dated 30.06.1956. Though the deed of exchange dated 30.06.1956 was marked as Ex.P1 before the trial Court, when the trust deed itself provides schedule of property dedicated to the trust, there shall not be any exchange against the recitals of the trust deed. Once a property was dedicated as Wakf property, there cannot be any alterations, unless otherwise the deed itself provides for such alterations. Nothing has been produced to show that the trust was empowered to exchange the property.

24. It appears that the relief claimed in the petition is barred by the Doctrine of acquiescence. The first respondent being aware of the sale in favour of the petitioner, even prior to three years of filing of W.O.P.No.4 of 2003, cannot plead ignorance of the sale and the first respondent is estopped from questioning the right and title of the petitioner.

25. The contention of the petitioner that Jaila Nachiar was acting against the welfare of the trust was evident from the conduct of the first respondent in not taking steps for recovery

of a portion of the property, i.e., 579 square feet from the hands of one Arivukadavul, who had also put up RCC building in it.

26. It is seen that after purchase, the petitioner had put up construction in "B" schedule property and in fact, the construction was made prior to the filing of W.O.P.No.4 of 2003. If really, the "B" schedule property belongs to the trust, the first respondent ought to have taken steps objecting the construction at the earlier point of time, but the first respondent had failed to do so. Moreover, the first respondent had not filed any suit to set aside the sale deed in favour of the petitioner and other respondents. If really, the "B" schedule belongs to the trust, Jaila Nachair would have informed the purchase and construction made by the petitioner to the Wakf Board. In the case on hand, nothing has been produced to show that the said fact was informed to the Wakf Board.

27. It was also stated by the first respondent before the trial Court that since then the property was enjoyed as the trust property and income therein was used for the purpose of performing charities as mentioned in the trust deed, nothing has been produced to show that the "B" schedule property was the trust property.

28. The trial Court failed to discuss the exchange of the trust property by Abubucker Maraikair alleged in the petition, as the trust deed did not contain any recital about the exchange of property. The order of the trial Court, admittedly, is based on presumptions and surmises. In fact, the pleadings and the evidence adduced on the side of the first respondent were not enough to show that the property in question was the trust property. If the petition mentioned property is the trust property, it is the duty of the first respondent to show that the remaining portion of petition mentioned property i.e., 579 square feet was with the trust.

29. The contention of the learned counsel for the petitioner that the first respondent has filed W.O.P.No.3 of 2004 only to protect her from the action of the Wakf Board, after a period of three years from the date of knowledge of the sale is merit acceptance as the first respondent has not initiated proceedings within the period of three years from the sale in favour of the petitioner. The failure on the part of the first respondent in not taking steps within the period of three years from the date of sale would clearly establish that the "B" schedule is separate property of the vendors of the petitioner.

30. In the light of the above, this Court finds that the trial Court only based on conjectures and surmises held that the

petition mentioned property is the trust property and the sale effected in favour of the petitioner and other respondents qua "B" schedule property would not bind the first respondent. The aforesaid finding of the trial Court is without proper appreciation of the oral evidence adduced on both sides. In fact, on a perusal of the order impugned in this revision, this Court finds that there was no discussion about the evidence adduced on the side of the petitioner. Mainly by relying upon the evidence of the first respondent herein, the trial Court allowed the petition and directed to hand over possession of the "B" schedule property. In my considered view, the trial Court committed an error in allowing W.O.P.No.4 of 2003 and therefore, the same is liable to be set aside.

31. In the result, the Civil Revision Petition is allowed by setting aside the order passed in W.O.P.No.4 of 2003, dated 12.10.2006 on the file of the Subordinate Judge, Nagapattinam. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

vs

To

1. The Subordinate Judge,
Nagapattinam.
2. The Section Officer,
VR Section,
High Court, Madras

+6cc to M/s.T.R.Rajaraman, Advocate in sr.no.50400 (12.09.18)

PPA(CO)
CS/30/08/18

C.R.P.No.1382 of 2007

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