

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:20.07.2018

PRONOUNCED ON :13.12.2018

CORAM

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM
S.A.No.1801 of 2001

Kongumandala Sivanmalai Sasti
Sanga Annathana Mandapa Trust,
rep. by its President S.Avinashiappan
Sivanmalai Kasba and Village,
Kangeyam Taluk, Erode District.
...Appellant/Plaintiff

-Vs-

Sri Subramania Swami Temple,
rep. by its Executive Officer,
Sivanmalai Village, Kangeyam Taluk,
Erode District.
...Respondent/Defendant

(Amended vide Court order dated
11.07.2018 in C.M.P.No.11008 of 2018
in S.A.No.1801 of 2001)

PRAYER: Second Appeal filed under Section 100 of C.P.C,
against the judgment and decree made in A.S.No.360 of 1997
on the file of the Principal District Court, Periyar
District at Erode, dated 21.04.1998 as reversing the
judgment and decree made in O.S.No.238 of 1994 on the file
of Sub-Court, Dharapuram dated 22.09.1997.

For Appellant : Mr.R. Gandhi
Senior Counsel for
Mr.R.G.Narendiran
For Respondent : Mr.B. Eswaran

JUDGMENT

This Second Appeal has been filed by the plaintiff
against the judgment and decree passed by the Principal
District Judge, Erode in A.S.No.360 of 1997 dated
21.04.1998 reversing the judgment and decree passed by the
Sub-ordinate Judge, Dharapuram in O.S.No.238 of 1994,
dated 22.09.1997.

2. The appellant herein has filed a suit in
O.S.No.238 of 1994 on the file of the Sub-ordinate Judge,
Dharapuram, to declare that the suit property belongs to

the plaintiff, to direct the defendant to deliver vacant possession of the suit property and to render statement of accounts. The learned Sub-ordinate Judge by the judgment dated 22.09.1997 has decreed the suit declaring that the suit property belongs to the plaintiff Trust and directed the defendant to deliver the suit property to the plaintiff within three months. In respect of rendition of accounts, it was ordered for separate enquiry under Order 20 Rule 12 of C.P.C. Aggrieved by the same, the defendant has filed an appeal in A.S.No.360 of 1997 on the file of the Principal District Judge of Periyar District at Erode. He also filed an application in I.A.No.227 of 1998 under Order 41 Rule 27 of C.P.C. to receive additional documentary evidence. The learned Principal District Judge by the judgment and order dated 21.04.1998, has partly allowed the application in I.A.No.227 of 1998 and marked two documents as Ex.B43 and B44 and allowed the said appeal with cost and set-aside the judgment and decree passed by the trial Court and dismissed the suit. Feeling aggrieved, the plaintiff has filed the present Second Appeal. For the sake of convenience, the parties are referred to as described before the trial Court.

3. The averments made in the plaint are, in brief, as follows:

The plaintiff Trust is a registered Trust. Originally, seventeen members joined together and constituted a Trust by name Kongu Mandala Sivanmalai Sasti Sanga Annathana Mandapa Trust and executed a deed on 01.01.1979, and registered the same. One Subbaraya Gounder was nominated as President of the said Trust. The devotees of Sivanmalai Murugan Temple contributed a sum of Rs.1,000/- each and constructed Annathana Mandapam. Thereafter, the seventeen members contributed Rs.501/- each and created the said Trust. On 25.10.1983, the said Subbaraya Gounder had resigned the post of President but, he treated the Trust property as his own property and refused to handover the records to the members of the Trust. Hence Mr.Narayamsamy Gounder, who was the Vice-President of the said Trust had filed a suit in O.S.No.124 of 1987 on the file of the Sub-ordinate Judge, Dharapuram for the relief of mandatory injunction directing the said Subbaraya Gounder to handover all the records pertaining to the plaintiff trust. The said suit was decreed on 29.11.1993. During pendency of the suit in O.S.No.124 of 1987, the said Subbaraya Gounder had handed over the suit property to the defendant on 31.07.1987. The said Subbaraya Gounder had no right to handover the suit property to the defendant, because the suit property absolutely belongs to the plaintiff Trust. The defendant, by taking advantage of the dispute arose between the members of the plaintiff Trust, had leased out the suit property to the public and collected rents and therefore,

the defendant is liable to furnish accounts and also pay the amount which was collected by him by way of rent. Hence, the plaintiff after sending notice under Section 80 C.P.C. has filed the above suit for the aforesaid reliefs.

4. The averments made in the written statement are, in brief, as follows:

The suit property belongs to Sivanmalai Sri Subramanyasamy Temple. The suit before the civil Court is not maintainable. The plaintiff ought to have filed petitions before the authorities concerned under the TamilNadu Hindu Religious and Charitable Endowments Act, 1959, (herein after referred to as the 'Act'). The plaintiff cannot claim that he is the President of the Trust. He has not stated that when he was elected as President, Mr.Narayanasamy Gounder and others had filed a suit in O.S.No.124 of 1987 on the file of the Sub-ordinate Court, Dharapuram against one Subbaraya Gounder and in that suit, the defendant herein was shown as second defendant. Subsequently, the defendant herein (second defendant therein) was exonerated and obtained ex-parte decree against other defendants. Thereafter, the said decree was not at all executed. So, it is clear that there was no unity between the plaintiffs therein. Therefore, the said Narayanasamy Gounder cannot file a suit claiming that he is the President of the Trust. The defendant herein was appointed as fit person as per the proceedings of the Assistant Commissioner of H.R.&C.E., Department vide Na.Ka.No.6677 of 1985. As against the same, the said Narayanasamy Gounder and others had filed an application in R.P.No.9 of 1998 before the Commissioner of H.R.&C.E., in M.M.No. 14845 of 1989 and the same was dismissed. Thereafter, the said Narayanasamy Gounder and others had filed a suit in O.S.No.124 of 1989, wherein it was held that it was not an endowment and hence, possession cannot be asked. Therefore, the present suit is not maintainable and hence, the defendant prayed to dismiss the suit.

5. The averments made in the reply statement filed by the plaintiff are, in brief, as follows:

At the time of creating Kongu Mandala Sivanmalai Sasti Sanga Annathana Mandapa Trust, the Subramaniya Gounder was the President. Since he resigned the post of President, the plaintiff has filed the present suit in O.S.No.124 of 1987. The defendant herein was added as a second defendant and subsequently, the second defendant was exonerated and thereafter the plaintiff therein got decree in that suit. The suit property does not belong to Devasthanam. It belongs to the plaintiff's Trust. The proceedings which were held before the Deputy Commissioner of H.R.&C.E., are not relevant for this suit. Therefore, the plaintiff prayed to decree the suit.

Sub-ordinate Judge has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, two witnesses were examined as PWs.1 and 2. The plaintiff has marked Ex.A1 to Ex.A7 as exhibits. On the side of the defendant, one witness was examined as D.W.1 and he has marked Ex.B1 to Ex.B42 as exhibits.

7. The learned Sub-ordinate Judge, after considering the materials placed before her found that the said Narayanasamy was elected as President of the plaintiff Trust and as such he is entitled to file the suit. She further found that since the former President of the Trust viz., Subbaraya Gounder had handed over the suit property to the defendant, during pendency of the suit in O.S.No.124 of 1987, the said transaction is not valid in law. Accordingly, she decreed the suit as prayed for with cost and directed the defendant to deliver possession of the suit property to the plaintiff within three months. Insofar as rendition of accounts is concerned, the learned Sub-ordinate Judge has directed for separate enquiry under Order 20 Rule 12 C.P.C. Aggrieved by the same, the defendant has filed an appeal in A.S.No.360 of 1997 on the file of the Principal District Judge of Periyar District at Erode. The defendant has also filed an application in I.A.No.227 of 1998 under Order 41 Rule 27 C.P.C. to receive additional documentary evidence. The learned Principal District Judge of Periyar District at Erode, has allowed the application in I.A.No.227 of 1998 and received two documents as additional evidence and marked as Ex.B43 and Ex.B44 and allowed the said appeal with cost and set-aside the judgment and decree passed by the trial Court and dismissed the suit. Feeling aggrieved, the plaintiff has filed the present second appeal.

8. At the time of admitting this Second Appeal, this Court has formulated the following substantial questions of law:-

" 1) Whether the lower appellate Court erred in law in reversing the well considered judgment and decree of the trial Court when admittedly the suit property has been given possession to the defendant/respondent by the plaintiff/appellant trust as could be seen from Ex.B34, B35 and B36?

2) Whether the lower appellate Court erred in holding that the defendant/respondent alone is entitled to the suit property while its own evidence under Ex.B34, B35 and B36 and Ex.A1 and A4 would go to show that suit property as admittedly belong to the

plaintiff?

3) Whether the non-examination of Executive Officer of the defendant/respondent is fatal to the defendant's case especially when D.W.1 has admittedly not been authorised to depose in its favour? ''

9. Heard Mr.R.Gandhi, learned Senior Counsel for Mr.R.G.Narendiran, appearing for the appellant and Mr.B. Eswaran, learned counsel appearing for the respondent.

10.Substantial Question Nos. 1 to 3:

The learned senior counsel for the appellant has submitted that the first Appellate Court erred in reversing the well considered judgment of the trial Court. He further submitted that in the absence of any rival claim with regard to the President of the plaintiff Trust, there is no justification in rejecting the plaintiff's case on the ground of maintainability, that too, when the defendant is not competent to dispute the status of the plaintiff's representation. He further submitted that the erstwhile President Subbaraya Gounder had handed over the possession of the suit property to the defendant during pendency of the suit in O.S.No.124 of 1987 and hence the said transfer was illegal and at any event hit by lis-pendens. He further submitted that the first Appellate Court erred in holding that the defendant is entitled to the suit property while Ex.B34, B35 and B36 and Ex.A1 and A4 would go to show that the suit property absolutely belongs to the plaintiff Trust. He further submitted that the first Appellate Court failed to consider that the non-examination of the defendant is fatal to the defence case especially when DW.1 was not authorized to give evidence on behalf of the defendant and therefore, he prayed to allow the second appeal and set-aside the judgment and decree passed by the first Appellate Court and restore the judgment and decree passed by the trial Court.

11. Per contra, the learned counsel for the respondent/ defendant has submitted that the said Narayanasamy Gounder had not produced any evidence to show that he was elected as President of the plaintiff Trust. He further submitted that it is an admitted fact that the said Subbaraya Gounder had handed over the possession of the suit property to the defendant and the same has been recognized by the Assistant Commissioner of H.R.& C.E., Department. He further submitted that the said Narayanasamy Gounder and others have filed an application under Section 64(i) of the TamilNadu H.R.&C.E., Act, 1959, for framing a scheme of administration for the plaintiff Trust and the said application was allowed by the Deputy

Commissioner, H.R.&C.E., Department, Coimbatore by the order dated 01.07.1996 and consequently a scheme was also framed vide Ex.B41 and B42 and that being so, it is not open to the said Narayanasamy Gounder to file a suit for seeking delivery of possession of the suit property. He further submitted that if the said Narayanasamy Gounder was aggrieved by the order passed by the Deputy Commissioner, H.R.&C.E., Department, he would have filed an appeal before the Commissioner of H.R.&C.E. Department as provided under Section 69 of the Act, and thereafter, if he is aggrieved by the order of the Commissioner also, then he should have filed a suit under Section 70 of the said Act. Instead of that, he should not have filed the suit of the present nature and the same is prohibited under Section 108 of the Act. He further submitted that the trial Court failed to consider the aforesaid facts in a proper perspective but the first Appellate Court has properly considered the said facts and rightly reversed the judgment and decree passed by the trial Court and in the said factual findings, this Court cannot interfere. In support of the said contentions, he relied upon the decision of this Court in Subbammal Trust Private Trust represented by its Managing Trustee Vs. The Commissioner, Hindu Religious and Charitable Endowments Administration Department, Chennai and another (SA.No.1430 of 2005 dated 07.08.2012) reported in CDJ 2012 MHC 4055.

12. It is an admitted fact that the devotees of Sri Subbramaniya Samy Temple of Sivan Malai, Kankeyam Taluk numbering about seventeen persons had formed a Trust by name of Kongu Mandala Sivanmalai Sasti Sanga Annathana Mandapa Trust and registered the same on 01.01.1979 and one Subbaraya Gounder was nominated as President of the said Trust. Subsequently, disputes arose between the members of the said Trust and hence one Narayanasamy Gounder and twelve others had filed a suit in O.S.No.124 of 1987 on the file of the Sub-ordinate Court, Dharapuram against the said Subbaraya Gounder and the defendant herein to declare that the said Subbaraya Gounder is not entitled to convene the Trust meeting on 01.02.1984 and for permanent injunction to restrain him from conducting election for the post of President and for mandatory injunction to direct the said Subbaraya Gounder to produce the records relating to the said Trust. In that suit, the said Narayanasamy Gounder described himself as Vice-President of the said Trust. After filing of the said suit, three plaintiffs had been transposed as defendants 3 to 5 and the second defendant therein (defendant herein) exonerated and the plaintiff therein got ex-parte decree on 29.11.1993. It is also an admitted fact that during pendency of this said suit, i.e., on 01.08.1987, the said Subbaraya Gounder had handed over the possession of the suit property to the defendant herein. It is seen from Ex.B43 that the Assistant Commissioner of H.R.&C.E.,

Department, Erode by the proceedings dated 11.08.1987 has appointed the defendant as the fit person to manage the Trust and in pursuance of the said order, the defendant took possession of the suit property vide Ex.B44 on 12.08.1987. This fact has also been admitted by the plaintiff in the plaint itself. The plaintiff has not produced any documentary evidence to show that the said Narayanasamy was elected as President of the Trust.

13. It is seen from Ex.B41, the said Narayanasamy Gounder and others had submitted an application under Section 64(i) of the Act, in O.A.No.47/93/B1 before the Deputy Commissioner of H.R.&C.E., Department, Coimbatore for framing a scheme of administration to the plaintiff Trust. The Deputy Commissioner of H.R.&C.E., Department after conducting enquiry by the order dated 01.07.1996 had allowed the said application and ordered to frame a scheme of administration. Ex.B42 shows that the Deputy Commissioner of H.R.&C.E., Department had framed the scheme also on 01.07.1996 itself. From the conduct of the said Narayanasamy Gounder, it can be inferred that he had accepted the handing over of the suit property by the erstwhile President Subbramaniya Gounder to the defendant and that is why he filed an application under Section 64 (i) of the Act, to frame a scheme. The said application was allowed and scheme also framed. Therefore, the said Narayanasamy Gounder is estopped from claiming right over the suit property.

14. Even if it is assumed that the said Narayanasamy Gounder had not accepted the decision of the Deputy Commissioner of H.R.&C.E., Department, he would have filed an appeal before the Commissioner as provided under 69 of the Act, and further if he is aggrieved, then he should have filed a suit under Section 70 of the Act. But he has not chosen to file any appeal under Section 69 of the Act, and suit under Section 70 of Act.

15. In Subbammal Trust Private Trust represented by its Managing Trustee Vs. The Commissioner, Hindu Religious and Charitable Endowments Administration Department, Chennai and another (supra), this Court in paragraph 10 to 12 has observed as follows:

'10..... A mere running of the eye over those precedents would unambiguously and unequivocally, evince and evidence, display and demonstrate that if the trustees of a private trust are really aggrieved by the steps taken by the officials of the HR & CE department questioning the status as a private trust, by treating it as a public trust, then the only remedy open for such alleged trustees is to approach the authority concerned under Section 63 of the Hindu Religious and

Charitable Endowments Act, which clearly empowers the authority to decide as to whether such a trust is a public trust or a private trust. If the concerned persons are not satisfied with the findings of the authority, it is open for them to prefer appeal before the Commissioner under Section 69 of the Act. Even thereafter, if they are not satisfied with the decision of the appellate authority, it is open for them to file a statutory suit under Section 70 of the Act.

11. When such is the legal position, both the courts below resorting to Section 108 of the Hindu Religious and Charitable Endowments Act, 1959 which is extracted here under for ready reference:

"Bar of suits in respect of administration of management of religious institutions, etc.: 108. No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of Law, except under and in conformity with, the provisions of this Act" correctly dismissed the suit, warranting no interference in this second appeal.

12. As such, the aforesaid substantial questions of law are answered to the effect that the plaintiff had no right at all to file the suit straightaway and hence, Section 108 of the Act was a bar for filing such a suit."

16. From the aforesaid decision, it is clear that if the concerned persons are not satisfied with the findings of the Deputy Commissioner, it is open for them to prefer an appeal before the Commissioner under Section 69 of the Act. Even thereafter, if they are not satisfied with the decision of the appellate authority, it is open for them to file a statutory suit under Section 70 of the Act. As per Section 108 of the Act, no suit or other legal proceeding in respect of the administration or management of religious institution can be instituted in any Court of Law, except under and in conformity with, the provisions of the said Act. Therefore, the present suit is not maintainable.

17. The learned counsel for the appellant also contended that since the defendant did not examine himself as witness, an adverse inference has to be drawn against the defendant. At this juncture, it would be relevant to

refer to the decision in Union of India and Others Vs. Vasavi Cooperative Housing Society Limited and Others, (2014) 2 SCC 269, wherein the Hon'ble Supreme Court in paragraph No.15 has observed as follows:

' 15. It is trite law that, in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.'

18. In view of the aforesaid decision, the burden always lies on the plaintiff to make out and establish a clear case for granting relief for declaration of title and the weakness, if any, set up by the defendant would not be a ground to grant relief to the plaintiff. In this case, as already pointed out that the plaintiff has failed to prove that the said Narayanasamy Gounder was elected as President of the Trust. Further, since the said Narayanasamy Gounder himself had filed an application under Section 64(i) of the Act, to frame a scheme for administration of the plaintiff Trust and the same had been allowed vide Ex.B41 and scheme also framed vide Ex.B42. It is not open to the said Narayanasamy Gounder to claim right over the suit property. Further, if he was not satisfied with the decision of the Deputy Commissioner of H.R.&C.E. Department, he should have filed an appeal before the Commissioner under Section 69 of the Act and even thereafter, if he was not satisfied with the decision of the Appellate authority, it is open to him to file a statutory suit under Section 70 of the Act. But he has not followed the aforesaid procedure and hence, the suit filed by the said Narayanasamy Gounder is barred under Section 108 of the Act. As per Section 52 of the Transfer of Property Act, 1882, the Principle of lispendens will apply only where the property is transferred during pendency of any suit or proceedings in which any right to immovable property is directly and specifically involved. In this case, admittedly the suit in O.S.No.124 of 1987 was not filed relating to immovable property. Therefore, the Principle of lispendens will not apply. Taking into consideration of all the aforesaid facts, the first Appellate court had rightly reversed the findings of the trial Court and dismissed the said suit. In the said findings, this Court cannot interfere. Accordingly, the substantial questions of law are answered against the plaintiff / appellant.

19. In the result, the Second Appeal is dismissed.
No costs.

Sd/-
Assistant Registrar (CS)
//True Copy//

Sub Assistant Registrar

vsa

To

1.The Principal District Judge,
Periyar District, Erode.

2.The Sub-ordinate Judge,
Dharapuram.

Copy to
The section officer,
VR Section,
High court
Madras

+1cc to Mr.G.Narendiran, Advocate SR.No.86174
+2ccs to Mr.B.Bakkiyalakshmi, Advocate SR.No. 86514

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A.SK(28/03/2019)



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