

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :09.02.2018
PRONOUNCED ON:21.02.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1592 of 2003
&
C.M.P.No.14635 of 2003

Sournaburiswarar koil Arthajama kattalai
Rep. By its Hereditary Trustee,
S.Sivasubramanian,
S/o, Ramalinga Udaiyar,
Sembanarkoil,
Tharangambai Taluk,
Now at West mambalam,
Chennai.

...Appellant/Plaintiff

Vs.

Sundaram

...Respondent/Defendant

Prayer: Second Appeal filed under Section 100 of C.P.C.,
against the judgment and Decree dated 30.04.2003 made in
A.S.No.44 of 2002 on the file of the Additional Subordinate
Judge, Mayiladuthurai confirming the judgment and decree dated
15.03.2002 made in O.S.No.908 of 1996 on the file of Additional
District Munsif, Mayiladuthurai.

For Appellant : Mr.S.Sounthar

For Respondent: No representation
No appearance
Set exparte.

Vide Order dated 09.02.2018.

J U D G M E N T

Challenge in this second appeal is made to the judgment and
decree dated 30.04.2003 passed in A.S.No.44 of 2002 on the file
of the Additional Subordinate Court, Mayiladuthurai confirming
the judgment and decree dated 15.03.2002 passed in O.S.No.908
of 1996 on the file of the Additional District Munsif Court,
Mayiladuthurai.

2. The parties are referred to as per the rankings in the trial court.

3. Suit for possession.

4. The case of the plaintiff in brief is that the suit property belongs to the plaintiff's Trust and the suit property had been acquired by the family of the plaintiff's trustee and endowed to the trust for the performance of the temple rituals and rites and the defendant owns the property described in the B scheduled property and taking into consideration, the convenience of the parties, the plaintiff and the defendant exchanged the properties belonging to them and accordingly, the suit property described in the A schedule was entrusted to the defendant and the B schedule property belonging to defendant was entrusted to the plaintiff and accordingly the parties had orally agreed that, at the time of need, the parties, should again exchange their respective properties and accordingly based on the above said exchange/arrangement orally effected, the parties had been enjoying the properties and while so, the plaintiff learnt that the defendant is attempting to alienate the suit property described in the A schedule by converting them into sites to third parties, to which he is not entitled to and hence the plaintiff, by way of a legal notice called upon the defendant to entrust the suit property and take back the B schedule property and to the same, the defendant sent a reply containing false allegations denying the oral exchange/arrangement pleaded by the plaintiff and also claiming that he had taken the suit property on lease from the plaintiff and enjoying the suit property as the cultivating tenant thereof. However, the defendant is not entitled to claim the benefits of the cultivating tenant in respect of the suit property and the defendant was put in possession of the suit property only as projected in the plaint and hence the defendant is liable to hand over the possession of the plaint A schedule property to the plaintiff and hence the suit.

5. The case of the defendant in brief is that the suit is not maintainable either in law or on facts. The oral exchange/arrangement pleaded by the plaintiff is false and it is false to state that by way of the above said oral exchange/arrangement, the plaintiff's A schedule property was entrusted to the defendant and that the defendant's B schedule property was entrusted to the plaintiff by the respective parties and on the other hand, the defendant had been assisting the plaintiff in disposing of his properties and the plaintiff is unable to dispose of the suit property and as the plaintiff is permanently settled at Chennai and accordingly, unable to maintain the suit property, leased out the suit property to the defendant and accordingly, the defendant took the suit property on lease, spent a huge amount for converting the same into a

cultivable land and accordingly the plaintiff is performing the temple festivals out of the lease income paid by the defendant and hence the defendant is entitled to the benefits of the cultivating tenant and the plaintiff has filed the suit suppressing the arrangement above stated entered into between the parties in respect of the suit property and the exchange pleaded by the plaintiff is false and it is false to state that the defendant is attempting to alienate the suit property by converting the same as sites and the plaintiff has no cause of action and not maintainable and the suit is liable to be dismissed.

6. In support of the plaintiff's case, P.Ws.1 to 3 were examined. Exs.A1 to A3 were marked. On the side of the defendant, D.Ws.1 to 3 were examined. Exs.B1 to B5 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to dismiss the suit laid by the plaintiff. Impugning the same, the present second appeal has been laid.

8. At the time of admission of the second appeal the following substantial questions of law were formulated for consideration.

(i) Whether the Courts below have not erred in law in holding that the respondent is entitled to Tamil Nadu Act 10 of 1969 (Record of Tenancy Rights) as amended by Act 34 of 1972 in the absence of any entry in the register maintained under the said Act in respect of suit-A schedule property.

(ii) Whether the Courts below have not erred in law in failing to consider whether the respondent is a cultivating tenant within the meaning of Tamil Nadu Act 25 of 1995 (Tamil Nadu Cultivating Tenants Protection Act) and in failing to note that the respondent had not claimed that he is cultivating the suit A schedule lands with his own physical labour.

(iii) Whether the Courts below have not erred in law in dismissing the suit notwithstanding the admission made by the defendant that the plaintiff refused to grant a lease?

9. It is not in dispute that the plaint A schedule property belonged to the plaintiff. Similarly, it is not in dispute that the plaint B schedule property belonged to the defendant. Now, according to the plaintiff, for the sake of convenience, the parties had agreed to exchange their respective properties and accordingly, it is pleaded that the plaint A schedule property was entrusted to the defendant and that the defendant entrusted the B schedule property to the plaintiff and the parties had orally agreed that in case of need, they have to take back their respective parties from the other and inasmuch the plaintiff had learnt that the defendant is attempting to alienate the A schedule property to the parties by converting the same into sites, according to the plaintiff, he has been necessitated to lay the suit against the plaintiff for appropriate reliefs. It is found that prior to the institution of the suit, the plaintiff had issued a legal notice and to the same, the defendant sent a reply contending that the oral exchange/arrangement pleaded by the plaintiff is false and that he had taken the suit property on the lease from the plaintiff and accordingly, paying lease to the plaintiff and from and out of said lease, the plaintiff is performing the temple's functions/rites and accordingly, the defendant is entitled to the benefits of the cultivating tenant and hence the suit laid by the plaintiff for recovery of the suit property is not maintainable and liable to be dismissed. The same plea has been taken by the defendant in the written statement also. Inasmuch as the defendant has disputed the oral exchange/arrangement pleaded by the plaintiff, it is for the plaintiff to establish the above said plea. However, as rightly determined by the Courts below, no valid material as such has been placed by the plaintiff, to show that the parties had exchanged their properties as put forth in the plaint. At the foremost, the plaintiff had not pleaded in the plaint as to on what date or during what period, the parties had agreed to exchange their respective properties as claimed. If the above said plea put forth by the plaintiff has any element of truth, definitely the plaintiff would have placed acceptable materials to show that pursuant to the same, he has been in possession and enjoyment of the plaint B schedule property following the alleged oral exchange/arrangement. However, it is found that the B schedule property continuous to be only in the possession and enjoyment of the defendant and with reference to the same, as rightly determined by the Courts below, the said position has been amply established by the defendant by marking Exs.B1 to B4. On a cumulative assessment of Exs.B1 to B4, it is found that the defendant had purchased the B schedule property by way of Ex.B3, sale transaction and pursuant to the same been in possession and enjoyment of the said property by paying Kists etc., and therefore, if really the oral exchange/arrangement put forth by the plaintiff is true, the plaintiff would be placed necessary

documents to sustain the same. On the other hand, other than marking the notices, exchanged between the parties and the acknowledgment card, there is no material placed by the plaintiff to show that pursuant to the alleged oral exchange/arrangement, it has been in possession and enjoyment of the B schedule property belonging to the defendant. On the other hand, the materials projected by the defendant as afore stated, point out that the B schedule property continues to remain in the possession and enjoyment of the defendant following the sale transaction marked as Ex.B3. Further, as rightly determined by the Courts below, the oral exchange pleaded by the plaintiff cannot be legally countenanced as could be seen from the nature of the properties involved in the matter. The exchange projected by the plaintiff, if true, should have been effected only by way of a registered instrument. In such view of the matter, the plea of oral exchange projected by the plaintiff is found to be also not legally sustainable and accordingly, it is seen that the Courts below had rightly discountenanced the plea of oral exchange/arrangement put forth by the plaintiff.

10.The plea of the oral exchange/ arrangement put forth by the plaintiff having not been established, as rightly determined by the Courts below, the case of the plaintiff that the suit property had been in possession of the defendant only pursuant to the alleged oral exchange/arrangement falls to the ground. It is not the case of the plaintiff that the defendant had trespassed in the said suit property and enjoying the same. It is thus found that as put forth by the defendant, he had been inducted into the possession of the suit property ie., A schedule property only by way of the lease arrangement entered into between the parties and accordingly it is found that the defendant is also paying necessary Kists in respect of the suit property and the Kists receipts have come to be marked as Ex.B5 series. Further, from the oral evidence adduced by the defendant, through the mouth of D.Ws.2 and 3, as well as from the admission on the part of P.W.2 as rightly discussed and determined by the Courts below, on a cumulative assessment of their evidence, we could gather that it is only the defendant, who had been enjoying the suit property as the lessee of the plaintiff and accordingly paying the lease to the plaintiff with reference to the same. Accordingly, the Courts below had rightly determined that the defendant has established the lease of the suit property in his favour and held that he is in possession and enjoyment of the suit property as the cultivating tenant thereof.

11.As regards the determination of the Courts below that the defendant is the cultivating tenant of the suit property, the plaintiff's counsel contended that inasmuch as the defendant has not pleaded in the written statement that he had contributed his

physical labour in the cultivation of the plaint schedule property and also not placed any material to sustain the said plea, the above said plea being sine qua non for claiming the benefit of the cultivating tenant and the same being conspicuously absent in this case, according to the plaintiff's counsel, the Courts below had erroneously held that the defendant is the cultivating tenant of the suit property. However, the above said contention of the plaintiff's counsel is not acceptable. On a reading of the averments contained in the written statement as a whole, it is found that the defendant has clearly pleaded that, on taking the suit property on lease from the plaintiff, he had spent a huge amount and made it fit for cultivation and accordingly, enjoying the suit property by cultivating the same and paying the lease to the plaintiff and thereby entitled to the benefits of the cultivating tenant. Therefore, it is found that the defendant has pleaded that he had put in his physical labour for the cultivation of the suit property and therefore the contention put forth that there is no plea made by the defendant in the written statement above the contribution of his physical labour in the cultivation of the suit property as such, has to be thrown out. That apart, the defendant through the evidence of D.Ws 2 and 3 and as well as his evidence has clearly established that he is cultivating the suit property by contributing his physical labour and when their evidence with reference to the same is found acceptable and convincing and also rightly appreciated by the Courts below, it is found that the defendant has established his possession of the suit property as the cultivating tenant thereof, as per the legal requirements.

12. It is further contended by the plaintiff's counsel that the defendant's name has not been recorded in the tenancy record by the authorities concerned and therefore he cannot be held to be the cultivating tenant of the suit property. However, it is found that the failure of the defendant in recording his name as the cultivating tenant by itself would not lead to the conclusion that he ceases to be the cultivating tenant of the suit property. Similarly, merely from the recording of a person's name in the tenancy record maintained by the authorities concerned by itself would not lead to the conclusion that he is the cultivating tenant of the suit property ipso facto. In the light of the above said position, the absence of the recording of the name of the defendant in the tenancy record by itself cannot be concluded that the defendant is not the cultivating tenant of the suit property when the materials placed otherwise point out that it is only the defendant who is engaged in the cultivation of the suit property by contributing his physical labour and paying the necessary lease to the plaintiff and out of the same, the plaintiff is also performing the festival functions and rites. Therefore, the above said

argument projected by the plaintiff's counsel as such cannot be readily accepted.

13. In the light of the above position, the defendant being held to be the cultivating tenant of the suit property, as rightly determined by the Courts below, it is found that the present suit laid by the plaintiff seeking possession of the property from the defendant, who is the cultivating tenant thereof, is not maintainable and therefore the Courts below were justified in rejecting the plaintiff's case.

14. In the light of the above discussions, the absence of the entry in the tenancy register of the name of the defendant as the cultivating tenant of the suit property by itself would not determine that the defendant is not the cultivating tenant of the suit property, particularly when it is noted that the defendant has been contributing his physical labour in the cultivation of the suit property as per the definition of the cultivating tenant as above discussed and when the oral and documentary evidence placed in the matter seen cogently and read a whole, it is found that the Courts below were justified in holding that the defendant is the cultivating tenant of the suit property under the plaintiff and thus it is seen that there is no error, mistake or defect in the judgment and decree of the Courts below in rejecting the plaintiff's case. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff.

15. In conclusion, the second appeal fails, and is, accordingly dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional Subordinate Judge, Mayiladuthurai.

2. The Additional District Munsif, Mayiladuthurai.

3. The Section Officer, VR Section, High Court.

Copy to: The Section Officer, VR Section, High Court, Madras.

+ 1 cc to Mr. S. Sounthar, Advocate Sr.13387

S.A.No.1592 of 2003

SSI (CO)

EU (27/03/2018)