

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.03.2019

C O R A M

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

Second Appeal No.939 of 2009

S.Gopalakrishna Mudaliar (deceased)

1. Somasundaram
2. Shanmugam
3. Shenbagavalli
4. Sornalatha

..Appellants/ Respondents/Plaintiff

Vs.

Subramanian

..Respondent/Appellant/Defendant

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the decree and judgment dated 25.11.1997 passed in A.S.No.282 of 1996 by the District and Sessions Judge, Nagapattinam reversing the decree and judgment dated 31.07.1996 passed in O.S.No.177 of 1987 by the District Munsif, Thiruthuraipoondi.

For Appellants : Mr.V.Ragavachari
for M/s B.S.G Firm

For Respondent : Mr.Kingston Gerald

JUDGMENT

Aggrieved over the first appellate court's decree and judgment dated 25.11.1997 passed in A.S.No.282 of 1996 by the District and Sessions Judge, Nagapattinam reversing the decree and judgment dated 31.07.1996 passed in O.S.No.177 of 1987 by the District Munsif, Thiruthuraipoondi, the appellants came up with the present second appeal in S.A.No.939 of 2009.

2. The appellants are the plaintiffs and the respondent is the defendant in the original suit. For the sake of convenience, the parties are referred to as per their

original rank in the suit.

3. The brief facts leading to file the second appeals are as follows.

The contention of the plaintiffs is that the suit property was originally leased to the father of the defendant and thereafter, rent has been increased in the year 1985. After 10.07.1985, the defendant's father never paid any rent. Since the suit property was required to the father of the plaintiffs, he issued a legal notice dated 07.09.1986 to the defendant and the same was received by him on 10.09.1986. However, he neither replied nor complied the request of the father of the plaintiffs and hence, he filed the suit for vacant possession of the land, after removing superstructure made by the defendant and for recovery of rent due with interest for the last three years. Pending suit, the father of the plaintiffs died and hence, they were brought on record as plaintiffs 2 to 5

4. The contention of the defendant is that the extent of the possession of the property by this defendant is 20 cents and not 6 cents as alleged by the plaintiffs. The site was occupied by the father of the defendant in the year 1940 itself as tenant. In the beginning, the rent was only manure and subsequently, it was converted into rent and the last enhanced rent was Rs.40/- per year. The defendant's father was an agriculturist owning about one acre of land and he was also cultivating some extent of the plaintiffs' land. Under the provisions of Act 38 of 1961, the father of the defendant was protected from eviction. The defendant's house is situated in 7 cents and the remaining portions are used to be cultivated with punja crops. After the Kudiyiruppu Act 40 of 1971 came into force, the property has become vested with the defendant's father and the ownership was conferred upon him. After the death of the father of the defendant in the year 1983, the defendant has succeeded to the property as the legal heir of his father and he has also applied for patta under Kudiyiruppu Act. There is no landlord tenant relationship existing between the plaintiffs and the defendant and hence, prayed for dismissal of the suit.

5. The trial court framed the following issues.

1. Is it true that the defendant has been enjoying the suit property for several years as tenant?

2. Whether the defendant is an agriculturist and is having rights as per the Kudiyiruppu Act 40 of 1971?

3. Whether the plaintiffs are entitled to get vacant possession of the land, suit property from the defendant

4. To what other relief?

Additional Issues.

1. Is it true that suit is bad for non impleading of

all the legal heirs of the first plaintiff as parties to the suit?

2. Whether the defendant is entitled to get benefits under the Tamil Nadu Occupants of Kudiyruppu (Protection from Eviction), Act 1961?

3. Whether the defendant is liable to pay the rent dues with interest for the last three years?

4. Whether the defendant is liable to pay compensation to the plaintiffs 2 to 5 till the date of delivery of vacant possession of the land?

6. Before the trial court, on the side of the plaintiffs, two witnesses were examined as PW1 and PW2 and marked Ex.A1 to Ex.A5. On the side of the defendant, two witnesses were examined as DW1 and DW2 and marked Ex.B1 to Ex.B18.

7. After analysing the evidence on record, the trial court decreed the suit in favour of the plaintiffs. However, the first appellate court allowed first appeal on the ground that the defendant is a cultivating tenant and hence, he is protected from evicting as per the Act 38 of 1961 and consequently, dismissed the suit. Against which, the plaintiffs came up with the present second appeal. The following substantial questions of law have been raised in the grounds of appeal.

1. Whether the first appellate court erred in applying the Protection of Act 40/1971 to confer benefits to the respondent?

2. Whether the first appellate court misread the misconstrued the evidence on record for allowing the appeal filed by the respondent?

8. The learned counsel appearing for the appellants/ plaintiffs vehemently argued that the first appellate court wrongly applied the provisions of the Tamil Nadu Cultivating Tenants Protection Act, 1955 and absolutely, there is no evidence to show that the defendant is a cultivating tenant. The suit property was originally belonged to the father of the plaintiffs, which is not in dispute and there is no evidence to show that the defendant and his father cultivating the land including the suit property and in the absence of any evidence to show that the defendant's father was cultivating the land or the defendant cultivating the land, the defendant cannot seek the benefits either under the Tamil Nadu Occupants of Kudiyruppu (Conferment of Ownership) Act, 1971 (the Act 40 of 1971) or under the Tamil Nadu Cultivating Tenants Protection Act, 1955.

9. The learned counsel appearing for the appellants/ plaintiffs further argued that the evidence of DW1 clearly indicates that the he is working in the society and also working as a teacher. and hence, the findings of the first appellate court that the defendant is an agriculturist is contrary to the fact. Therefore, without establishing the fact that the defendant is cultivating the land and he himself is a cultivating tenant, the defendant cannot resist the suit for recovery of possession. In support of his arguments, the learned counsel relied upon the following judgments.

1. Arumugam and another Vs. Sri. Dharmapuram Mutt at Dharmapuram reported in 1996(3) CTC 90

2. Kuppan Vs. Jayarama Chetty and another reported in 1996(I) CTC 611

3. Sri Ahobila Madam represented by its Power Agent S..Sarangachariar, Mannargudi Taluk, Thanjavur District. Vs. Revenue Court, Thanjavur, Thanjavur District and another reported in 1996 MLJ 529

4. K.Ramdoss Vs. Rukmani Ammal reported in 1997 (II) CTC 703

5. Esakki Vs. Subramania Aiyer reported 1998 (II) CTC 141

6. Order of this court in W.P.Nos.9344 and 17923 of 1994 dated 07.12.2001.

10. Whereas, the learned counsel appearing for the respondent/defendant would contend that the first appellate court has rightly found that the defendant is cultivating tenant. When the court below found that the defendant is a cultivating tenant, the same does not warrant any interference and hence, he prayed for the dismissal of the second appeal.

11. The suit has been filed for recovery of possession. It is the contention of the plaintiffs that the suit property was originally leased out to the father of the defendant, however he defaulted in payment of rent from the year 1985. Besides, the property also required for the plaintiffs' own purpose. The specific stand taken by the defendant is that his father was cultivating the agricultural land therefore, he is entitled to the benefits under the provisions of the Tamil Nadu Cultivating Tenants Protection Act, 1955.

12. It is relevant to note refer Section 2(8) of the Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act, 1971.

2(8) "Kudiyiruppu" means the site of any dwelling house or hut occupied either as tenant or as licensee, by any agriculturist or agricultural

labourer and includes such other are adjacent to the dwelling house or hut as may be necessary for the convenient enjoyment of such dwelling house or hut.

Therefore, the said definition makes it very clear that to construed the site of any dwelling house or plot is occupied by a person either as tenant or as licensee, that person in occupation should be an agriculturist or an agricultural labourer and it should be established that the person is also cultivating the land adjacent to the said occupied site. Only when those situations, the person who is in occupation of the site or hut should be construed as an occupier of Kudiyrupu.

13. The trial court has clearly found that though Ex.B3 to B6 and Ex.B9 have been filed, no documents are available on record to prove that the father of the defendant was cultivating the land. Further, the kist receipts relied upon by the first appellate court does not relate to the suit property. Similarly, Ex.B7 is related to some other survey number. The trial court has clearly found that the documents relied upon by the defendant are no way connected to the suit property. When a person claiming benefit under the Act, he should establish that he is an agriculturist and occupying a hut or site either as agriculturist or agricultural labourer and the entire burden is on him to prove the same. But the defendant has not discharged his burden and also no documents whatsoever filed.

14. It is also relevant to refer the definition of the Cultivating Tenants under the Act 25 of 1955.

Cultivating tenant

(i) means a person who contributes his own physical labour or that of any member of his family in the cultivation of any land belonging to another, under a tenancy agreement, express or implied; and

(ii) includes-

(a) any such person who continues in possession of the land after the determination of the tenancy agreement;

(b) the heir of such person, if the heir contributes his own physical labour or that of any member of his family in the cultivation of such land;

(c) a sub-tenant if he contributes his own physical labour or that of any member of his family in the cultivation of such land; or

(d) any such sub-tenant who continues in possession of the land notwithstanding that the person who sublet the land to such sub-tenant ceases to have the right to possession of such land; but

(iii) does not include a mere intermediary or his heir.

Therefore, a person, who claimed himself as a cultivating tenant, should contribute his own physical labour or that of any member of his family in the cultivation of the land. Absolutely, there is no evidence available on record to show that the defendant is contributing his physical labour or any member of his family in the cultivation of the land.

15. Whereas, the evidence of the defendant (DW1) clearly indicate that he is a teacher by profession, working for about 6 to 7 years. Further, the defendant also admitted that he did not plead even as to the nature of the land cultivated by his father. Similarly, he has also not filed any voters list to prove that he is residing in the suit property. Similarly, the defendant also admitted that there is no evidence to prove that his father has cultivated the land purchased under sale deed Ex.B5. When the evidence of the parties clearly shows that the defendant was not contributing any physical labour and that he is a teacher by profession, he cannot seek benefits under the Act 25 of 1955 or under Act 40 of 1971.

16. In the judgment in Arumugam and another Vs. Sri Dharmapuram Mutt at Dharmapuram reported in 1996(I)CTC90 in paragraph 5 it has been held thus:

" Though cultivation of lands by a person contributing his own physical labour or that of any member of his family in the cultivation on any land belonging to another is a vital ingredient, the primary requirement that such cultivation should be under a tenancy agreement express or implied cannot be ignored or given a go-bye. Even a careful scanning through of the judgment of the trial court would disclose a conspicuous omission to advert to this vital condition precedent about the existence of a tenancy agreement express or implied. This having been found lacking in the trial court judgment by the lower appellate court, in my view, legitimately and rightly, and having regard to the further admitted fact of the land having been given as remuneration for the services rendered to the Mutt as " gl; oaf; fhu CHpad; ** it is futile to contend that the appellants can be considered to be a tenant at all leave alone the claim of being a cultivating tenant in accordance with either the provisions of the Record of tenancy. Act or the provisions of the Tamil Nadu Act 47 of 1961. In view of the above findings of mine, the plea or objection raised to the judgment and decree of the lower appellate court based on Section 16-A of the

Act also pales into insignificance."

17. Similarly, this court in a judgment in K.Ramdoss Vs. Rukmani Ammal reported in 199(II) CTC 703, held thus:

" This revision is directed against the order of the Special Deputy Collector, Revenue Court, Salem in R.A.No.1453 of 1990 dismissing the application by the petitioner on the ground that the petitioner is not entitled for the prayer asked for in the said application for deposit of the rent. The court also held that the petitioner is admittedly employed as a teacher in a school, which is not disputed by the petitioner himself. He is not a tenant under the provisions as defined in the Tamil Nadu Cultivating Tenants Protection Act. In this case, the petitioner has no proof that he is a cultivating tenant and he is contributing his own physical labour or that of any member of his family in the cultivation of any land belonging to another, under a tenancy agreement, express or implied. It is contended that the heir of the petitioner namely his wife is entitled according to the provisions of the Tamil Nadu Cultivating Tenants Protection Act, since she also contributes her own physical labour. This definition is also not satisfied, since there is absolutely no proof on the part of the petitioner's wife that she is contributing her own physical labour for the cultivation of the land in question. The question of deposit of the rent will arise only if the petitioner proves that he is a cultivating tenant. No proof is placed before the lower court or before this court that his name has been registered as tenant under the provisions of the Tamil Nadu Record of Tenancy Rights Act. Since the petitioner has not proved that he is a cultivating tenant, he is not entitled to make a deposit of the rent arrears before the Special Deputy Collector and Special Deputy Collector has rightly rejected the case that he does not satisfy Section 2(b) of the Tamil Nadu Cultivating Tenants Protection Act. The learned counsel relied on the definition of the "Cultivating Tenant" in Angu @ Angammal V. The Record Officer and Additional Tahsildar, Thanjavur and 3 others, 1988, TNLJ 35, wherein Section 2(b) of the Act states that one should contribute his physical labour such as ploughing, sowing the seeds, taking away the weeds and also harvesting the products when the crop is ready for harvest.

Unless a person proves that he so physically applied the body for the purpose of cultivating the land, he cannot go anywhere near the definition of section 2(b) of the Tamil Nadu Cultivating Tenants Protection Act, 1955. "

18. In another judgment in *Esakki Vs. Subramania Aiyer* reported in 1998(II) CTC 141, this court held as follows:

" The contention of the appellant with reference to the bar of jurisdiction under Section 26 of the Act has to be appreciated in the context of the dispute arising under the present suit. It is not as though the plaintiff had approached this Court after receiving any notice from the Authorised Officer. On the other hand, it is the defendant who had approached the Authorised Officer after receiving the lawyer's notice as well as the notice in the present suit for eviction. The power which is vested on the Authorised Officer under Section 8(1)(a) and (b) of the Act to decide as to whether any person was a rural artisan or whether such a person was "holding any land other than Kudiyiruppu, was the power incidentally available to him for deciding such a question which may be raised by the landlord. But the fact remains that the Authorised Officer is vested with the said power. But such a question cannot be a bar for deciding the issue as to whether the tenant has the prima facie case to seek protection under the provisions of the Act. The power of a Civil Court to entertain a relief under Section 9, CPC can be taken away only by express words and not by presumption or implication. A Division Bench of this Court while interpreting Section 64 (c) of the Act 26 of 1978, has held that every presumption should be made to invoke the jurisdiction of the Civil Court which can be taken away only by express words in a statute. 1982 TNLJ 9 the same view was upheld by the Supreme Court in a decision reported in, *State of Tamil Nadu v. Ramalinga Swamigal Madam*, . The Civil Court has certainly the power to decide as to whether a person claiming protection under a particular enactment is entitled to and qualified to invoke the provisions of the Act. In the present case, as would be seen from the facts discussed above, the defendant was positively owning lands on his own and therefore, he was totally disentitled to the protection of the Act. That being so, merely filing a petition before the Authorised Officer that too after receiving notice from the plaintiff

and in the suit for eviction, will not disentitled the Civil Court from deciding whether the defendant was at all entitled to the protection of the Act. Once the Civil Court comes to the conclusion that the party was entitled to the protection of the Act, no further decision can be taken by the Civil Court and the parties have to be directed to approach the appropriate authority under the Act. But the Civil Court is not barred from considering as to whether one of the parties claiming protection under the Act has any prima facie case to substantiate his claim or not. The Civil Court is not deprived of the said power. One could easily visualise the easy process of abuse of statutory provisions as in the present case if the civil court does not have such a power. The provisions of the Act are not meant for frivolous abuse of the statutory provisions and the powers of the Civil Court are not taken away by the mere allegation of the defendant that he is entitled to the protection of the Act. The civil court has got every jurisdiction to find out as to whether the party claiming protection under the Act, is really a person who is entitled to the protection of the Act. Both the Courts have concurrently found that the plaintiff is not entitled to the protection of the Act and it has also been substantially established before the Courts below as well as through the additional evidence filed in CMP No.1255 of 1985 that the defendant was possessed of agricultural properties which would totally disentitle him from approaching the Authorised Officer, In the said circumstances, the objections, taken by the learned counsel for the appellant to the effect that the civil court has no jurisdiction to entertain the suit, cannot be sustained.

19. Having regard to the above judgments and on perusal of the evidence adduced by the defendant, it is clear that no evidence is available on record to show that he is occupying the suit property either as a tenant or as a agriculturist. Whereas, his evidence clearly shows that he is a teacher by profession. When a person seeks benefits under the Tamil Nadu Cultivating Tenants Protection Act, he should establish the ingredients of the Act to get such benefit. In the absence of evidence in this regard, this court find that the defendant cannot seek any benefit either under the provisions Tamil Nadu Cultivating Tenants Protection Act or under the Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act, 1971. Hence, the substantial questions of law are answered in favour

of the appellant and the decree and judgment passed by the first appellate warrant interference by this court.

20. In the result,

(i) The second appeal in S.A.No.939 of 2009 is allowed. No costs.

(ii) The decree and judgment dated 25.11.1997 passed in A.S.No.282 of 1996 by the District and Sessions Judge, Nagapattinam are set aside.

(iii) The decree and judgment dated 31.07.1996 passed in O.S.No.177 of 1987 by the District Munsif, Thiruthuraipoondi are confirmed.

mst

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The District and Sessions Judge,
Nagapattinam.

2. The District Munsif,
Thiruthuraipoondi

+1cc to Mr.S.Kingston Jerold, Advocate, SR.No.26463

+1cc to Mr.B.S.Gnanadesikan, Advocate, SR.No.26112

Second Appeal No.939 of 2009

Kak (24/06/2019)

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