

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.10.2019

PRONOUNCED ON : 11.11.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM
S.A.No.1106 of 2005

1. A.Mahadevan (died)
2. A.Hariharan
3. M.Premalatha
4. M.Yogesh Kumaran

(Appellants 3, 4 and R2 brought on
record as LR's of the deceased first
appellant viz., Mahadevan vide Court Order
dated 23.04.2019 made in CMP.Nos.6704,
6705 and 6711 of 2019
in S.A.No.1106 of 2005 ... Appellants/Respondents/
defendants

Vs.

1. Arulmigu Kapaleeswarar Temple
Rep. by its Deputy Commissioner/
Executive Officer,
Mylapore, Chennai - 600 004.

2. Jayashree ... Respondents/Appellant/
Plaintiff

PRAYER : Second Appeal filed under Section 100 of C.P.C.,
against the judgment and decree dated 29.11.2004 made in
A.S.No.278 of 2004 on the file of the I Additional Judge, City
Civil Court, Chennai reversing the Judgment and Decree dated
21.10.2003 made in O.S. No.14782 of 1996 on the file of the V
Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr. B.Soundarapandian

For Respondents : M/s.Usha Tholgappian (for R1)
: Mr. Raja Pandi (for R2)

JUDGMENT

This second appeal has been filed by the defendants against the judgment and decree passed by the I Additional Judge, City Civil Court, Chennai in A.S.No.278 of 2004 dated 29.11.2004 reversing the Judgment and Decree passed by the V Assistant Judge, City Civil Court, Chennai in O.S.No. 14782 of 1996 dated 21.10.2003.

2. The first respondent herein had filed a suit in O.S.No.14782 of 1996 on the file of the V Assistant Judge, City Civil Court, Chennai to direct the defendants to handover vacant possession of the suit land after removing the superstructure and also to direct the defendants to pay future damages for use and occupation of the suit property at the rate of Rs.60/- p.m from the date of suit till the date of realization. The learned V Assistant Judge, City Civil Court, Chennai by the judgment dated 21.10.2003 had dismissed the suit without costs. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.278 of 2004 on the file of the I Additional Judge, City Civil Court, Chennai. The learned I Additional Judge, City Civil Court, Chennai by the judgment dated 29.11.2004 had allowed the said appeal with costs and set aside the judgment and decree passed by the Trial Court and decreed the suit with costs directing the defendants to deliver the vacant possession of the suit property within three months and also directed the defendants to pay a sum of Rs.60/- per month towards damages for use and occupation from the date of the plaint till delivery of possession. Feeling Aggrieved, the defendants have filed a present Second Appeal.

3. For the sake of convenience, the parties are referred to as described before the Trial Court.

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

The suit site measuring 288 sq.ft belongs to the plaintiff temple. It was leased out to one Arumugha Mudaliar @ Kutti for non -residential purpose, on monthly tenancy according to English Calendar. After the death of the said Arumugha Mudaliar @ Kutti, his sons (defendants) are continuing as tenants. The present rent is Rs.60/- per month. With the permission of the temple, the defendants put up a temporary superstructure with zinc sheet roof. On 13.04.1996, the defendants sought for permission to put up a permanent structure. The same was refused by the plaintiff. However the defendants had dismantled the temporary structure and put up a

permanent building with RCC roof. Sanction from M.M.D.A and Chennai Corporation was also not obtained. Which is against Sec.108(p) of the Transfer of Property Act and City Municipal Corporation Act and the defendants are liable to be evicted. Hence the plaintiff had sent a notice on 30.08.1996 terminating their tenancy ending on 30.09.1996 and demanding vacant possession on 01.10.1996. The defendants after receipt of the said notice, had sent a reply notice with false averments. Hence the plaintiff was constrained to file the suit for delivery of possession after removing the superstructure and also for future damages for use and occupation at the rate of Rs.60/- per month from the date of suit till realization.

5. The averments made in the written statement filed by the defendants are in brief as follows:

It is untrue that the defendants are given permission only to put up a temporary structure and no such restriction was there in the permission. Even the Corporation of Madras gave permission for construction of a permanent building on the land in question. Since the roof was unsafe and there were thefts in between 1985 and 1996, on 13.04.1996, the defendants sought temple permission to strengthen the building. The plaintiff accorded permission for strengthening the building and thereafter strengthening work for the building was done, thereby the buildings became stronger. Therefore the contents of the plaintiff that no permission was granted for putting up any structure is not correct. The notice to quit is not proper and hence it was properly replied to. The defendants are entitled to purchase the site on a price to be fixed by the Court. No notice of compensation was issued. The Plaintiff wants to eject the defendants for the purpose of leasing out the property to others. The eviction action is motivated and therefore, the defendant prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the Trial Court, had framed necessary issues and tried the suit. During Trial, on the side of the plaintiff, one witness was examined as P.W.1 and Exs. A1 to A4 were marked as Exhibits. On the side of the defendants, the second defendant was examined as D.W.1 and Exhibits B1 to B14 were marked as Exhibits.

7. The learned Trial Judge, after considering the materials placed before him, found that, the defendants had applied for permission for putting up cement concrete roof but the plaintiff did not reply for the same. He further found that the reasons stated in the plaint for evicting the defendants are not valid reasons. Accordingly he dismissed the suit with costs. Aggrieved by the same, the plaintiff had filed an appeal in

A.S.No. 278 of 2004 on the file of the I Additional Judge, City Civil Court, Chennai. The learned I Additional Judge had allowed the said appeal and set aside the judgment and decree passed by the Trial Court and directed the defendants to deliver the suit property within three months and also directed the defendants to pay a sum of Rs.60/- per month for use and occupation from the date of plaint till delivery of possession. Aggrieved by the same, the defendants have filed a present second appeal.

8. This Court at the time of admitting the second appeal had formulated the following substantial questions of law:

" (a) Whether the finding of the lower Appellate Court that there is valid termination of tenancy under Ex.A.2 is correct since the notice refers to land in S.No.3136, while the actual Survey Number of the suit land is 3137?.

(b) Whether the notice to quit is valid since the extent of land mentioned in the notice is 270 sq.ft. and the plaint seeks to eject the appellants from a larger area of 288 sq.feet?

(c) whether the suit instituted by the Executive Officer of the respondent Temple, in the absence of any materials either in the plaint or in evidence to show the contrary, is maintainable in view of the decision of the Division Bench of this Court reported in (2003) 1 Law Weekly 386, which clearly lays down that Board of Trustees are the competent persons?

(d) Whether the decision of the lower appellate court in reversing the well considered decision of the trial Court is proper on the facts and circumstances of the case?

9. Eventhough, so many grounds were raised in the appeal memorandum, the learned counsel for the appellants pressed ground {Question (c) No.4 alone} relying upon the decision in Sri. Arthanareeswarar of Tiruchengode by its present Executive Officer, Sri Sabapathy vs. T.M. Muthuswamy Padayachi, etc., 2003-1-L.W. 386.

10. The learned counsel for the first respondent/plaintiff has submitted that the appellants/defendants have not raised the plea that the Executive Officer is not competent to file a suit before the Trial Court and only for the first time this point is raised before this Court and hence it has become necessary for the respondents/plaintiffs to file C.M.P.No.22727 of 2019 Under Order 41 Rule 27 (1) r/w Section 151 CPC to receive a copy of

the order passed by the Deputy Commissioner of Hindu Religious and Charitable Endowment Department, dated 08.05.1970 in O.A.No.125 of 1968. She further submitted that, in the said order the Executive Officer was authorized to file a suit on behalf of the plaintiff temple and hence she requested to receive the said document as additional documentary evidence and pass appropriate orders.

"In Sri. Arthanareeswarar of Tiruchengode by its present Executive Officer, Sri Sabapathy vs. T.M. Muthuswamy Padayachi, etc., 2003-1-L.W. 386." cited supra, a Division Bench of this Court in paragraph No. 19 held as follows:-

"19..... The Supreme Court, in State of Rajasthan vs. Rao Raja Kalyan Singh (A.I.R.1971 S.C 2018), has held that the plea of maintainability of a suit is essentially a legal plea. If the suit, on the face of it, is not maintainable, the fact that no specific plea was taken or no precise issues were framed is of little consequence. Therefore, it is open to the parties to raise the plea of maintainability of the suit as a legal plea without there being a specific plea in the written statement or the issues."

11. From the aforesaid decision it is clear that it is open to the parties to raise the plea of maintainability of the suit as a legal plea without there being a specific plea in the written statement. Therefore the defendants are entitled to raise the plea of maintainability of the suit as a legal plea before this Court without any specific plea in the written statement.

12. In the aforesaid decision itself in paragraph 20, 21 it has been held that the Executive Officer shall exercise such powers and discharge such duties as may be assigned to him by the Commissioner and further it was held that it is only the Board of Trustees in existence at that time which was competent to initiate the legal proceedings and without any authorization from the said board of Trustees, the Executive Officer cannot maintain a suit. For proper appreciation, paragraph Nos.20 and 21 aforesaid decision is exacted hereunder:-

"20. Insofar as the Executive Officer's suit is concerned, it is seen that 'Executive Officer' has been defined under Section 6(2) of the H.R.& C.E Act. According to this definition, Executive Officer is a person who is appointed to exercise such powers and discharge such duties appertaining to the administration of a religious institution as

are assigned to him by or under the Act or the Rules framed thereunder. 'Trustee' has been defined under Section 6(22) of the Act as any person or body in whom the administration of a religious institution is vested. Section 45 of the Act deals with the appointment and the duties of an Executive Officer. Sub - Section (2) to Section 45 says that the Executive Officer shall exercise such powers and discharge such duties as may be assigned to him by the Commissioner. The proviso says that only such powers and duties as appertaining to the administration of the properties of the religious institution shall be assigned to the Executive Officer. The powers and duties of the Executive Officer shall be defined by the Commissioner. Section 28 of the act empowers the trustee of every religious institution to administer its affairs and to apply the funds and properties of the institution. He shall be entitled to exercise all powers incidental to the provident and beneficial administration of the religious institution.

21. In this case, the Executive Officer, in his chief- examination as P.W.1, has stated that for the purpose of filing the suit, he sought permission from the Commissioner and got the order under Ex.A12. On a perusal of Ex.A12 dated 24.06.1970, it is seen that instructions were issued to the Executive Officer and the Board of Trustees to obtain legal opinion to enforce the charges mentioned in the settlement deed dated 1.11.1897 executed by one Thiru Venkatachala Gounder and his wife. A copy of these instructions was issued to the Executive Officer as well as to the Chairman, Board of Trustees. The above instructions did not authorise the Executive Officer to file a suit. As a matter of fact, the instructions were addressed to both the Executive Officer as well as to the Chairman, Board of Trustees in order to obtain legal opinion in reference to the enforcement of the settlement deed. Thereafter, the Inspector, H.R. & C.E Department held an enquiry on 1.10.1971 on the petition by T.P.Ardhanari Padayachi (the first plaintiff in

the Community's suit). Ex.B.107 is the report of the Inspector dated 24.1.1972 wherein he has stated that he found on his enquiry, that from the date of the gift/ settlement deed dated 1.11.1897, no such Nandavanam and its performance was conducted. It was further noted that in reference to this property, there was already an enquiry by the Commissioner on 26.05.1970 and an order dated 24.06.1970 had been passed directing the concerned to take legal opinion. From the above, it is clear that the Executive Officer is not the authority competent to initiate legal proceedings and that he had not been assigned with the power of filing a suit. It is only the Board of Trustees in existence at that time which was competent to initiate the legal proceedings. The trustees are not made parties to the suit and therefore, the finding insofar as the Executive officer's suit is concerned, that it is filed without authority has to be upheld."

13. In the order which is now sought to be filed by the first respondent/plaintiff also in para 7(c) it is specifically stated that the Executive Officer is entitled to file suit on behalf of the temple provided he has to obtain prior permission from the Board of Trustees. But, in this case, the respondent/plaintiff has not produced any such authorization which was issued by the Board of Trustees.

14. The learned counsel for the first respondent/plaintiff has submitted that the Board of Trustees had granted permission/authorization to the Executive Officer for filing suit on behalf of the temple but since the defendant's have raised the competency of the filing of the suit by the Executive Officer for the first time before this Court, the plaintiff temple has to trace out the said authorization and therefore she prayed to remand the matter to the Trial Court to enable the plaintiff to produce the said authorization. Admittedly, the defendant's have not raised plea of competency of the Executive Officer for filing this Court before the Courts below and have raised the said point for the first time before this Court only.

15. Taking into consideration of the aforesaid facts, this Court is of the view that an opportunity should be given to the plaintiff to enable it to produce the said authorization before the Court. Hence, this Court is inclined to remand the

matter to the Trial Court. Accordingly substantial questions of law are answered.

16. In the result, the second appeal is allowed and the decree passed by the Courts below are set aside. Consequently, the connected miscellaneous petition is closed. The matter is remitted back to the Trial Court to enable the plaintiff to produce the authorization said to have been issued by the Board of Trustees to the Executive Officer for filing suit. The Trial Court is directed to give sufficient opportunities to both the parties to adduce additional oral and documentary evidence and dispose of the case in accordance with law within four months from the date of receipt of a copy of this judgment. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

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To

1. The I Additional Judge,
City Civil Court, Chennai
2. The V Assistant Judge,
City Civil Court,
Chennai.
3. The Section Officer, VR Section,
High Court, Madras.

+1 cc to Mr.B.Soundrapandian Advocate sr93497
+1 cc to Mrs.usha Tholgappian Advocate sr93630

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S.A.No.1106 of 2005

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