

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.04.2019

PRONOUNCED ON : 08.04.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.289 of 2013

and

M.P.No.1 of 2013

1. Mohammed Rafeeq
being represented by his Power Agent
Mrs.Basheera Kani,
Sirkazhi Town,
Nagapattinam District.
2. Mrs. Basheera Kani ... Appellants/Appellants
2nd & 3rd Defendants
- Vs.
1. Sri Sattanathaswaminatha
Devasthanam, Sirkhazhi,
rep by its Hereditary Trustee
Sir La Sri Shanmuga
Desiga Gnanasambanda
Paramachariya Swamigal,
Dharmapuram Adhinam,
Dharmapuram, Mayiladuthurai. ... 1st Respondent/Respondent/
Plaintiff
2. Chandra ... 2nd Respondent/1st Appellant
1st Defendant

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the decree and judgment passed in AS.No.5 of 2012 dated 19.12.2012 on the file of the Principal Subordinate Judge of Mayiladuthurai confirming the decree and judgment passed in O.S.No.203 of 2005 dated 24.11.2011 on the file of the District Munsif Court of Sirkazhi.

For Appellants : Mr.S.B.Fazluddin

For Respondents : Mr.S.Sounthar for R1

: R2- Set exparte

JUDGMENT

This Second appeal has been filed by the defendant Nos. 2 and 3 against the judgment and decree passed by the Principal Sub Judge, Mayiladuthurai in A.S.No.5 of 2012 dated 19.12.2012 confirming the judgment and decree passed by the District Munsif, Sirkazhi in O.S.No.203 of 2005 dated 24.11.2011.

2. The first respondent herein had filed a suit in O.S.No.203 of 2005 on the file of the District Munsif, Sirkazhi for recovery of possession of the suit property after removing the constructions made by the defendants. The learned District Munsif, Sirkazhi, by the judgment dated 24.11.2011 decreed the suit as prayed for and directed the defendants to remove the constructions made in the suit property and deliver vacant possession of the suit property within two months. Aggrieved by the same, the defendant Nos.1 to 3 filed an appeal in A.S.No.5 of 2012 on the file of the Principal Sub Judge, Mayiladuthurai. The learned Principal Sub-Judge, Mayiladuthurai by the judgment dated 19.12.2012 dismissed the said appeal and confirmed the judgment and decree passed by the Trial Court and granted one month time for delivery of possession. Feeling aggrieved, the defendant Nos.2 and 3 filed the 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 property belongs to the plaintiff i.e., Sri Sattanathaswaminatha Devasthanam, Sirkazhi. The plaintiff leased out a vacant site to one Subramaniya Pillai under a registered lease deed dated 31.05.1940. In pursuance of the said lease deed, the said Subramaniya Pillai had constructed a thatched house and residing there. In the said lease deed, it has been specifically stated that the said Subramaniyapillai has to surrender the vacant possession of the suit site after removing the superstructures when ever required by the plaintiff. Further he agreed to pay Rs.3/- as rent for a fasali. After the death of Subramaniyapillai, his son Krishna Murthi Pillai was residing, subject to the conditions mentioned in the aforesaid lease deed. After the death of Krishna Murthi Pillai, his wife (first defendant) also has been residing there subject to the aforesaid conditions. Contrary to the clauses mentioned in the aforesaid lease deed, the first defendant had constructed a stone building and sold the suit property in favour of the defendant Nos.2 and 3 in the year 2004. Hence, the first defendant has lost the right to continue her possession in the suit property. The transaction which took place between the first defendant and the defendant Nos.2 and 3 would not bind

upon the plaintiff. Hence, the defendant Nos.2 and 3 should be treated as trespassers. On 30.08.2004, the plaintiff had sent a Lawyer's Notice demanding the defendant Nos.1 to 3 to remove the superstructure and deliver the vacant possession of the suit property. The first defendant had received the said notice, but she did not send any reply. The defendant Nos.2 and 3 refused to receive the said notice. Further, they have not handed over the possession of the suit property. Hence, the plaintiff was constrained to file the above suit for the relief of recovery of possession after removing the superstructures made in the suit property.

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

The allegations that the suit property belongs to the plaintiff and it was leased out to one Subramaniya Pillai on 31.05.1940 are denied as false. The alleged lease deed dated 31.05.1940 is a forged document. It is false to state that the said Subramaniya Pillai was residing there as a tenant under the plaintiff. It is also denied that after the death of Subramaniya Pillai, his son Krishna Murthi Pillai was residing in the suit property with the same conditions mentioned in the aforesaid lease deed dated 31.05.1940 and after his death, the first defendant continued as tenant with the same conditions. The said Subramaniya Pillai before his death, executed a registered will dated 14.03.1973. As per the said will, the suit property and the building there on were bequeathed in favour of the first defendant's husband namely Krishna Murthi Pillai. After the death of Subramaniya Pillai, his son Krishna Murthi Pillai has taken possession of the suit property and he has been in possession and enjoyment of the same till his death. After the death of the said Krishna Murthi Pillai, his wife (first defendant) and his sons and daughters succeeded to the suit property and they have been enjoying as owners. They had mortgaged the suit property on 18.08.1997 in favour of the Co-operative Housing Society, Sirkazhi for Rs.1,50,000/-. The first defendant and her predecessors in title have been in possession and enjoyment of the suit property for more than fifty years and as such, she perfected title by adverse possession also. Since the first defendant is having right to alienate the property, she sold the suit property to the defendant Nos.2 and 3 and they are in possession and enjoyment of the same. It is false to state that the first respondent has lost the right to continue the possession of the suit property. It is also false to state that the defendant Nos.2 and 3 are the trespassers. When the Lawyer's notice of the plaintiff received by the first defendant, she was not doing well and hence, she could not give any reply to the said notice. Therefore, she prayed to dismiss the suit.

6. The averments made in the written statement filed by the third respondent and adopted by the second defendant are in brief as follows:

The plaintiff is not having any right or title over the suit property. The plaintiff was never in possession of the suit property at any point of time. The description of the suit property given in the plaint schedule is not correct. It is false to state that the said Subramaniya Pillai had executed a lease deed dated 31.05.1940 in favour of the plaintiff. The third defendant had purchased a portion of the suit property on the eastern side from one Kalia Perumal Chettiyar under a registered sale deed dated 03.12.1994 and thereafter, she constructed a terraced building and she has been in possession and enjoyment of the suit property for more than twelve years. On 12.02.2004, the second defendant had purchased a portion of the suit property on the western side along with the constructions made there on from the first defendant. The defendant Nos.2 and 3 constructed a building after getting necessary permission from the Municipality and therefore, they are absolute owners of the suit property. The allegation that the defendants 2 and 3 are trespassers is false. The defendant Nos.2 and 3 do not know about the alleged Lawyer's notice dated 30.08.2004. Therefore, the defendant Nos.2 and 3 prayed to dismiss the suit.

7. The averments made in the additional written statement filed by the defendant Nos.2 and 3 are as follows:

Since the defendant Nos.2 and 3 and their predecessors in title have been in possession and enjoyment of the suit property for more than 30 years, they perfected title by the adverse possession also. Hence, the suit is barred by limitation. The plaintiff has not produced the alleged original lease deed dated 31.05.1940 and if the said document is produced that would reveal the true facts. Purposely, the plaintiff has not produced the said original lease deed. Therefore, the defendant Nos.2 and 3 prayed to dismiss the suit.

8. Based on the aforesaid averments, the learned District Munsif, Sirkazhi 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 A7 were marked as exhibits. On the side of the defendants, the third defendant was examined as D.W.1, the first defendant was examined as D.W.2 and the second defendant was examined as D.W.3. Further, they have examined two more witnesses as D.W.4 and D.W.5 and they have marked Exs.B1 to B35 as exhibits.

9. The learned District Munsif, Sirkazhi, after considering the materials placed before him found that the suit property belongs to the plaintiff and as per the Ex.A.7 lease

deed dated 31.05.1940, the suit site was leased out to one Subramaniya Pillai and as such, the first defendant had no right to alienate the suit property and the alleged sale deeds namely Exs.B4 and B14 would not bind upon the plaintiff and hence the defendants are liable to surrender the vacant possession to the plaintiff. Accordingly, he decreed the suit as prayed for and directed the defendants to remove the superstructures made in the suit property and deliver vacant possession of the suit property to the plaintiff within two months.

10. Aggrieved by the Trial Court's judgment and decree, the defendant Nos. 1 to 3 had filed an appeal in A.S.No.5 of 2012 on the file of the Principal Sub-Judge, Mayiladuthurai. The learned Principal Sub-Judge, Mayiladuthurai by the judgment dated 19.12.2012 had dismissed the said appeal and confirmed the judgment and decree passed by the Trial Court. Feeling aggrieved, the defendant Nos.2 and 3 have filed the present second appeal.

11. This Court at the time of admitting the second appeal, has formulated the following substantial questions of law:

"(1). Whether the plaintiff (first respondent) could claim the suit property as its own when it failed to produce the Property Register of the Devasthanam as per Section 29 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 to prove that the suit land did really belong to the Devasthanam?

(2) Whether plea of prescription and adverse possession could be set up against the religious institution when the suit property was found to have not belonged to it even as per its own Register of Property?

(3) Whether the law of limitation is available to the plaintiff (first respondent) when the Devasthanam failed to prove its ownership through proper property Registers of the Devasthanam while the defendants had cogent and continuous title deed relating to the same ? "

12. Heard Mr.S.B.Fazluddin, the learned counsel for the appellants and Mr.S.Sounther, the learned counsel for the first respondent.

13. Substantial Questions of Law 1 to 3:

The learned counsel for the appellants/defendant Nos.2 and 3 has submitted that as per Section 29 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (herein after referred to as "the Act ") for every religious

institution, shall prepare and maintain a Register in such form as the Commissioner may direct, showing the particulars of all other endowments of the institution and of all title deeds and other documents, etc. He further submitted that if really, the suit property belongs to the plaintiff and it was originally leased out to one Subramaniya Pillai on 31.05.1940, the said facts would have been reflected in the said Register, but, in this case, the plaintiff has not produced any such Register. He further submitted that the dispute as to whether the suit property belongs to the religious institution or not has to

be decided by the Joint Commissioner or Deputy Commissioner under Section 63 of the Act and as such the suit before the Civil Court, is barred under Section 108 of the Act. He further submitted that the plaintiff has not produced the original lease deed dated 31.05.1940 and failed to prove that the lease deed dated 31.05.1940 was acted upon. He further submitted that the plaintiff has not adduced any evidence to show that it has made any demand for payment of rent except the demand made in the year 2005, i.e., at the tail end.

14. The learned counsel for the appellants further submitted that there is no evidence to show that after the death of Subramaniya Pillai, his son Krishna Murthi Pillai continued as a tenant and after his death, the first defendant continued as a tenant. He further submitted that absolutely there is no evidence that the plaintiff had collected any rent either from the said Subramaniya Pillai or his son or the first defendant. He further submitted that Ex.B1 would show that Subramaniya Pillai had executed a will in favour of his son on 14.03.1973 and in pursuance of the said will, his son succeeded to the suit property and after his death, his wife (first defendant) succeeded to the suit property and sold to the defendant Nos.2 and 3. He further submitted that the eastern portion of the suit property was purchased by the third defendant from one Kaliya Perumal Chettiyar under the registered Sale deed dated 03.12.1994, the western portion was purchased by the second defendant from the first defendant under the registered sale deed dated 12.02.2004 and thereafter a multi storied building has been constructed by the defendant Nos.2 and 3 by getting permission from the municipality. He further submitted that the municipal authorities would not have granted permission unless they satisfied with regard to the title. He further submitted that at the time of making constructions, the plaintiff has not raised any objection and therefore, the plaintiff is estopped from claiming any right over the suit property.

15. The learned counsel for the appellants further submitted that the description of property given in the lease deed dated 31.05.1940 is not tallied with the description given

in the plaint schedule. He further submitted that the appellants and their predecessors in title have been in possession and enjoyment of the suit property for more than 50 years and hence they have perfected title by adverse possession. He further submitted that the Section 109 of the Act says that Limitation Act 1963 shall not apply to any suit for possession of immovable property belonging to any religious institution but it does not say anything about non-applicability of plea of adverse possession. He further submitted that the Trial Court failed to consider the said facts in proper perspective and decreed the suit and the First Appellate Court also mechanically confirmed the Trial Court's judgment and decree and hence he requests to allow the second appeal and set aside the judgments and decrees of the Courts below and dismiss the suit. In support of his contentions, he relied upon the decision in Inspector/Fit Person H.R. & C.E, Arulmighu Sunderasa Gnanar Koil Cholakadai Street Dharapuram Vs. Amithammal and Others - 2003 -1- L.W.681.

16. Per Contra, the learned counsel for the first respondent/plaintiff has submitted that the plaintiff has produced the original lease deed dated 31.05.1940 executed by Subramaniya Pillai and marked as Ex.A.7 and therefore, the contention of the appellants that the plaintiff has not produced the original lease deed is not correct. He further submitted that in the said lease deed, it is clearly stated that the suit site was leased out to the said Subramaniya Pillai only for constructing a residential house and further he has to pay Rs.3/- as rent for a fasali and further he agreed that he will surrender the vacant possession of the suit property as and when required by the plaintiff and further he will not alienate or encumber the suit property. He further submitted that as against the clause mentioned in Ex.A.7, the sons of Subramaniya Pillai had sold eastern portion of the suit property to one Kaliya Perumal and from the said Kaliya Peruaml the third defendant purchased the same and the first defendant had sold western portion of the suit property to the second defendant and the said sale deeds will not bind upon the plaintiff. He further submitted that since no prior sanction has been obtained from the Commissioner as mandated under Section 34 of the Act, the said sales are null and void. He further submitted that there is no dispute as to whether the property belongs to the Temple or not and hence Section 63 of the Act will not apply.

17. The learned counsel for the first respondent further submitted that Ex.A.7 is a thirty years old document and the same has been produced from proper custody namely by the plaintiff and therefore, as per Section 90 of the Indian Evidence Act, 1872, it has to be presumed that it is a genuine document. He further submitted that as per Section 116 of the Indian Evidence Act, 1872, the tenant is estopped from denying

title of the landlord during the continuance of the tenancy. He further submitted that Ex.A5 and A6 would show that the plaintiff has made demand for recovery of rent. He further submitted that the suit for recovery of possession is a common law remedy and the said relief can be asked before the Civil Court and the same is not barred under Section 108 of the Act. He further submitted that if the Limitation Act, applies then only the plea of adverse possession can be taken, whereas, Section 109 of the Act specifically excludes the application of Limitation Act in respect of religious institutions and hence the defendants cannot take a plea of adverse possession. He further submitted that the Courts below taking into consideration of all the aforesaid facts have concurrently held that the defendants 2 and 3 are encroachers and hence they are liable to surrender vacant possession of the suit property after removing constructions made there on and in the said concurrent findings, this Court cannot interfere. In support of the aforesaid contentions, he relied upon the decision in A.N.Kumar Vs. Arulmighu Arunachaleswarar Devasthanam Thiruvannamalai and Others - 2011 -2 -L.W.1.

18. The plaintiff has produced the Original lease deed dated 31.05.1940 said to have been executed by Subramaniya Pillai and marked as Ex.A7. Therefore, the contention of the appellants that the plaintiff has not produced the original lease deed cannot be accepted.

19. Ex.A.7 dated 31.05.1940 has been produced before the Trial Court on 21.08.2008 by the plaintiff. So, on the date of production of the said document before the trial court, it was more than thirty years old document. Under Section 90 of the Indian Evidence Act, 1872, the Court may presume the genuineness of the said document. Moreover, Ex.A7 is a registered document. So, it is having a sanctity. Further, when the said document was shown to D.W.2 during cross-examination, she has not denied that the signatures found in the said document are not that of her Father-in-law namely Subramaniya Pillai. On the contrary, she has stated that she cannot say whether the signatures found in Ex.A7 are her father-in-law's signatures or not. Further, she has admitted in her cross-examination, that RCC building was constructed in the suit property in the year 1994 and she has made such construction only after obtaining necessary permission from the municipality and further she has stated that she has obtained no objection certificate from the plaintiff ie., Devasthanam. Unless the suit property belongs the plaintiff Devasthanam, there was no necessity for getting no objection certificate from the Plaintiff Devasthanam for making construction.

20. The defendants claimed right over the suit property

through Ex.B.1 Will said to have been executed by Subramaniya Pillai dated 14.03.1973. In the said will, Subramaniya Pillai has simply stated that the suit property belongs to him but he has not stated how he acquired the said property, either as ancestral property or through purchase. As already pointed out that Ex.A.7 is a thirty years old document and has been produced from proper custody and in view of Section 90 of the Evidence Act, its genuineness cannot be disputed. Further, the defendants have not produced any evidence to show how the said Subramaniya Pillai got title over the suit property. Under the said circumstances, the case of the plaintiff has to be accepted.

21. Once it is proved that the plaintiff is the owner of the suit property and the same has been leased out to Subramaniya Pillai, as per Section 116 of the Indian Evidence Act, the tenants are estopped from denying the title of the land lord during continuance of the said tenancy.

22. Since the plaintiff has proved its title over the suit property and it leased out the suit property to Subramaniya Pillai under Ex.A7, merely because, the plaintiff has not produced the Register which has to be maintained under Section 29 of the Act, no adverse inference can be drawn against the plaintiff.

23. In Inspector/Fit Person H.R. & C.E, Arulmighu Sunderasa Gnanar Koil Cholakadai Street Dharapuram Vs. Amithammal and Others (cited supra) a suit was filed to declare a Samadhi is not a Public Temple. A Division Bench of this Court has held that the said dispute falls under Section 63(a) of Hindu Religious and Charitable Endowments Act and hence the suit is not maintainable. Whereas, in this case, no question arises as to whether the suit property is a private temple or public temple. Therefore, the aforesaid decision will not apply to the facts of this case.

24. In A.N.Kumar Vs. Arulmighu Arunachaleswarar Devasthanam Thiruvannamalai and Others (cited supra) a Division Bench of this Court in Paragraph No.49 has held as follows:

"49. We summarise our conclusions as under:

So far as the suits filed by the temple for eviction of tenants/licensees/lessees/mortgagees for filing of the ejectment suit, the Civil Court's jurisdiction is not barred. The decision to approach Civil Court or invoke the provisions of H.R & C.E. Act vests with the Temple.

In cases of encroachers, temple authorities can either resort to the provisions under Sections 78, 79-A, 79-B or to approach the Civil Court. The decision to elect a particular procedure lies

with the owner of the property, being the Temple.

In view of the express bar under 2 nd proviso to Section 79, in so far as the suits by the encroacher/lessees/licensees/mortgagees, the bar under Section 108 will get attracted excepting in instances specifically stated in the 1st proviso to Section 79".

25. From the aforesaid decision, it is clear that the suit filed by the Temple for eviction of tenant before the Civil Court is maintainable. Further, in cases of encroachers also the temple authorities can either resort to the provisions under Sections 78, 79-A, 79-B of the Act or to approach the Civil Court. In this case, the first defendant is the legal heir of the original tenant namely Subramaniya Pillai. So the suit for eviction against her is not barred. In so far as the defendants 2 and 3 are concerned, they have purchased the suit property from the first respondent herein and one Kaliya Perumal who are not having any right to sell the suit property and therefore, the defendants 2 and 3 have to be treated as encroachers. In view of the aforesaid decision, the suit is maintainable against them also.

26. As per Section 34 of the Act that any alienation of immovable property of any religious institution by way of sale, mortgage, exchange or lease for a term exceeding five years shall be null and void,

unless sanctioned by the commission as being beneficial or necessary for the institution. In this case, no such sanction has been obtained from the Commissioner. Therefore, the sale deeds executed in favour of the defendants 2 and 3 in respect of the suit properties are null and void and they will not bind upon the plaintiff.

27. As per Section 109 of the Act, the Limitation Act, 1963 shall not apply to any suit for possession of immovable property belonging to any religious institution. If the Limitation Act, 1963 applies then only as per Article 65 of the Limitation Act 1963, the plea of adverse possession can be taken. Since Section 109 of the Act, excludes the application of Limitation Act 1963, the defendants cannot take a plea of adverse possession.

28. The Courts below taking into consideration of all the aforesaid facts have concurrently held that the suit property belongs to the plaintiff Devasthanam and it was leased out to Subramaniya Pillai under Ex.A.7 Lease deed and in the said lease deed, the said Subramaniya Pillai had specifically agreed that he will not alienate or encumber the suit property

and in violation of the said clause, he executed Ex.B1 Will in favour of his sons and in pursuance of the said Will, his sons sold a portion of the suit suit property to one Kaliya Perumal under Ex.B2 and the said Kaliya Perumal in turn sold the said portion to the third defendant vide Ex.B4 and the first defendant sold another portion to the second defendant under Ex.B14 and the said sales are null and void as per Section 34 of the Act and hence the defendants are bound to surrender vacant possession of the suit property to the plaintiff after removing the superstructures. In the said concurrent findings, this Court cannot interfere. Accordingly, the Substantial Questions of Law are answered against the appellants/defendants 2 and 3.

29. In the result, the second appeal is dismissed confirming the judgments and decrees of the Courts below. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

Vv

To

1. The Principal Subordinate Judge,
Mayiladuthurai
2. The District Munsif Court,
Sirkazhi.
3. The Section Officer, VR Section,
High Court, Madras.

+1cc to Mr.S.B.Fazluddin, Advocate, S.R.No. 35203

+1cc to Mr.S.Sounthar, Advocate, S.R.No. 34400

S.A.No.289 of 2013
and

M.P.No.1 of 2013

MR(CO)
GN(14/10/2019)