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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.04.2019

PRONOUNCED ON : 23.05.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM
S.A.No.423 of 2013
and
M.P.No.1 of 2013

Kalavathy ... Appellant
Vs.

Arulmighu Ramantheeswarar Temple,
Porur, Chennai 600 116, rep. By
Executive Officer, having office at
A/M.Sakthi Vinayagar Temple at P.T.Rajan Salai,
K.K.Nagar, Chennai 600078. ... Respondent

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 12.12.2012 passed by the Subordinate Judge, Poonamallee made in A.S.No.6 of 2011 confirming the judgment and decree of Additional District Munsif, Poonamallee dated 29.11.2010 made in O.S.No.148 of 2005.

For Appellant : Mr.P.Gopalan

For Respondent : set exparte

JUDGMENT

This second appeal has been filed by the defendant against the judgment and decree passed by the Sub-Court, Poonamallee in A.S.No.6 of 2011 dated 12.12.2002 confirming the judgment and decree passed by the Additional District Munsif, Poonamallee in O.S.No.148 of 2005 dated 29.11.2010.

2. The respondent herein had filed a suit in O.S.No.148 of 2005 on the file of the Additional District Munsif, Poonamallee, for recovery of arrears of rent of Rs.1260/- and for mandatory injunction to direct the defendant to remove the multi-storied building which has been unauthorisedly constructed by her in the suit property. The learned Additional District Munsif, Poonamallee, by the Judgment dated 29.11.2010 had decreed the said suit directing the defendant to handover the suit property to the plaintiff. Aggrieved by the same, the defendant had filed an appeal in A.S.No.6 of 2011 on the file of the Sub-Judge, Poonamallee. The learned Sub-



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Judge, Poonamallee by the judgment dated 12.12.2012 had partly set aside the judgment and decree passed by the trial court and dismissed the suit in so far as the prayer (a) is concerned and in so far as the prayer (b) is concerned, she has granted mandatory injunction as prayed for. She granted three months time for removal of unauthorised construction. Feeling aggrieved, the defendant has 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 absolutely belonged to the plaintiff. It is used for residential purpose. The defendant became a tenant under the plaintiff in or about 1985 on a monthly rent of Rs.35/-. The tenancy is an oral one for residential purpose according to the English Calendar month. The defendant is irregular in payment of monthly rent from the date of inception. The defendant had wantonly failed to pay the ground rent at the rate of Rs.35/- per month from January, 2002 till January, 2005 amounting to Rs.35x36= 1260/- in spite of number of oral demands made by the plaintiff. Apart from committing wilful default in payment of rents, the defendant had put up a pucca storied building in the suit site without the knowledge and consent of the plaintiff and sub-let it to the third parties with a view to enrich herself by squatting on the suit property. The defendant had violated the terms of the oral lease, non-payment of ground rent, by way of putting up storied building and sub-letting the same. When the plaintiff has questioned about the construction of the defendant, she has not replied properly. Hence, the plaintiff was constrained to file the above suit for recovery of arrears of rent and for mandatory injunction to remove the storied building which has been unauthorisedly constructed without the consent of the plaintiff in the suit property.

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

The defendant became a tenant on 01.05.1994 and not in the year 1985 as alleged in the plaint. The monthly rent is Rs.35/-. In the schedule of property, the description of the property has not been properly given. The defendant never put up any building as alleged. The defendant purchased the building from one S.Rajabather who purchased the same from one Nithyanandam, who was a tenant of the plaintiff in respect of the ground. There is a registered sale deed in favour of S. Rajabather in respect of the suit property in the year 1989. The plaintiff is very well aware of the facts. The defendant



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only altered and not put up any new construction or any multi-storied buildings as alleged in the plaint. On the contrary, she only altered the building which was already in existence. The plaintiff has not issued any notice before filing the suit. Hence, there is no violation of oral lease. Even before filing of the suit, the defendant had sent a sum of Rs.840/- being arrears of rent for the period from January 2004 to December 2004. On 01.04.2005, the rents for the period from January 2005 to June 2005 were sent by Money Order which was refused by the plaintiff. Hence, there is no arrears of rent as alleged in the plaint. There is no cause of action for filing the suit. There are about 750 families occupied in the temple property and paying ground rent to the plaintiff and the tenants put up buildings and multi-storied complex. The suit is concocted one and not maintainable and therefore, the defendant prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned Additional District Munsif, Poonamallee had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, one witness was examined as PW1. Exs.A1 and A2 were marked as exhibits on the side of the plaintiff. On the side of the defendant, the defendant examined herself as DW1 and marked exhibits as Exs.B1 to B5. The Additional District Munsif, Poonamallee, after considering the materials placed before her found that the defendant had paid the arrears of the rent of Rs.1260/- but the said amount was paid belatedly and hence, she committed wilful default. She further found that the defendant in violation of the rental agreement had changed the character of the suit property. Accordingly, she directed the defendant to handover the suit property to the plaintiff. Aggrieved by the same, the defendant had filed an appeal in A.S.No.6 of 2011 on the file of the Sub-Judge, Poonamallee. The learned Sub-Judge had partly allowed the said appeal and set aside the judgment and decree passed by the trial court and modified the said decree to the effect that as far as the prayer (a) is concerned, the suit is dismissed. As far as the prayer (b) mandatory injunction is concerned, the suit is decreed as prayed for. She granted three months time for removing unauthorised construction. Feeling aggrieved, the defendant has filed the present second appeal.

7. This court at the time of admitting the second appeal has formulated the following substantial questions of law:

'1) On the available facts and circumstances of the case, whether the Respondent-Temple is entitled to a decree for



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Mandatory injunction on the basis of oral lease?

2) Whether the learned Judge is right in holding that suit filed by the Executive Officer is maintainable, when admittedly, in the decision of the Division Bench reported in 2004(3) Law Weekly 529, it was held that only the Trustees of the Temple can represent the idol ?"

8. Though notice has been served on the respondent on 19.04.2013 and the name of the respondent also printed in the cause list, the respondent has not appeared either in person or through counsel and hence, the respondent has been set exparte. Hence, after hearing the arguments of the learned counsel for the appellant and perusing the records, the judgment is being passed in this second appeal.

9. Substantial questions of law 1 and 2:

The learned counsel for the appellants has submitted that though the plaintiff had filed a suit for recovery of arrears of rent and for mandatory injunction to remove the construction made by the defendant in the suit property, the trial court had mechanically decreed the suit directing the defendant to deliver vacant possession of the suit property. The first appellate court also failed to consider that the Executive Officer has no locustandi to file the above suit and therefore, he prayed to allow the second appeal and set aside the judgments and decrees passed by the courts below. In support of the aforesaid contentions, the learned counsel for the appellant has relied upon the following decisions:-

1. Sri Arthanareeswarar of Tiruchengode by its present Executive Officer, Sri Sabapathy Vs. T.M. Muthuswamy Padayachi & Others 2003-1-LW-386.

2. Executive Officer, A/m. Subramaniaswamy Thirukovil, Sivan Malai Village, Kangayam Taluk, Tiruppur District Vs. P. Subramaniam and 64 others 2018 (3) MWN (Civil) 45

10. A perusal of the plaint prayer shows that the above suit has been filed for recovery of arrears of rent of Rs.1260/- and for mandatory injunction to direct the defendant to remove the storied building of the suit property but the trial court misconstrued the prayer and granted decree for delivery of possession. As against the said judgment and decree of the trial court, the defendant had filed an appeal in A.S.No.6 of 2011 on the



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file of the Sub-Judge Poonamallee. The learned Sub-Judge found that the plaintiff temple has recovered the arrears of rent pending suit and hence the suit in respect of the prayer for recovery of rent has to be dismissed. She further found that the defendant had constructed the storied building without consent from the plaintiff temple and hence she is bound to remove the same. She further found that since the suit is only for mandatory injunction and not for delivery of possession, the notice under Section 106 of the Transfer of Property Act terminating the lease is not necessary. She further found that though the defendant has raised several grounds regarding the power of the Executive Officer to the plaintiff temple to represent the temple and relied upon some decisions on this aspect, he has not canvassed the said point during arguments nor produced the authorities. Accordingly, she partly allowed the said appeal and set aside the judgment and decree passed by the trial court and modified the same to the effect that as far as the prayer (a) is concerned, the suit is dismissed and as far as prayer (b) for mandatory injunction is concerned, the suit is decreed as prayed for and granted three months time for removal of unauthorised construction.

11. In Sri Arthanareeswarar of Tiruchengode by its present Executive Officer, Sri Sabapathy Vs. T.M. Muthuswamy Padayachi & Others, (cited supra), the Division Bench of this court in paragraph Nos.19 to 21 has observed as follows:

19. Maintainability of the suits : The Executive Officer's suit is filed by the then Executive Officer. The case of the Executive Officer is that after his appointment in the year 1970, he came to know, after enquiry, that the suit property is a trust property and that the various registered documents obtained are colourable and not binding on the temple. Though the question as to the competency of the Executive Officer to file the suit was not raised in the written statements, the question was raised in the course of argument that under the H.R. & C.E. Act, the Board of Trustees alone have been empowered to sue and be sued and that before filing the suit, enquiries have been made by the authorities of the H.R. & C.E. Department and it was found that there was no Nandavanam in the suit property. Rejecting the objection of the plaintiffs, the trial court proceeded to consider the question of maintainability as the question of law and found that the Executive Officer had no authority to file the suit and that he cannot invoke Article 96



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of the Limitation Act. The Supreme Court, in STATE OF RAJASTHAN VS. RAO RAJA KALYAN SINGH, 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.

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.A.12. On a perusal of Ex.A.12 dated 24.6.1970, it is seen that instructions were issued to the Executive



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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 26.5.1970 and an order dated 24.6.1970 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."

12. He has also relied upon the decision of the Single Judge of this Court in Executive Officer, A/m.Subramaniaswamy Thirukovil, Sivan Malai Village, Kangayam Taluk, Tiruppur District Vs. P. Subramaniam and 64 others, (cited supra), in paragraph No.23 has observed as follows:

" 23. In the present case, admittedly no permission was granted to the Executive Officer by the Commissioner of H.R. and C.E. Department. This has been admitted by the Executive Officer in his evidence as P.W.1. He has deposed that he has independent power to file the suit and there is no necessity to obtain any permission from anybody to file



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the suit. Contrary to the said evidence of the Executive Officer, the learned counsel for the appellant has contended that the trustees have power to file the suit representing the temple or authorise any other person to file the suit and that in the present case, the board of trustees have passed resolution authorising Executive Officer to file the suit. The said resolution was not marked by the appellant and the respondents ought to have taken steps under Order XVI C.P.C. to call for the said resolution to prove their case. These contentions of the learned counsel for the appellant are without merits. When the plaintiff comes with a specific case, it is for the plaintiff to prove the same by acceptable evidence. The issue whether the Executive Officer can file the suit without obtaining permission from the Commissioner or can file the suit only after obtaining permission from the Commissioner, is no longer res-integra. This issue had been considered by the Division Bench of this Court in the judgment reported in 2003 (1) L.W. 386 (Sri Arthanareeswarar of Tiruchengode by its present Executive Officer, Sri Sabapathy v. T.M.Muthusamy Padayachi), wherein the Division Bench of this Court held that the suit filed by the Executive Officer without obtaining permission from the Commissioner is not maintainable. The Division Bench of this Court came to the conclusion, after considering the earlier judgments on this issue. I had an occasion to consider this issue in Order dated 01.11.2017 passed in C.R.P.(NPD)No.2112 of 2014 (V.Kuppusamy v. A/M.Prasanna Vinayagar Thirukoil) and held that the suit filed by the Executive Officer without obtaining permission from the Commissioner is not maintainable by following the ratio laid down in the judgment reported in 2003 (1) L.W. 386 ".

From the aforesaid decisions, it is clear that the suit filed by the Executive Officer without obtaining permission from the Commissioner is not maintainable. In this case, she has not stated that she has obtained permission from the Commissioner for filing the above suit. Therefore, in view of the aforesaid decisions, the suit filed by Executive Officer is not maintainable. Accordingly, the substantial questions of law are answered in favour of the appellant/defendant.



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13. In the result, the second appeal is allowed. Consequently, connected miscellaneous petition is closed. No costs. The judgment and decree passed by the courts below are set aside and the suit in O.S.No.148 of 2005 is dismissed. It is open to the concerned Executive Officer to file a fresh suit after getting necessary permission from the Commissioner of HR & CE Department, if he is advised so.

Sd/-

Assistant Registrar(CS)

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Sub Assistant Registrar

gv

To

1. The Subordinate Judge,
Poonamallee.

2. The Additional District Munsif,
Poonamallee.

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

+1cc to Mr.P.Gopalan , Advocate SR.No. 44527

S.A.No.423 of 2013

and

M.P.No.1 of 2013

A.SK(06/11/2019)