

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.02.2019

PRONOUNCED ON : 23.05.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.1001 of 2014

Arulmigu Selva Vinayagar Koil, Manjakuppam and
Arulmigu Dharmarajar Koil, Manjakuppam, Cuddalore
N.T. Represented by its Executive Officer,
having its Office at No.1, Varadaraja Perumal Temple,
Sanjeeva Naidu Street,
Thirupapuliyur, Cuddalore 607 002.

... Appellant/plaintiff

Vs.

1. Mani alias Kalaimani
2. The Sub-Inspector of Police,
having its Office at Bharathi street,
Cuddalore - 607 001. ... Respondents/defendants

PRAYER : Second Appeal filed under Section 100 of C.P.C.,
against the judgment and decree dated 20.03.2014 made in
A.S.No.5 of 2013 on the file of the Principal Subordinate Judge,
Cuddalore, confirming the judgment and decree dated 31.10.2012
made in O.S.No.165 of 2007 on the file of the Principal
District Munsif, Cuddalore.

For Appellant : M/s. T.S.Baskaran

For Respondents : M/s.U.Venkatesan for R1

JUDGMENT

This second appeal has been filed by the plaintiff against
the judgment and decree passed by the Principal Sub-Judge,
Cuddalore, in A.S.No.5 of 2013 dated 20.03.2014 confirming the
judgment and decree passed by the Principal District Munsif,
Cuddalore in O.S.No.165 of 2007 dated 31.10.2012.

2. The appellant herein had filed a suit in O.S.No.165 of 2007
on the file of the Principal District Munsif, Cuddalore, for

recovery of possession of the suit property from the first defendant, to direct the first defendant to pay a sum of Rs.77,500/- towards the damages for use and occupation of the suit property and for mesne profits and to direct the second defendant to give legal and suitable assistance to the plaintiff for taking delivery of the suit properties. The learned District Munsif, Cuddalore, by the judgment dated 31.10.2012 had dismissed the said suit. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.5 of 2013 on the file of the Principal Sub-Judge, Cuddalore. The learned Principal Sub-Judge, Cuddalore, by the judgment dated 20.03.2014 had dismissed the said appeal confirming the judgment and decree passed by the trial court. Feeling aggrieved, the plaintiff 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 belongs to the plaintiff temples. The defendant is a trespasser. The defendant had filed a suit in O.S.No.991 of 2004 on the file of the District Munsif, Cuddalore, for permanent injunction claiming title to the suit property. In that suit, the plaintiff herein was the defendant. The said suit has been decreed with a direction that the possession of the defendant cannot be disturbed till he is legally evicted under due process of law. The possession and enjoyment of the defendant is illegal and unlawful and hence he is liable to pay damages for use and occupation of the suit property. The second defendant is an authority to maintain law and order and cooperate with the plaintiff to take delivery of the suit property through execution. Hence, the second defendant has been impleaded as a party to the suit. The defendant has been in possession and enjoyment of the suit property from the year 1975 and realising the income from the suit property. Hence the first defendant is liable to pay the damages to the temple. The plaintiff estimates the damages at Rs.2500/- per year from the year 1975. The total damages comes to Rs.77500/- . There is no limitation to recover the aforesaid amount as the suit property is the trust property. Hence, the plaintiff had filed the above suit for recovery of possession of the suit property; recovery of damages of Rs.77500/- from the first defendant and to direct the second defendant to provide legal and suitable assistance for taking delivery of the suit property by the plaintiff.

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

The suit as framed is not maintainable. Arulmigu Selva Vinayagar and Arulmigu Dharmarajar are different entities and it

is not known which temple is claiming title for the suit properties. The suit without seeking declaration of title is not maintainable. The allegation that the suit property belongs to the plaintiff temples and the first defendant is a trespasser and he is in possession of the suit property from the year 1975, are all false. The suit properties are the ancestral properties of the first defendant's family. They have been in possession and enjoyment of the suit property from time immemorial. To the knowledge of the first defendant, his grandfather Kaliyasamy was in possession and enjoyment of the suit properties till he died in or about 1971 and after his death, the first defendant and his paternal uncles Gajapathi and Senthamarai Kannan were jointly in possession till 1975 and thereafter the first defendant continues to be in possession and enjoyment of the suit properties, claiming absolute title, adverse to the interest of anyone else and hence, he perfected title by adverse possession also. The first defendant came to know in or about the year 1999 that the patta was wrongly issued in favour of the plaintiff and after coming to know of the said fact, he gave a petition to the Tahsildar and after enquiry, the patta has been transferred to the name of the first defendant. The first defendant is in "Settled Possession" of the suit properties. There is no dispute all these years. The plaintiff gave a petition to the District Revenue Officer, Cuddalore, for re-transfer of patta and without proper enquiry, the patta which was granted in favour of the first defendant has been cancelled on 25.11.2004. The order passed by the District Revenue Officer is null and void and without jurisdiction. Further the patta will not confer any title to the plaintiff. The plaintiff attempted to interfere with the first defendant's peaceful possession and enjoyment and hence he filed a suit in O.S.No.991 of 2004 on the file of the District Munsif, Cuddalore, for permanent injunction not to disturb his settled possession except by due process of law and the said suit was decreed on 30.08.2005. The first defendant is not liable to pay any damages and he is not liable to surrender possession. The suit is barred by limitation. Since the plaintiff was never in possession of suit properties, the title of the plaintiff, if any, is got extinguished by lapse of time and hence the suit is barred by limitation. The second defendant is an unnecessary party to the suit. In any event, the plaintiff is not entitled to file a suit for recovery of possession in civil suit and the civil suit has no jurisdiction to try the above suit. Therefore, the first defendant prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned District Munsif, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, one witness was examined as PW1 and Exs. A1 to A9 were marked as exhibits. On the side of the first defendant, the first defendant examined himself as DW1

but he has not marked any exhibits on his side. The second defendant remained exparte before the trial court.

7. The learned District Munsif, after considering the materials placed before her, found that since the first defendant had already filed a suit in O.S.No.991 of 2004 claiming title over the suit property, the plaintiff ought to have filed a suit for declaration of title. She further found that the plaintiff has not produced any documentary evidence except the patta to show that the suit temples are absolute owners of the suit property. She further found that the patta is not a document of title and hence based on the patta alone, the plaintiff cannot claim title over the suit property. She further found that the Executive Officer is not a competent person to file the above suit for delivery of possession and damages. Accordingly, she dismissed the suit. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.5 of 2013 on the file of the Sub-Judge, Cuddalore.

8. The learned Principal Sub-Judge, Cuddalore had dismissed the said appeal confirming the judgment and decree passed by the trial court. Feeling aggrieved, the appellant has filed the present second appeal.

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

"i) Whether the courts below were right in holding that the findings of issues of title of the suit properties rendered in OS.No.991 of 2004 is not resjudicate in the present proceeding contrary to the dictum in 2009 (1) MLJ 1001, 2004 (6) SCC 202 and 1994 (2) SC 14?

ii) Whether the courts below were in error in dismissing the suit filed by the Temple through its Executive Officer in the absence of proof of existence of duly constituted Board of Trustees to represent the Temple?"

10. Heard Mr. T.S.Baskaran, learned counsel for the appellant and Mr.U.Venkatesan, learned counsel for the respondents.

11. Substantial Questions of law 1 and 2:

The learned counsel for the appellant has submitted that the courts below failed to consider that there is no duly constituted Board of Trustees to represent the plaintiff temples and in such consideration, the suit filed by the plaintiff temples through Executive Officer is legally

maintainable. He further submitted that in O.S.No.991 of 2004, the court recorded the findings that the suit property belongs to the plaintiff temples and the first defendant herein has been in possession and enjoyment of the suit property only as a trespasser for a long period and hence he can be evicted only by due process of law. He further submitted that the said findings would operate as resjudicata and hence the first defendant is not entitled to deny the title of the plaintiff. The courts below without taking into consideration of the aforesaid facts have mechanically rejected the claim of the plaintiffs and therefore, he prayed to allow the second appeal and set aside the judgment and decree passed by the courts below and decree the suit as prayed for.

12. Learned counsel for the appellant/plaintiff in support of the aforesaid contentions relied upon the following decisions:

- i) Sulochana Amma Vs. Narayanan Nair (1994) 2 SCC 14
- ii) P.Lakshmanan Vs. The Superintendent of Police, Sivagangai District, Sivagangai and others (WP. (MD).No.14428 of 2007 on the file of Madurai Bench of this court dated 12.02.2018.)

13. Per contra, the learned counsel for the first respondent/first defendant has submitted that as per Section 45 (2) of the Tamilnadu Hindu Religious and Charitable and Endowments Act, (hereinafter referred to as HR & CE Act), the Executive Officer exercises such power and discharges such duties as may be assigned to him by the Commissioner. He further submitted that in this case, the PW1 has categorically admitted in his evidence that he has not been authorised by the Commissioner for filing the present suit and hence, the Executive Officer is not competent to file the present suit. He further submitted that the first defendant denied the title of the plaintiff, the burden is upon the plaintiff to prove the title over the suit property. He further submitted that the plaintiff has not produced any documents, except the patta, to show the title over the suit property. He further submitted that the patta is not a document of title and hence based on the patta, the title cannot be decided. He further submitted that the first defendant has filed a suit in O.S.No.991 of 2004 seeking permanent injunction and the said suit has been decreed holding that the first defendant herein cannot be evicted from the suit property except by due process of law. He further submitted that since the suit has been decreed, the first defendant herein cannot file an appeal against the adverse findings recorded against him in that suit and therefore, the said findings, will not operate as resjudicata. He further submitted that taking into consideration of the aforesaid facts, the trial court has dismissed the plaintiff's suit and the same has been confirmed by the first appellate court and in the said factual concurrent findings, this court cannot interfere and

therefore, he prayed to dismiss the second appeal.

14. The learned counsel for the first respondent in support of the aforesaid contentions, relied upon the following decisions:

i) Obla Subbier and Others Vs. Ramaswami Konar AIR 1932 Madras 541.

ii) Ramesh Chandra Vs. Shiv Charan Das, AIR 1991 SC 264

iii) Anathula Sudhakar vs P. Buchi Reddy (Dead) By Lrs & Ors, AIR 2008 SC 2033

iv) E.Sathidass vs C.Ponnuswamy, 2011 (1) CTC 801

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

15. In Sulochana Amma Vs. Narayanan Nair, (cited supra), the respondent filed a suit in O.S.No.151 of 1972 on the file of the District Munsif Court to restrain K from alienating the properties and committing act of waste. Pending the suit, the appellant purchased the suit property on 7th April, 1975 under Ex.B1 from one Narayanan Nair and Chennan. The trial court, by its judgment and decree dated 18.11.1975, decreed the suit holding that K had no right to alienate the lands and permanent injunction was issued restraining him from committing the acts of waste. The appeal in A.S.No.31 of 1976 by K was dismissed on 09.06.1978. The appellant, being not a party to the earlier suit, when he was committing acts of waste, the respondent filed O.S.No.237 of 1975 against K and the appellant for perpetual injunction restraining them from committing the acts of waste. The said suit was decreed on 22.10.1981, but the validity of the appellant's title was left open. The respondent filed another suit in O.S.No.61 of 1982 for declaration of his title and possession against the appellant. The trial court by the judgment and decree dated 14.10.1986, decreed the suit and granted mesne profits. On appeal, it was confirmed. The second appeal was dismissed. Thus an appeal filed before the Hon'ble Supreme Court by special leave. In that case, it was contended that the remedy of injunction is an equitable relief and in equity, the doctrine of resjudicata cannot be extended to a decree of a court of pecuniary jurisdiction. The Hon'ble Supreme Court has held that is a settled law that in a suit for injunction when title is in issue for the purpose of granting injunction, the issue directly and substantially in issue in a later suit filed in a court of unlimited jurisdiction, the result would flow is that an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a competent court or tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as res judicata in a subsequent suit or proceeding, notwithstanding the fact that such court of

limited or special jurisdiction was not a competent court to try the subsequent suit. But in this case, the facts are totally different. In this case, the first defendant herein filed a suit in O.S.No.991 of 2004 for the relief of permanent injunction restraining the plaintiff herein from disturbing his peaceful possession and enjoyment of the suit property except under due process of law. The said suit was decreed, however, an adverse finding has been recorded that the plaintiff herein is the owner of the suit property and that the first defendant herein is only a trespasser but since he is in settled possession, he can be evicted only by due process of law. An appeal can be filed only against the judgment and decree and not against the findings. If the plaintiff herein had filed any appeal against the decree passed in O.S.No.991 of 2004, the first defendant herein could have an opportunity to challenge the said findings, by way of filing cross objection. But in this case, no such appeal has been filed by the plaintiff herein and hence, there was no occasion for the first defendant to challenge the findings of the trial court in O.S.No.991 of 2004. Therefore, the the aforesaid decision will not help the appellant/plaintiff.

16. In *Obla Subbier and Others Vs. Ramaswami Konar* (cited supra), this court has held that where a decree is in favour of the plaintiff, an adverse finding on an issue that in no way affects the decree, cannot be treated as res judicata in a subsequent litigation between the parties which raises the same issue.

17. In *Ramesh Chandra Vs. Shiv Charan Das* (cited supra), the Hon'ble Supreme Court also has taken the same view.

18. In *E.Sathidass vs C.Ponnuswamy*, this court has held that any incidental findings in an injunction suit as it has been done in this case, would not operate as res judicata in the subsequent suit, if any that would be filed by the plaintiff for establishing his alleged title over the suit property. Therefore, the findings in O.S.No.991 of 2004 will not operate as res judicata.

19. In *Anathula Sudhakar vs P. Buchi Reddy (Dead) By Lrs & Others*, (cited supra), the Hon'ble Supreme Court has held that where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction. In this case, the first defendant not only denied the title of the plaintiff but also set up a title by himself. In such a case, the plaintiff should have amended the plaint for the relief of declaration of title. But he has not amended the plaint to declare his title.

20. In Sri Arthanareeswarar of Tiruchengode by its present Executive Officer, Sri Sabapathy Vs. T.M. Muthuswamy Padayachi, etc., & others, (cited supra), a Division Bench of this court in paragraph Nos.20 and 21 has observed as follows:

"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 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."

From the aforesaid decision, it is clear that the Executive Officer shall exercise such power and discharge such duties as may be assigned to him by the Commissioner. In this case, the PW1 has categorically admitted in his cross examination that he has not been authorised by the Commissioner to file the above suit. Therefore, in view of the aforesaid decision of the Division Bench, the Executive Officer is not a competent person to institute the suit.

21. In P.Lakshmanan Vs. The Superintendent of Police, Sivagangai District, Sivagangai and others, (cited supra) also, it was not held that the Executive Officer is empowered to file a suit. On the contrary, it has been observed that the Joint Commissioners are clothed with the power to retrieve the temple lands from the encroachers by exercising the power under Sections 78, 79 and 80 of HR & CE Act. Further, in that case, this court gave a direction to the fifth respondent therein (The Commissioner) that he shall instruct the appropriate Assistant Commissioners/Joint Commissioners to initiate inquiry under Section 78 of the HR & CE Act to retrieve the temple lands from the encroachers and shall submit a report to that effect within four weeks.

22. In this case, the title of the plaintiff over the suit property is denied by the first defendant. Hence, it is for the Commissioner to decide whether this case falls within the ambit of Section 78 of the HR & CE Act. If he feels that this case falls within the ambit of Section 78 of the said Act, he has to follow the directions issued by this court in P.Lakshmanan Vs. The Superintendent of Police, Sivagangai District, Sivagangai and others (cited supra), or otherwise, he has to authorise the concerned Executive Officer to file a Civil Suit for appropriate reliefs.

23. In this case, the courts below taking into consideration of the aforesaid facts have concurrently found that the Executive Officer has not been authorised to file the suit and further that the plaintiff should have asked for the relief of declaration of title and in the said factual concurrent findings, this court cannot interfere. Accordingly, the substantial questions of law are answered against the appellant/plaintiff.

24. In the result, the second appeal is dismissed confirming the judgments and decrees of the courts below. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

Gv

To

1. The Principal Subordinate Judge,
Cuddalore.
2. The Principal District Munsif,
Cuddalore.

+1cc to Mr.K.Govindaraj, Advocate, S.R.No.44166
+1cc to Mr.T.S.Baskaran, Advocate, S.R.No. 44168

S.A.No.1001 of 2014

SSV(CO)
GN(16/07/2019)