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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.07.2021
PRONOUNCED ON : 13.08.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.1224 of 2007
and
M.P.No.1 of 2007

S.Radhabai ... Appellant/Defendant

Vs.

Bharani Abishheka Kattalai
attached to A/M Arunachaleswarar Thirukoil,
Rep. by its Deputy Commissioner/Executive Officer,
Hindu Religious & Charitable
Endowments Department,
Having its Office at the Thirukoil
Premises at Thiruvannamalai. ... Respondent/Plaintiff

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Code of Civil Procedure, against the Judgment and decree dated 22.12.2006 passed in A.S.No.695 of 2005 on the file of the Additional District and Sessions Court, Chennai, reversing the judgment and decree dated 29.06.2005, passed in O.S.No.3998 of 1999 on the file of the II Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.S.Kalyanaraman

For Respondents: Mr.A.K.Sriram
for M/s.A.S.Kailasam Associates

J U D G M E N T

The present second appeal has been filed challenging the judgment and decree dated 22.12.2006 passed in A.S.No.696 of 2005 on the file of learned Additional District and Sessions Judge (FTC-V), Chennai, reversing the judgment and decree dated 29.06.2005, passed in O.S.No.3998 of 1999 on the file of the II Assistant Judge, City Civil Court, Chennai.

2. Originally, the plaintiff has filed the suit before the learned II Assistant Judge, City Civil Court, Chennai, in O.S.No.3998 of 1999, seeking the following reliefs.



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- (i) For a direction, directing the defendant to quit and deliver the vacant possession of the suit schedule property to the plaintiff;
- (ii) For a direction, directing the defendant to pull down the superstructure found in the schedule mentioned property, to pay a sum of Rs.2,000/- p.m. for use and occupation, from the date of plaint, till the date of delivery and possession; and for costs.

The learned II Assistant Judge, City Civil Court, Chennai, by judgment and decree dated 29.06.2005, dismissed the suit with costs.

3. Aggrieved over the same, the plaintiff preferred an appeal in A.S.No.695 of 2005, on the file of the learned Additional District and Sessions Judge [FTC-V], Chennai. By judgment and decree dated 22.12.2006, the learned Additional District and Sessions Judge [FTC-V], Chennai, had allowed the appeal filed by the plaintiff and granted a decree in favour of plaintiff. Feeling aggrieved over the same, the appellant/defendant, preferred the instant second appeal, praying to set aside the findings arrived at by the first appellate Court.

4. For the sake of convenience, the parties are referred to as prescribed before the trial Court.

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

(i) The suit schedule property bearing Door No.338, an extent of 0.1249 sq.ft, belongs to the plaintiff's temple and has been leased out on a monthly rent of Rs.19/- per month to the defendant. It is further agreed between the parties that without written consent of the Temple authorities, the Lessee should not put up masonry structure on the leased land. But, despite protest from the plaintiff by sending telegram on 18.09.1998, the defendant has violated the condition and put up a puccaa masonry construction.

(ii) Therefore, the plaintiff caused a legal notice terminating the tenancy of the defendant on 20.10.1998 by directing the defendant to quit and deliver vacant possession of the schedule property on 01.12.1998 after removing the superstructure thereon. Even after the receipt of notice, the defendant failed to comply the same. The defendant is also liable to pay future damages of Rs.2,000/- per month from the date of plaint till the date of delivery of possession for use and occupation. Hence, the suit.



6. The case of the defendant, is as follows:

(i) The defendant has contended that on 15.07.1976, from the vendor by name, C.Y.Sundararajan, she had purchased the suit schedule property along with superstructure. In that sale deed, the existence of superstructure is clearly narrated. In the sale deed dated 22.06.1938, executed by Ethirajulu and others in the name of one Govindaraja Shetty, pertains to the suit schedule property, there was a recital in respect of the presence of superstructure. In the subsequent sale deeds to various persons also, the existence of Puccaa superstructure is clearly mentioned. Just to evict her, the plaintiff had created and concocted the story that the defendant has put up a puccaa construction without the consent of the plaintiff. The damages claimed by the plaintiff is exorbitant and unlawful.

(ii) After admitting as the superstructure is built up by the defendant, the claim made by the plaintiff in respect of use and occupation is not legal and as such, the defendant is not liable to pay any damages. While issuing the notice under Section 106 of the Transfer of Property Act, the plaintiff has failed to follow the requirements of the said provisions and thereby the notice sent by the plaintiff is a defective one. Hence, the suit filed by the plaintiff is liable to be dismissed.

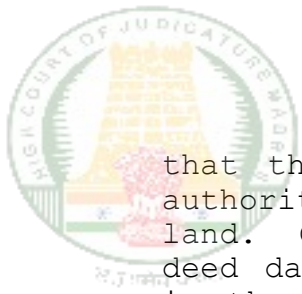
7. Based on the above pleadings, the learned II Assistant Judge, City Civil Court, Chennai, framed necessary issues and tried the suit. On the side of the plaintiff, one Mrs.Suseela, was examined as PW1 and four documents were marked as Exs.A1 to A4. On the side of the defendant, one Mr.Subramani, was examined as DW1 and two documents were marked as Exs.B1 and B2.

8. Having considered all the materials placed before him, the learned II Assistant Judge, City Civil Court, Chennai, vide judgment and decree dated 21.07.2006, dismissed the suit filed by the plaintiff.

9. Aggrieved over the same, the plaintiff preferred an appeal in A.S.No.696 of 2005 on the file of the learned Additional District and Sessions Judge (FTC-V), Chennai.

10. During the pendency of the said appeal, the plaintiff filed an application under Order 41 Rule 27 of the Code of Civil Procedure in C.M.P.No.42 of 2006, praying to receive the document i.e. The proceedings of the Commissioner, HR&CE Department, issued in R.Dis.No.33812/1960 dated 11.08.1961, as additional document and to mark the same as an exhibit on the side of the plaintiff.

11. The learned Additional District and Sessions Judge (FTC-V), Chennai, by order dated 22.12.2006, allowed the said application and after receiving the petition mentioned document,



that the defendant herein without getting permission from the authority, had constructed a permanent structure in the leased land. On the other hand, on the side of the defendant, the sale deed dated 15.07.1976, in respect of the suit property, stands in the name of the defendant, was marked as Ex.B2. The said document reveals the fact that the leased property was purchased by the defendant with superstructure. Therefore, from the said document it is evident that the defendant has purchased the suit land with the existing superstructure. Therefore, it is made clear that the notice dated 20.10.1998, issued by the plaintiff is with full of false averments.

16. However, in the said notice dated 20.10.1998, there was a direction to the defendant to quit and deliver vacant possession on 01.12.1998 after removing the superstructure thereon. In this connection, it is necessary and useful to see the judgment of S.Venkatasamy Vs. S.Rajaram, reported in 1995 AI HC 3210 : LAWS (MAD) - 1995-1-140, wherein, this Court has held as follows:

"In the case of month to month tenancy, the period of notice is 15 days. In this case the notice was issued on 6-5-1988 terminating the tenancy with the end of May, 1988. Admittedly, their tenant had more than 20 days notice. There is absolutely no necessity for the owner of the -building to give any reason for terminating the tenancy."

17. By applying the ratio laid down in the above referred judgment to the case on hand, herein also, it is admitted on either side that the tenancy pertains to the leased land is on monthly basis. In this regard, notice has been issued after giving 40 days time, to quit and deliver vacant possession. Therefore, herein also, there is absolutely no necessity for the plaintiff to give reason for terminating the tenancy. Even assuming that the notice issued by the plaintiff is having a false averment, that alone would not be a reason for treating the notice as a defective one. Accordingly, this Court is of the opinion that the notice issued under Section 106 of the Transfer of Property Act, is not a defective one.

Substantial Question of Law No.I:-

18. In respect of substantial question of law No.I is concerned, before the Courts below, the contention raised by the defendant is that the plaintiff viz., the Executive Officer of the Temple is not a competent person to institute the suit on behalf of the Temple. Further, the contention of the appellant in this appeal is that after allowing the application filed by the plaintiff under Order 41 Rule 27 C.P.C. while at the time of marking additional document as Ex.A5, the appellant/defendant



was not provided with any opportunity to test the veracity of the document. Therefore, by relying on Ex.A5, which has been marked against the principles of law i.e., without giving opportunity to the defendant, it cannot be held that the plaintiff is having right to institute the suit. In this regard, the learned counsel appearing for the appellant relied on the decision of this Court in the case of T.Tamilarasan Vs. Arokkiasamy and others reported in 2007 (2) LW 999, wherein this Court has held as follows:-

'14.A reading of the Judgment of the first appellate Court shows that the first appellate Court has straight away taken the additional documents filed on behalf of the defendants in the suit who were appellants before the first appellate Court without even giving any opportunity to the plaintiff to disprove the veracity or otherwise of such documents by way of evidence and the first appellate Court has considered as if those documents were proved and chosen to pass final judgment which is a patent error committed by the first appellate Court in not following the code of Civil Procedure Code scrupulously. It is relevant to point out at this stage that the plaintiff has been given opportunity to file counter affidavit in the application for receipt of the additional evidence. It is one thing to say that the first appellate Court has allowed the documents to be produced and another thing to prove the document through proper method of evidence. In the present case, the second aspect has not been followed by the first appellate Court.'

19. Now, applying the ratio laid down in the above referred judgment herein also, though the appellant/defendant was provided with an opportunity to file a counter affidavit in the application filed under Order 41 Rule 27 of C.P.C., non-providing of opportunity to test the veracity of the additional document would amount to non-proving of the contents of the said document. In this regard, the learned counsel appearing for the respondent/plaintiff contended that the document exhibited as 'A5' is a Circular, dated 11.06.1961, issued by the Commissioner, H.R. & C.E. (Admn.) Department, in respect of the duties and powers of the Executive Officers. Since the said document is a public document, there is no necessity to provide an opportunity to the other side to disprove the contents. Even assuming that the first appellate Court had committed the mistake due to the said act, the defendant is no way prejudiced. Further, if the matter is remanded back again to the first



appellate Court for the purpose of marking additional document as an evidence after providing opportunity to the defendant, it will lead to wastage of time and therefore, it is not necessary to consider the submissions made by the appellant's counsel in this regard. In support of the said contention, he relied on the judgment of this Court in the case of Sri.Madhavaperumal Devasthanam Vs. Tmt.Dhanalakshmi and others reported in 1996 SCC Online Mad 401 : 1996 (2) LW 231, wherein this Court has held as follows:-

'9. ... it is well settled that a remand cannot be made merely to enable a party to adduce additional evidence, even if it is necessary, and that before an order of remand is made, the appellate court has to find out whether the findings given by the court below are correct or erroneous.'

Accordingly, both the judgments relied on by the learned counsel for the appellant and the respondent are specific that before marking the documents, opportunity will be given to the other side to test the veracity of the document. On other hand, it is also necessary to find out whether the order of remand can be made specifically for adducing additional evidence. Here, it is a case, I am of the opinion that since the document now under dispute is a Circular issued by the Commissioner, H.R. & C.E. Department, the question of remand for adducing additional evidence is not necessary. Therefore, I am of the view that the error committed by the first appellate Court is not having any much significance.

20. Now, the learned counsel appearing for the appellant contended that even assuming that the document viz., Ex.A5 has been marked by following the procedures, the same cannot give any express authorisation to the Executive Officer to institute the suit and therefore, it cannot be held that the plaintiff is a competent person to institute the suit on behalf of the Temple.

21. By considering the said submission with the relevant records, it is seen that, before the first appellate Court, the Circular dated 11.06.1961, issued by the Commissioner, H.R. & C.E. Department in R.Dis.No.33812/60, was marked as Ex.A5. On a whole reading of the said Circular, it appears that the same has been issued by virtue of Section 45 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959. In the said Circular, in respect of institution of the suit etc., Rule 11 reads as follows:-

'Rule 11

The Executive Officer shall be the person entitled to sue or be sued on behalf of the temple. It shall be the duty of the Executive



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Officer to see that all legal proceedings on behalf of or against the institution are instituted in due time and properly prosecuted and that all such proceedings against the institution are properly defended. He should act in accordance with resolutions of the trustees and also obtain prior sanction of the competent authority whenever necessary.''

22. Now, on a close reading of the said Rule, it is apparent that the Executive Officer can act in accordance with the direction given by the Trustees or by following the prior sanction of the competent authority.

23. In this connection, it is relevant to extract Section 45 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, which reads as follows:-

'45. Appointment and duties of Executive Officers.-(1) Notwithstanding anything contained in this Act, the Commissioner may appoint, subject to such conditions as may be prescribed, an Executive Officer for any religious institution other than a math or a specific endowment attached to a math.

Explanation.-In this section #math# shall not include a temple under the control of a math.

(2) The Executive Officer shall exercise such powers and discharge such duties as may be assigned to him by the Commissioner:

Provided that only such powers and duties as appertain to the administration of the properties of the religious institution referred to in sub-section (1) shall be assigned to the Executive Officer.

(3) The Commissioner may define the powers and duties which may be exercised and discharged, respectively, by the Executive Officer and the trustee, if any, of any religious institution other than a math or a specific endowment attached to a math.

(4) The Commissioner may, for good and sufficient cause, suspend, remove or dismiss the Executive Officer.''

24. Therefore, on a conjoint reading of Rule 11 of the Circular with Section 45 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, it is very clear that the Executive Officer shall exercise such powers and discharge duties as may be assigned to him by the Commissioner. But, in



this case, vide Ex.A5 for instituting the suit against the appellant, the Commissioner, H.R. & C.E. Department, did not give any specific authorisation to the Executive Officer.

25. In this connection, it is necessary and useful to see the judgment of a Division Bench of this Court in the case of Sri Arthanareeswarar of Tiruchengode Vs. T.M.Muthuswamy Padayachi etc. and others reported in 2003 (1) LW 386, wherein the Division Bench of this Court has held as follows:-

'19. Maintainability of the suits: he 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 of the Limitation Act. The Supreme Court, in State Of Rajasthan v. 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.

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



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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



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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.''

26. From the materials available on record, it appears that Special Leave Petition filed against the above judgment, was also dismissed by our Hon'ble Apex Court and the Review Petition filed was also dismissed.

27. Here, it is a case, no such permission is placed on record. Further, Mr.A.K.Sriram, learned counsel appearing for the respondent has fairly stated that it does not appear from the records that such specific permission was obtained from the Commissioner before institution of the suit. Therefore, in view of the categorical pronouncement of the Division Bench of this Court, the suit filed by the Executive Officer suffers for want of authority. Accordingly, the substantial question of law No.I is answered in favour of the appellant. Therefore, this second appeal is allowed and the judgment and decree of the first appellate Court, dated 22.12.2006, passed in A.S.No.695 of 2005, reversing the judgment and decree dated 29.06.2005, passed in O.S.No.3998 of 1999, on the file of the II Assistant Judge, City Civil Court, Chennai, is set aside and the suit in O.S.No.3998 of 1999 will stand dismissed as not competent. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(TNMCC)

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Sub Assistant Registrar



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To

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1.The Additional District and Sessions Judge (FTC-V),
Chennai.

2.The II Assistant Judge, City Civil Court,
Chennai.

Copy to: The Section Officer,
V.R.Section, High Court,
Madras.

+1cc to Mr.Kalyanaraman, Advocate, S.R.No.40573

S.A.No.1224 of 2007

MG(CO)
CB(15/11/2021)