



IN THE HIGH COURT OF AT MADRAS

RESERVED ON : 23.11.2021

PRONOUNCED ON: 07.12.2021

WEB COPY

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.60 of 2010
& M.P.No.1 of 2010

1. Amsavalli (Deceased) ...1st Appellant/Defendant
2. Devakumari
3. Bhuvaneswari
4. Nagalakshmi
5. Kamaraj
6. Nagarathinam
7. Mohan
8. Jeevanandam
9. Govindammal
10. Rajasekaran
11. V. Jayalakshmi
12. Nagaraj
13. Udayakumar ... Appellants 2 to 13

Vs.

Arulmighu Ayyanar Koil
Rep. By
Hereditary Trustee Rupesh. ... Respondent/Plaintiff

[Appellants 2 to 13 brought on record as LRs of the deceased Sole Appellant vide Court order dated 31.07.2017 made in CMP Nos.12072 to 12074 of 2017 in S.A.No.60 /2010]

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Code of Civil Procedure, against the Judgment and decree dated 19.08.2009 made in A.S.No.32 of 2008 on the file of the learned Additional Subordinate Judge, Mayiladuthurai, confirming the judgment and decree dated 15.02.2008 made in O.S.No.132 of 2004 on the file of the learned District Munsif, Sirkali.

For Appellants : Mr.A.Muthukumar

For Respondent : Mr.S.Sounthar



J U D G M E N T

Aggrieved over the concurrent findings made in A.S.No.32 of 2008 on the file of the learned Additional Subordinate Judge, Mayiladuthuri and in O.S.No.132 of 2004 on the file of the learned District Munsif, Sirkali, the 1st appellant, who is the sole defendant in O.S.No.132 of 2004, has preferred this Second Appeal.

2. In earlier, the respondent in this appeal filed a suit in O.S.No.132 of 2004, on the file of the learned District Munsif, Sirkali, seeking the relief for the recovery of possession of the suit schedule property, after removing the superstructure. The learned District Munsif, Sirkali, by judgment and decree dated 15.02.2008, allowed the suit in entirety and granted the decree in favour of the plaintiff, as prayed for.

3. Challenging the said finding, the defendant preferred an appeal in A.S.No.32 of 2008 on the file of the learned Additional Subordinate Judge, Mayiladuthuri. The learned Additional Subordinate Judge, Mayiladuthurai, by judgment and decree dated 19.08.2009 dismissed the appeal and confirmed the findings arrived at by the learned District Munsif, Sirkali. Being dissatisfied with the findings, the sole defendant preferred the present Second Appeal and prayed to set aside the findings of the Courts below. During the pendency of the appeal, the sole defendant died and his legal heirs were brought on record as appellants 2 to 13.

4. For the sake of convenience hereinafter the deceased 1st appellant is called as 'defendant' and the respondent is called as 'plaintiff'.

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

(i) The suit schedule property belongs to one Ayyanar Temple situated at Poraiyur Village, Tharangapadi Taluk. The defendant after getting consent from the temple authorities, put up a hut in the suit property and was residing there. Initially, the rent was fixed as Rs.5/- per month. Subsequently, the same has been enhanced to Rs.75/-. The defendant is having the habit to pay the consolidated rent for several months. For the period of 36 months i.e., from 01.03.2001 to 29.02.2004, the defendant has to pay Rs.2,700/- as arrears of rent. Even after repeated request, the defendant has not paid the same. Hence, on 03.11.2003, notice under Section 106 of the Transfer of Property Act, was sent to the defendant



and the same was received by him on 10.11.2003. After the receipt of the said statutory notice, the defendant has not given any reply. Further, he has not paid the arrears of the rent. Hence, for recovery of possession of the suit schedule property, the present suit has been filed by the trustee, who is the competent person to file a suit on behalf of the temple.

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

(i) The alleged Trustee Rubesh has no locus standi to represent the plaintiff temple. In the suit, the survey number and the extent described in the plaint are not correct. The boundaries stated in the plaint are also not correct. The pathway situated in south side of the suit property does not belong to the plaintiff temple. Similarly, the properties situated on the Eastern and Western side of the plaintiff temple do not belong to the plaintiff temple. Above all, the suit property itself does not belong to plaintiff temple.

(ii) The suit property and other properties situated in and around the suit property is a Government Poromboke. The defendant and her predecessors-in-title have been in possession of the suit property for more than 35 years. The Government after recognising the long possession of the defendant granted patta in his favour. Thus, the defendant is the absolute owner of the suit property. The superstructure found in the suit property was put up by him and the house tax is also levied in his name.

(iii) The suit property is situated in the old Survey No.111B/7 and the corresponding new Survey Number is 689/4. The plaintiff is not entitled to the relief of recovery of possession and other reliefs claimed in the plaint. It is not correct to say that the defendant is a 'Paguthidar' in the plaintiff's temple.

(iv) The notice dated 03.07.1998, the re-joinder notice dated 17.02.1999 and the notice dated 03.11.2003 are not valid and they do not fulfill the conditions laid down under Section 106 of the Transfer of Property Act. The plaintiff temple has no semblance of right over the suit property and never in possession at any point of time. The suit is barred by limitation. The suit is not properly valued for the purpose of Court fee and jurisdiction. The alleged tenency set out in the plaint is not true.

(v) The plaintiff has suppressed the material fact and has come forward with this fraudulent suit. In respect to the same



property, the plaintiff had already filed a suit, that too for the same relief in O.S.No.36 of 2000 on the file of the trial Court. The suit was dismissed on 24.04.2002. Hence, the present suit is barred under the principles of 'Res-judicata'. The suit is barred under Order-IX Rule 9 of Civil Procedure Code. Hence, the suit filed by the plaintiff is liable for dismissal.

7. Based on the above pleadings, the learned District Munsif, Sirkali, framed necessary issues and tried the suit. On the side of the plaintiff, two witnesses were examined as PW1 and PW2 and eight documents were exhibited as Ex.A1 to Ex.A8. Similarly, on the side of the defendant, one witness was examined as DW1 and twelve documents were marked as Ex.B1 to B12.

8. Having considered the materials placed before him, the learned District Munsif, Sirkali, vide judgment and decree dated 15.02.2008 allowed the suit filed by the plaintiff. In the appeal preferred by the defendant, the learned Additional Subordinate Judge, Mayiladuthurai, confirmed the findings arrived at by the trial Court and dismissed the appeal.

9. Feeling aggrieved over the concurrent findings of the Courts below, the 1st defendant is before this Court with this present second appeal. As stated earlier, during the pendency of the appeal, the sole defendant/1st appellant died and his legal heirs were brought on record as appellants 2 to 13. When the second appeal is taken up for admission, this Court formulated the following substantial questions of law.

"1. Whether the Courts below erred in law in holding that the defendant is a tenant under the plaintiff in the absence of any proof such as lease agreement or counter foil for rental receipts?

2. Whether the Courts below erred in law in placing reliance upon Ex.A-2 to Ex.A-4, which came into existence only after Ex.B-1?

3. Whether the suit is barred under Order IX Rule 9 of CPC and hit by re-litigation?

4. Whether Courts below erred in law in holding that the defendant had failed to prove his title to the suit property?

5. Whether the suit is bad for want of a prayer for declaration of the plaintiff's title to the suit property?

10. Heard Mr.A.Muthukumar, the learned counsel appearing on behalf of the appellants/defendants and Mr.S.Southar, the



learned counsel appearing on behalf of the respondent/plaintiff and perused the materials available on record.

11. The learned counsel appearing for the appellants/defendants would contend that before the trial Court, in order to prove the jural relationship between the landlord and the tenant, the plaintiff has not produced any substantial evidence. The survey number pertains to the suit property and the four boundaries stated in the plaint are not found correct. He would further contend that the suit property does not belong to the plaintiff's temple. According to him, the suit property is a natham porombokke.

12. The further submission of the appellants/defendants is that after recognising the possession, vide order dated 29.04.1996 the government issued patta to the 1st appellant/defendant, under Ex.B2. More than that in respect to the same prayer, the plaintiff already filed a suit and the same was dismissed for default. Afterwards, after suppressing the said fact, the plaintiff filed the present suit and thereby, the present suit is hit under the provisions of Order IX Rule 9 of the Code of Civil Procedure.

13. The learned counsel for the appellants/defendants would furthermore contend that Ex.A3 and Ex.A4 which are all the documents maintained by the plaintiff temple are all created subsequent to the filing of the suit and hence, the said documents are no way relevant to decide the issue raised in the present suit. He further added that in view of the pleading set out in the plaint, initially, the rent was fixed as Rs.5/- and subsequently, the same has been enhanced to Rs.75/-. But in order to show on what date, the rent was enhanced, no document has been produced on the side of the respondent/plaintiff and therefore, the entire circumstances shown by the defendant would go to show that the prayer sought for by the respondent/plaintiff in the suit is not maintainable. The Court below without considering the same allowed the suit, which is erroneous in law.

14. Further, the learned counsel for the appellants/defendants contended that since the plaintiff filed the suit for ejectment and for recovery of possession, the Court fee paid by the plaintiff is not found correct.

15. In support of his contention, the learned counsel for the appellants/defendants relied on the following judgments of this Court.



20. The submissions made by the learned counsel appearing on either side are considered.

21. Initially, in order to prove the jural relationship between the plaintiff and the 1st appellant/defendant, before the trial Court, the documents pertain to the income and expenditure maintained by the temple was marked as Ex.A2 to Ex.A4. In the said documents, the name of the 1st appellant/defendant was shown as he is a tenant. Further, those documents are relates to the period of 01.07.2001 to 30.06.2003. More than that, those documents are maintained in the temple in a regular course and therefore, the entries made in the said document are relevant under Section 34 of the Indian Evidence Act. Though, the 1st appellant/defendant had formally denied the said entries, in order to substantiate his claim he has not produced any relevant document to disprove the contents of Ex.A2 to A4.

22. Therefore, I am of the considered opinion that the entries made in Exs.A2 to A4, is sufficient to accept the case of the plaintiff that the 1st appellant/defendant is a tenant under the plaintiff and accordingly, the plaintiff temple has proved the jural relationship between the plaintiff and the 1st appellant/defendant, as above. Therefore, non production of lease agreement or counter foil in respect to the payment of rent is not fatal to the case of the plaintiff.

23. It is true, the previous suit filed by the temple in O.S.No.36 of 2000, for evicting the defendant from the suit schedule property, was dismissed for default on 24.04.2002. Subsequent to that, in order to set aside the same, no application has been filed by the plaintiff. In the said circumstances, Ex.A2 to Ex.A4, which are all the accounts maintained by the temple are all related to the year 2000 and for the subsequent period.

24. In the said circumstances, it is the contention raised by the defendants that still they are in the possession of the suit schedule property. On the other hand, the present suit has been filed after calculating the arrears of rent for the years 2000 to 2003. Hence being the reason that the present suit has been filed for the arrears of rent from the year 2000 and subsequent period, the same appears that this suit is filed on different cause of action. In otherwise, as already stated, it



is not in dispute that Ex.A2 to Ex.A4 are maintained in the course of business and accordingly, under Section 34 of the Indian Evidence Act, the said entries made in the accounts book, are relevant to accept the case of the plaintiff.

WEB COPY

25. It is true, Order IX Rule 9 of Code of Civil Procedure, is a bar to file a fresh suit, if the suit filed earlier on the same cause of action, was dismissed for default. In this regard, the learned counsel for the appellants relied on the decision of this Court, in Dr.S.Jayakumar and another Vs. K.Kandasamy Gounder, reported in 2006 (2) LW 259, wherein this Court has held as follows.

"6....Order IX Rule 9 C.P.C precludes filing of fresh suit in respect of the same cause of action. Reliance has been placed in A.I.R. 1965 S.C. 295.

Order XXIII Rule 1(4) C.P.C precludes the Plaintiff in bringing a fresh suit referring to the same subject matter.

When the relief and the cause of action are one and the same, the Suit is to be struck off. Reliance is placed upon the decision reported in 1998 (2) C.T.C. 474. Learned Senior Counsel has drawn the attention of the Court to the cause of action and the Schedule of Properties and contended that the Suit in O.S.No.278 of 1999 is nothing but replication of earlier suit and that the Plaint in O.S.No.278 of 1999 is to be struck off."

26. Applying the ratio laid down in the above referred judgment to the case on hand, here it is a case, the learned counsel for the respondent /plaintiff had drawn the attention of this Court that the present suit has been filed by relying on Ex.A2 to A4 and as such it is necessary to decide that the present suit has been filed based on the fresh cause of action. Further, it is not in dispute that the present suit has been filed upon the notice dated 03.11.2003, wherein, the plaintiff has stated about the arrears of rent pertains to the period after 2003. Hence, being the reason that the cause of action is a mixed question of fact, it cannot be said that the present suit has been filed on the same cause of action as stated by the appellants. Therefore, I am of the considered opinion that the present suit has been filed based on the fresh cause of action and this Court cannot hold that the present suit is barred under Order IX Rule 9 of Code of Civil Procedure. The Courts below after observing as above, came to the conclusion that the present suit has been filed on the different cause of action and therefore, the said finding arrived at by the Courts below is found correct.



27. The learned counsel appearing for the appellants/defendants would contend that the suit property is a natham land, wherein the 1st appellant/defendant after putting up the hut, was residing there from time immemorial. Further contention of the defendants is that after recognising the possession of the 1st appellant/defendant, the Government issued a patta and the same was marked as Ex.B2 and accordingly, it cannot be said that the temple proved the title.

28. In this occasion, on going through the contents of Ex.A1, which is the document related to the property owned by the plaintiff's temple, would reveal the fact that the said property register was maintained by the temple regularly in the course of business. As already observed under Section 34 of the Indian Evidence Act, the entries made in the books of account kept in the course of business is relevant to decide the issue. More than that, the said register was regularly surveyed by the Inspector of Hindu Religious and Charitable Endowments Department. Therefore, it cannot be said that the said document is created for the purpose of this suit. As per the entry in the said document, the suit property in S.No.97 was classified as Inam, further, the same was assigned to the plaintiff temple through T.D.1028. On the other hand, on going through Ex.B2, which is a patta, stands in 1st appellant/defendant's name, the property having old survey number 111B/7 corresponding to new survey number 689/4 alone was assigned to the 1st appellant/defendant. Hence, the survey number pertains to suit property and the patta are different one.

29. Another one important aspect is that being the reason that the defendant had taken the stand as the suit property is his own property, it is for him to prove the same by producing the relevant documents. But here it is a case, except the patta, which stands in his name, that too, for a different survey number, the defendant has not produced the document relates to the suit survey number and accordingly, the defendant failed in his attempt to prove the fact the the suit property belongs to him.

30. Finally, it is the submission made by the learned counsel for the appellants that without asking the relief of declaration, filing suit for the ejectment and for recovery of possession, is bad in law.

31. Now on considering the said submissions, it is true, if the 1st appellant/defendant has disputed the title in respect to



the suit schedule property, it is for the plaintiff to ask the declaratory relief by adding one more prayer. Here it is a case, in the written statement filed by the defendant, the defendant pleaded about the suit property as the same was government poramboke and the defendant and his predecessors have been in possession of the suit property for more than 35 years. In this regard, as already observed, in order to prove the said contention, the defendant has not produced the relevant records. He produced only one document i.e. patta issued in favour of the defendant and the same pertains to different survey number. Therefore, in respect to the suit survey number, he has not taken any particular stand that the suit survey number pertains to him.

32. Apart from that, after the receipt of Ex.A5, notice, by denying the title, he has not sent any reply to the plaintiff. Therefore, in the absence of any specific denial, it is not necessary for the plaintiff to amend the prayer for declaration. Accordingly, the suit is not bad for want of declaratory relief.

33. The next submission of the appellants would be that the plaintiff has not paid necessary court fee for the relief of ejectment as well as to the recovery of possession and therefore, the suit is liable to be dismissed.

34. After contending as above, learned counsel for the appellants/defendants relied on the judgment of this Court in Soura Beeviammal Vs. Ameena Ammal, reported in 1981 (94) LW 502, wherein this Court has held as follows:

"3. In Balasidhantan v. Perumal Chetti (1994)1 L.W. 641, a Division-Bench of this Court, consisting of Seshagiri Aiyar and Kumaraswami Sastriar, JJ. held that in a suit for ejectment and arrears of rent, the suit having been valued upon one year's rent only, the court will not go into the question of title. When the plaintiff files the suit expressly proceeding on the basis that the defendant is a tenant under him and wants the relief of possession alleging that the tenancy has been validly determined and pays the court-fee on that basis, the plaintiff could get the relief of possession only if he proves the tenancy. If on a plea by the defendant a question of title arises, it can be gone into only for the purpose of determining as to whether the relationship of tenancy subsisted between the plaintiff and the defendant. If it is to be found that the relationship of tenancy between



WEB COPY

the plaintiff and the defendant does not subsist, the plaintiff must fail in the suit as instituted by him and the suit cannot be converted into a suit for declaration of title and for recovery of possession on the basis of title."

35. Now, by applying the ratio laid down in the above referred judgment, in the case in hand, herein it is a case, the plaintiff paid the Court fee under Section 30 of the Tamil Nadu Court Fee and Suits Valuation Act, 1995 and not under Section 43 of the Court Fee Act. Therefore, being the reason that the plaintiff after calculating the market value, paid the Court fee under Section 30 of the Act, the judgments relied on by the appellants' counsel, would no way affect the case of the plaintiff. Accordingly, I am of the opinion that the plaintiff paid the correct Court fee for the prayer sought for.

36. Hence, in the light of the above discussions, all the substantial questions of law, are answered in favour of the respondent/plaintiff and accordingly, the present second appeal is dismissed. The concurrent findings made in A.S.No.32 of 2008 on the file of the learned Additional Subordinate Judge, Mayiladuthuri and in O.S.No.132 of 2004 on the file of the learned District Munsif, Sirkali, are confirmed. No Costs. Consequently, the connected Miscellaneous Petition is closed.

SD/-
ASSISTANT REGISTRAR

// TRUE COPY //

SUB ASSISTANT REGISTRAR

ars
To

1.The Additional Subordinate Judge,
Mayiladuthurai.

2.The District Munsif,
Sirkali.

+1cc to Mr.A.Muthukumar, Advocate Sr.64726

S.A.No.60 of 2010

ak-II[co]
srg 30/12/2021