



S.A.(MD)No.168 of 2007

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Judgment Reserved On	Judgment Pronounced On
28.10.2024	02.12.2024

CORAM

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

S.A.(MD).No.168 of 2007

Sri Siddheswari Peedam,
Courtallam,
Represented by its Peedathipati.

...Appellant

--Vs--

Pon Durai Samy

... Respondent

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the Judgment and Decree passed in A.S.No.134 of 2005 dated 27.02.2006 on the file of the Learned Additional Sub Judge, Tenkasi, reversing the Judgement and Decree of the District Munsif Court, Sengottai, dated 14.10.2004 in O.S.No. 17 of 2002.

For Appellant : Mr.T.S.R.Venkatramana
Senior Counsel
for Mr.S.Prithviraj
For Respondent : Mr.V.Meenakshi Sundaram
for Mr.V.Chinnakaruppan

JUDGMENT

The second appeal is preferred by the plaintiff in the suit against the Judgment and Decree dated 27.02.2006 on the file of Additional Sub Court,



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Tenkasi in A.S.No.134 of 2005 reversing the Judgment and Decree dated 14.10.2004 passed in O.S.No.17 of 2002 on the file of District Munsif Court, Senkottai.

2. The plaintiff in the suit is the appellant herein and the defendant in the suit is the respondent herein. For the sake of convenience, the parties shall be referred as plaintiff and defendant as per the ranking in the suit.

3. The brief facts of the case as stated in the plaint are that the 1st and 2nd schedule of properties belongs to the plaintiff's Srimadam and the plaintiff is in possession of the lands for more than 80 years (now 100 years). The 1st schedule of suit properties consisting of threshing floor (Nerkalam) and Well was not leased out to the defendant. The 2nd schedule of properties consisting of agricultural nanja lands are leased to the defendant and the same is having separate channel for irrigation. The defendant had become cultivating tenant which is against his legal profession and he is having money power and political power. And the defendant has planted cash crops instead of paddy, which is against the agreement between the parties. Further the defendant had failed to pay the lease amount and separate action has been initiated against the defendant. The defendant deliberately quarrelled as if he has right in the suit properties and



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had filed O.S.No.349 of 1999 on the file of Sub Court Tenkasi and had obtained interim injunction in I.A.No.1278 of 1999 against the plaintiff herein. The plaintiff Srimadam had filed written statement in the said suit by stating the true facts, thereafter the defendant felt based on the true facts the said suit would not be sustained and would be dismissed, hence left the suit without contesting and the said suit was dismissed for non-prosecution. Therefore, the defendant is hit by principles of estoppel and res-judicata. The defendant had encroached the 1st schedule property and from 08.03.2002 trying to use the Well water situated in the 1st schedule for agricultural activity carried in the 2nd schedule property. The defendant is capable of doing anything. Hence the suit is filed inter alia praying to declare the defendant is not having any right to the Well and Nerkalam situated in the 1st schedule property consequently restrain the defendant from using the Well water to irrigate the 2nd schedule property.

4. The defendant had filed a written statement wherein it is stated that the suit is filed to create loss to the defendant. The plaintiff had failed to mention in which schedule the Well and the Nerkalam is situated, the survey number mentioned in first schedule of property is incorrect, the suit is bad since the same is against the provisions of code of civil procedure for not stating the nature of land and extent of land. The well is not situated in the 1st schedule of property



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and the major portion of the well is situated in S.No.1158 and a small portion is situated in S.No.1173. The defendant had taken on lease the 2nd schedule of property along with the 1st schedule property wherein Well situated in S.No.1158 and S.No.1173 for 20 Kottai paddy per pasali and 2nd schedule property for Rs. 800/- per year from February 1993 onwards. The then Madathipathi had received Rs.25,000/- for letting the schedule property for lease. The Hindu Undivided Family of the defendant family is in possession and enjoyment of the properties. But there was disagreement in the joint family wherein the plaintiff, his brother Pon Anbalagan, Pon Arivalagan had orally divided the joint family properties during January 2000 and the cultivating tenant rights of the suit properties were allotted to the Pon Arivalagan and it was agreed that the said Pon Arivalagan would pay the lease amount to the plaintiff. The said oral partition had come into force and hence from 1st week of January 2000 onwards the said Pon Arivalagan is in possession and enjoyment of the suit schedule properties. Hence the suit is filed in order to evict the said Pon Arivalagan illegally. Further the plaintiff is aware of the fact the land is in possession with Pon Arivalagan and hence the defendant is an unnecessary party. And the said Pon Arivalagan is the necessary party. This fact is intimated in the reply notice dated 07.06.2000. When the defendant had taken the lease, the defendant had taken the lease of land as well as Well situated in the said Survey numbers for the irrigation of the said land. When



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the Well was dug to irrigate the lands in S.No.1158 and 1173, then the usage of water to the lands cannot be estopped. And the water from the Well is essential for the irrigation of the land. The Well was desilted twice by the said Pon Arivalagan and he is using the water from the Well through oil motor from 1993 onwards. The plaintiff ought to explain how the estoppel and res-judicata would apply for non-prosecution of the earlier case. There is no cause of action, hence the suit ought to be dismissed.

5. The defendant had filed additional written statement on 21.10.2003. The suit was filed in individual capacity by the erstwhile Madathipathi and he died on 17.12.2002. Hence, the present suit cannot be conducted and continued by the present Madathipathi. The new Peedathipathi should be added in the suit. Since the same is not added, the suit is liable to be dismissed. The Peedathipathi has filed a reply on 27.11.2003, wherein it is stated after amendment of Order 8 Rule 9 C.P.C., which was deleted from the code, hence the additional written statement cannot be filed by the defendant. Further, the plaintiff is a Madam and not an individual party and the Madathipathi only administers the Madam. If the Madathipathi had attained mukthi, the next successor would continue the administration. Hence, the plaintiff as the new Madathipathi has right to conduct the suit.



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6. After considering, the rival pleadings, the following issues were framed:

- i. *Whether the well situated in item No.1 exclusively belong to the plaintiff?*
- ii. *Whether the plaintiff is entitled to declaration and injunction for the well situated in 1st item?*
- iii. *Whether the details of the schedule of properties are incorrectly stated in the plaint?*
- iv. *Whether the defendant has taken lease for the entire properties stated in the suit schedule property?*
- v. *Whether the suit is bad for non-joinder of necessary party?*
- vi. *Whether the defendant was not in possession of the suit schedule property?*
- vii. *To what other reliefs the plaintiff is entitled to?*

On 09.12.2003 the following additional issues were framed:

- (i) *Whether the new Madathipathi has right to continue the suit?*
- (ii) *Whether the suit had lapsed on the death of Madathipathi?*

Thereafter the 1st issue stated supra is modified and re-framed as under:

“Whether the defendant has any right to claim the 1st item and the well situated in the 1st item?”



7. Based on the above stated issues, the Trial Court had marked Ex.A1 to A5 and PW1 was examined on the plaintiff's side. The defendant had marked as Ex.B1 and DW1 was examined on the defendant's side.

8. After considering the rival claims the suit was allowed declaring that the property belonged to the plaintiff and the defendant was permanently restrained from the suit property and also restrained from using the water from the Well and using Nerkalam situated in 1st schedule of property. Aggrieved over the same, the defendant had preferred the appeal suit and the same was allowed. Aggrieved over the same, the plaintiff had preferred the present Second Appeal.

9. The second appeal was admitted on 21.02.2007 on the following substantial questions of law:

- “i. Can respondent/defendant an Advocate, enter into a contract of tenancy and take on lease of property?*
- ii. Is not such an agreement is void under section 23 of the contract Act?*
- iii. When the lease agreement itself is void can respondent/defendant claim that he had transferred an illegal contract to his brother and that too without proof or evidence?*
- iv. Whether the Appellate Court was right in dismissing the suit when, admittedly, respondent/defendant an Advocate cannot be a Tenant of another man's property contrary to Advocates Act and rules of Bar Council?”*



10. The first substantial question of law “whether an advocate can take lease of property” would create ripples among the legal fraternity. The issue before this Court is cultivating tenancy rights, therefore the first substantial question of law is reframed as “whether an advocate by profession can take agricultural land for lease and be cultivating tenant”. The Tamil Nadu Cultivating Tenants Protection Act, 1955 (Act 25 of 1955) defines the word under section 2(aa) and the same is extracted hereunder:

“2.(aa) -Cultivating tenant?-

(i) means of person who contributes his own physical labour or that of any member of his family in the cultivation of any land belonging to another, under a tenancy agreement, express or implied; and

(ii) includes –

(a) any such person who continues in possession of the land after the determination of the tenancy agreement;

(b) the heir of such person, if the heir contributes his own physical labour or that of any member of his family in the cultivation of such land;

(c) a sub-tenant if he contributes his own physical labour or that of any member of his family in the cultivation of such land; or

(d) any such sub-tenant who continues in possession of the land notwithstanding that the person who sublet the land to such sub-tenant ceases to have the right to possession of such land; but



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(iii) *does not include a mere intermediary or his heir;*”

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If a person ought to be termed as cultivating tenant, the said person ought to contribute his physical labour. The advocate profession is a full-time job and he cannot contribute his physical labour. Infact the Learned Senior Counsel appearing for the plaintiff and the Learned Counsel appearing for the defendant /advocate submitted that the advocate cannot contribute physical labour. And an advocate cannot be a cultivating tenant based on the definition of under the aforesaid Act. Therefore, this Court is of the considered opinion that an advocate who is carrying on his profession as advocate cannot claim the rights of “cultivating tenant”. Either he can be an advocate or he can be a cultivating tenant.

11. However the Learned Counsel appearing for the defendant had submitted that the cultivating tenant rights were allotted to his younger brother Pon Arivalagan in the oral partition and as per the aforesaid definition the family members can also contribute physical labour. Since the brother Pon Arivalagan is contributing physical labour, he ought to be considered as cultivating tenant. Infact the said fact that Pon Arivalagan was the cultivating tenant as per the oral partition was intimated to the plaintiff srimadam through reply notice dated



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07.06.2000 and the same is admitted by the PW1 in his deposition. But the

Learned Senior Counsel appearing for the plaintiff submitted that the said Pon Arivalagan also cannot be considered as cultivating tenant since he was elected as Panchayat President. This Court considered the rival submissions. Even though the defendant counsel had submitted the brother as cultivating tenant, as on date the brother's name was not entered in the revenue records as cultivating tenant. The Learned Counsel submitted that a petition was filed to this effect but the same is still pending. It is seen the oral partition is in the year 2000 but till now the brother's name is not entered in the revenue records. Further as rightly pointed out by the plaintiff counsel the defendant had filed first appeal in A.S.No.134 of 2005 and not his brother Pon Arivalagan. Even though the plaintiff had filed the suit by arraying the advocate as defendant, at least at appellant stage the defendant ought to have allowed the brother to file the first appeal. But the defendant / advocate had filed the appeal in his name only. The defendant on one hand states that the cultivating tenancy rights were transferred to his brother through oral partition in the year 2000, but had filed first appeal in the year 2005 in his name and not in his brother's name, thereby taken inconsistent plea. The defendant had not taken any steps to substantiate the claim that his brother is cultivating tenant. Based on the inconsistent stand, the plaintiff cannot be expected to file a suit in the name of Pon Arivalagan. Therefore, the contention that the defendant brother Pon



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Arivalagan was the cultivating tenant cannot be accepted. By filing appeal in his name and not in his brother's name the action of the defendant would prove that still the defendant is the cultivating tenant. Therefore, the first substantial question of law “whether an advocate by profession can take agricultural land for lease and be cultivating tenant” is answered in favour of the plaintiff and against the defendant.

12. The fourth substantial question of law is “whether the Appellate Court was right in dismissing the suit when, admittedly, respondent/defendant an Advocate cannot be a tenant of another man's property which is contrary to Advocates Act and rules of Bar Council?” Again, this substantial question of law is reframed for the reason stated supra as “whether the Appellate Court was right in dismissing the suit when, admittedly, respondent/defendant an Advocate cannot be a cultivating tenant of another man's property which is contrary to Advocates Act and rules of Bar Council?”

13. If the words “tenant” and “cultivating tenant” are analysed the same would clarify the issue raised before this court. A tenant is a person who had taken the place, premises for lease or rent either for using the premises as residence or for commercial purpose. But the cultivating tenant takes the land for



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lease, put their physical labour, from the produce grown in the land the lease amount is paid. In short the cultivating tenant ought to be an agriculturist/farmer.

Then the next question would be whether agriculture activity is a profession. Traditionally the produce of paddy, plantain, cereals alone was considered as agriculture activities, hence generally the agriculture activity are not considered as profession. But of late agriculture and allied activities are brought under the broad spectrum of agriculture activities, wherein horticulture, animal husbandry etc. are considered as agriculture. Infact Bachelor Degree courses are offered in Agriculture, Forestry, Animal Husbandry, Genetic Plant Breeding, Soil and Water management etc. in colleges. Further Master Degrees, Ph.D. courses are offered and Agriculture Universities are established. Now based on the courses offered professionally qualified people are available and technological advancements are available which is responsible for new reforms and innovations in the field of agriculture. In the light of the above developments this Court is of the considered opinion now the agriculture activities ought to be considered as profession.

14. The Bar Council of India Rules had barred advocates from carrying on other business, job etc., under Section VII under the heading “Section on other Employments” and the relevant provision is extracted hereunder:



“Section-VII-Section on other Employments

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47. An Advocate shall not personally engage in any business; but he may be a sleeping partner in a firm doing business provided that, in the opinion of the appropriate State Bar Council, the nature of the business is not inconsistent with the dignity of the profession.

48. An Advocate may be Director or Chairman of the Board of Directors of a company with or without any ordinary sitting fee, provided none of his duties are of an executive character. An Advocate shall not be a Managing Director or a Secretary of any company.

49. An Advocate shall not be a full-time salaried employee of any person, Government, firm, corporation or concern, so long as he continues to practice, and shall, on taking up any employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practise as an Advocate so long as he continues in such employment.

[* *] [[Para 2 and 3 deleted by Resolution dated 22.6.2001. Prior to their deletion, Para 2 and 3 read as under:-"Nothing in his rule shall apply to a Law Officer of the Central Government of a State or of any Public Corporation or body constituted by statute who is entitled to be enrolled under the rules of his State Bar Council made under section 28(2)(d) read with section 24(1)(e) of the Act despite his being a full time salaried employee. Law Officer for the purpose of this rule means a person who is so designated by the terms appointment and who, by the said terms, is required to act and/or plead in Courts on behalf of his employer."]]*

50. An Advocate who has inherited, or succeeded by survivorship to, a family business may continue it, but may not personally participate in the management thereof. He may continue to hold a share with others in any business which has descended to him by survivorship or inheritance or by



will, provided he does not personally participate in the management thereof.

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51. *An Advocate may review Parliamentary Bills for a remuneration, edit legal text books at a salary, do press-vetting for newspapers, coach pupils for legal examination, set and examine question papers; and, subject to the rules against advertising and full-time employment, engage in broadcasting journalism, lecturing and teaching subjects, both legal and non-legal.*

52. *Nothing in these rules shall prevent an Advocate from accepting, after obtaining the consent of the State Bar Council, part-time employment provided that in the opinion of the State Bar Council the nature of the employment does not conflict with his professional work and is not inconsistent with the dignity of the profession. This rule shall be subject to such directives if any as may be issued by the Bar Council of India from time to time.”*

15. The rule bars to be Managing Director, but allows to be Director of the company. The rule bars to do business, but allows to be sleeping partner. And allows to continue in family business, but cannot actively participate in the business. And also states that the business shall not affect the dignity of the advocate profession. Further the rules bars to be a salaried person. In the light of the above rules, now it ought to be seen whether agriculture activities are barred under the said rules. The aforesaid rules has not dealt with the agriculture activity at all.



16. However it ought to be analysed whether the rules bars the cultivating tenancy either directly or indirectly. It is seen the rule allows to be Director, dormant partner, sleeping partner, family business, but bars Managing Director, active partner etc. In other words, the Rules bars any full time job / profession, therefore an enrolled advocate cannot take any full time job or profession. The cultivating tenant is a full time job, wherein he has to contribute physical labour. Therefore this Court is of the considered opinion that the agricultural activities if carried out as a profession and carried out as full time job, then the Rules bar an advocate from carrying the said full time job/profession. When the category of 'cultivating tenant' is a full time job, then the BCI Rules is indirectly bars to be a cultivating tenant. Therefore, the fourth substantial question of law is answered in favour of plaintiff and against the defendant.

17. The next substantial question of law is the said lease agreement is void under section 23 of the Indian Contract Act. The provision is extracted hereunder:

“23. What considerations and objects are lawful, and what not.—The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or

is of such a nature that if permitted, it would defeat the provisions of any law; or



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is fraudulent ; or

*involves or implies injury to the person or property of another; or
the Court regards it as immoral, or opposed to public policy.*

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.”

The contention of the Learned Senior Counsel is that the Bar Council of India Rules bars the advocate from doing any other job and profession, hence the contract is forbidden under section 23 of the Contract Act. As stated supra the Rules is not forbidding but bars to take up full time job / profession but allows to be dormant / sleeping partner. This Court has already held that the cultivating tenant is full time job, therefore as per BCI Rules it bars to be a cultivating tenant. Consequently the cultivating agreement entered in the year 1993 in the name of the defendant while he is an advocate is against section 23 of Indian Contract Act. Therefore, the second substantial question of law is held in favour of the plaintiff and against defendant.

18. The third substantial question of law is “when the lease agreement itself is void can respondent/defendant claim that he had transferred an illegal contract to his brother and that too without proof or evidence?” Since this Court has held that the contract entered by the defendant/advocate is against the provisions of



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section 23 of Indian Contract Act, then the transfer of such illegal contract in the name of the defendant brother Pon Arivalagan is void. The third substantial question of law is held in favour of the plaintiff and against the defendant.

19. All the substantial questions of law are held in favour of the plaintiff and against the defendant. Therefore the Judgment and Decree passed in A.S.No. 134 of 2005 dated 27.02.2006 on the file of the Additional Sub Court, Tenkasi is set aside and the Judgement and Decree dated 14.10.2004 in O.S.No.17 of 2002 of the District Munsif Court, Sengottai is confirmed. Hence, the second appeal is allowed. No costs.

02.12.2024

Index : Yes / No

NCC : Yes / No

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TO:

1. Additional Sub Judge, Tenkasi.
2. District Munsif Court, Sengottai.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

Tmg

Judgment made in
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Dated:
02.12.2024