

Kuppusamy Vs Arulmigu Puthu Mariamman Koil

Court: Madras High Court

Date of Decision: Dec. 23, 2009

Acts Referred: Civil Procedure Code, 1908 (CPC) " Section 80

Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 " Section 108

Transfer of Property Act, 1882 " Section 105

Hon'ble Judges: R. Mala, J

Bench: Single Bench

Advocate: Hema Sampath for R. Subramanian, for the Appellant; R. Vasudevan, for T. Susindran, for R-1 and Bhavani Subbarayan, Spl. G.P. (C.S) for R-2, for the Respondent

Final Decision: Dismissed

Judgement

R. Mala, J.

The Second Appeal is filed by the appellant-plaintiff against the judgment and decree dated 7.2.2002 in A.S. No. 6 of 1995

on the file of the Additional Sub-Court, Cuddalore, confirming the judgment and decree dated 29.11.1994 in O.S. No. 614 of 1993 on the file of

the Principal District Munsif Court, Cuddalore.

2. The averments in the plaint are as follows:

The suit property is a vacant site belonging to the first respondent-first defendant-Temple. It is immediately on the east of the plaintiff's house. The

plaintiff purchased his house from the previous owner Ramaswami Mudaliar's heirs, by means of registered sale deed, dated 14.2.1985. The

previous owner was enjoying the suit property as a lessee of the first defendant-Temple, paying annual rent of Rs. 15/- for the vacant site. After

purchase by the plaintiff, he is in possession. The plaintiff is tethering his cow and calf in the suit property and also storing hay-rick and rubbish. He

has put up a fence on the northern side. The first defendant is aware of the plaintiff's possession and right as a tenant. The Executive Officer has

changed the records and not receiving the rent. The plaintiff cannot be evicted except by due process of law. However, the defendants are taking

steps to evict the plaintiff from the suit property. Hence, the plaintiff has come forward with the suit for bare injunction restraining the defendants

from interfering with the peaceful possession and prayed for a decree.

3. The gist and essence of the written statement filed by the first defendant-Temple are as follows:

The property belong to the Temple. The Temple has got every right to lease it out to the third parties. The plaintiff cannot claim the right to use the

suit property as a matter of right. By mere purchase of the house, the plaintiff cannot be deemed to have purchased the right to use the suit

property also. If the plaintiff wants to use the suit property, he ought to have obtained permission from the Commissioner of H.R. & C.E., without

which the plaintiff's claim is not valid in law. There is no cattle shed or manure pit or hay-stack in the suit property. The suit property is lying

vacant. The first defendant is at liberty to lease out the suit property to anybody under public auction. There is no cause of action for the suit. The

first defendant prayed for dismissal of the suit.

4. The gist and essence of the written statement filed by the second defendant are as follows:

The second defendant-Assistant Commissioner of H.R. & C.E. is not necessary party to the suit. The suit is bad for misjoinder of necessary party.

The Controlling Officer of the first defendant-Temple is necessary party. Only the Executive Officer and the Trustees are necessary parties. The

Department has not passed any order in respect of the suit property. The suit is barred u/s 108 of the H.R. & C.E. Act. No notice has been given

u/s 80 C.P.C. The plaintiff is not entitled for any injunction. Hence, the second defendant prayed for dismissal of the suit.

5. The trial Court, after considering the averments both in the plaint and in the written statement, has framed four issues and considering the

evidence of P.W.1, D.W.1 and Exs.A-1 to A-8, dismissed the suit. Against that, the plaintiff preferred appeal. The learned first appellate Judge,

after framing two points for determination, concurred with the findings of the trial Court and dismissed the appeal. Hence, the Second Appeal has

been filed by the appellant-plaintiff.

6. At the time of admission of the Second Appeal, the following substantial questions of law were framed for consideration:

(i) Whether in law the Courts below are right in failing to see that the appellant being a lessee could be evicted only under due process of law?

(ii) Whether in law the Courts below are right in overlooking that u/s 105 of the Transfer of Property Act, the appellant is a lessee and that he is

entitled to hold possession against the lesser?

(iii) Whether in law the lower appellate Court was right in simply copying the trial Court's judgment word by word without independently

considering the facts and evidence as contemplated under Order 43 Rule 1 C.P.C. ?

7. The appellant as plaintiff filed the suit for bare injunction stating that the suit property belongs to the first defendant-Temple, and one Ramaswami

Mudaliar is the lessee under the first defendant-Temple. The appellant-plaintiff purchased the adjacent house and leasehold right under Ex.A-1.

Ramaswami Mudaliar has paid kist and lease amount has been paid as seen from Exs.A-2 to A-4. The appellant-plaintiff is in possession and

enjoyment of the same. Now, the respondents are attempting to interfere with the possession. Hence, he has come forward with the suit.

8. The respondents as defendants filed written statement that the plaintiff is not a tenant as per the provisions of the Tamil Nadu Hindu Religious

and Charitable Endowments Act and they are entitled to lease out the property belonging to the Temple in public auction. Hence, the suit is not

maintainable. They prayed for dismissal of the suit.

9. The trial Court, after framing necessary issues and considering the oral and documentary evidence, dismissed the suit. Against that, the plaintiff

preferred appeal. The first appellate Court concurred with the findings of the trial Court and dismissed the suit. Against that, the present appeal has

been preferred by the appellant-plaintiff.

10. Learned Senior Counsel appearing for the appellant-plaintiff would contend that the suit property belongs to the first respondent-Temple. It is

under the control of the second respondent. Already, the property was enjoyed by one Ramaswami Mudaliar as a lessee. He paid lease amount as

per Exs.A-2 to A-4. When he sold his property under Ex.A-1, he also sold his leasehold right to the appellant-plaintiff. The appellant is in

possession from 14.2.1985 onwards. That factum is known to the respondents. The respondents are attempting to interfere with the possession of

the plaintiff. Both the trial Court and the appellate Court have come to the conclusion that no injunction can be granted against a true owner.

Learned Senior Counsel appearing for the appellant-plaintiff culled out some portion of the plaint averments. Even though he sought for a blanket

prayer of injunction, the plaintiff, in paragraph 5 of the plaint has stated that he cannot be evicted except by due process of law. So, even the

trespasser in possession could be evicted only by due process of law. Learned Senior Counsel appearing for the appellant-plaintiff relied upon the

decision of the Supreme Court reported in 2004 (3) L.W. 143 (Rame Gowda (D) by Lrs. v. M. Varadappa Naidu (D) by Lrs. and Anr.) and

sought for injunction till the appellant-plaintiff is evicted by due process of law.

11. Per contra, learned Counsel for the respondents-defendants would contend that the appellant-plaintiff is not a lessee under them. He has not

paid any rental amount. After the admission of the Second Appeal, only as per the direction of this Court, he is paying the amount. As per the

provisions of Tamil Nadu H.R. & C.E. Act, 1959, the appellant-plaintiff is said to be an encroacher. So, he has to be evicted as per the provisions

of Sections 78 and 79 of the Tamil Nadu H.R. & C.E. Act. In view of the direction from the second defendant, the first respondent-first defendant

is taking steps to lease out the property by way of public auction and immediately, the appellant-plaintiff has come forward with the suit and

obtained interim order from this Court and hence, the respondents-defendants are not able to proceed further. Learned Counsel for the

respondents further contended that from 1985 till the direction of the High Court, he has been enjoying the property without paying any amount

and so, no leniency could be shown to him. The learned Counsel for the respondents prayed for dismissal of the Second Appeal.

12. Even though Substantial Question of No. (ii) has been framed in respect of Section 105 of the Transfer of Property Act, in this case, it is not a

suit filed for eviction by the landlord. Section 105 of the Transfer of Property Act is not applicable to the facts of the present case and the said

Substantial Question of Law No. (ii) is answered accordingly.

13. Even though Substantial Question of Law No. (iii) has been framed with regard to Order 43 Rule 1 C.P.C., in respect of dismissal of I.A.

Nos. 138 of 1996 and 96 of 2001 for reception of additional evidence, the first appellate Court, in paragraphs 16 and 17 of the judgment,

dismissed the said I.As. Even though the said substantial question of law has been raised in respect of Order 43 Rule 1 C.P.C., learned Counsel

for the appellant-plaintiff has not canvassed any arguments in this aspect. In such circumstances, it is not necessary to give answer to this substantial

question of law.

14. Substantial Question of Law No. (i):

Admittedly, the suit property belongs to the first respondent-Temple. One Ramaswami Mudaliar was a lessee under the first defendant. It is

evidenced by Exs.A-2 to A-4 lease receipts. The case of the appellant-plaintiff is that he has purchased the leasehold rights. He filed Ex.A-1 which

related to the house and not to the suit property. In Ex.A-1, one of the boundaries has been shown as the suit property and west of Arulmighu

Puthu Mariamman Temple is vacant site. In the said boundaries, the appellant-plaintiff has purchased the brick-built terrace house and southern

vacant portion is garden. Admittedly, the appellant-plaintiff is in possession of the property. D.W.1 also admitted that the appellant is in possession

of the property. To prove the possession, the photographs have been marked as Exs.A-5 to A-8. The photographs have not been marked in

accordance with law. De-hors Exs.A-5 to A-8, the respondents-defendants admitted that the appellant is in possession of the property. In the

above circumstances, I am of the opinion that the appellant-plaintiff is in possession of the property.

15. It is appropriate to consider the decision relied upon by the learned Senior Counsel appearing for the appellant reported in 2004 (3) L.W. 143

(cited supra), wherein, the Supreme Court held as follows:

12. In the present case the Court has found the plaintiff as having failed in proving his title. Nevertheless, he has been found to be in settled

possession of the property. Even the defendant failed in proving his title over the disputed land so as to substantiate his entitlement to evict the

plaintiff. The Trial Court therefore left the question of title open and proceeded to determine the suit on the basis of possession, protecting the

established possession and restraining the attempted interference therewith. The Trial Court and the High Court have rightly decided the suit. It is

still open to the defendant-appellant to file a suit based on his title against the plaintiff-respondent and evict the latter on the former establishing his

better right to possess the property.

16. Sections 78 and 79 of the Tamil Nadu H.R. & C.E. Act read as follows:

Section 78: Encroachment by persons on land or building belonging to charitable or religious institution or endowment and the eviction of

encroachers--(1) Where the Assistant Commissioner having jurisdiction either suo motu or upon a complaint made by the trustee has reason to

believe that any person has encroached upon (hereinafter in this section referred to as ""encroacher"") any land, building, tank, well, spring or water-

course or any space wherever situated belonging to the religious institution or endowment (hereinafter referred to as the ""property""), he shall report

the fact together with relevant particulars to the Joint Commissioner having jurisdiction over the division in which the religious institution or

endowment is situated.

Explanation--For the purpose of this section, the expression ""encroacher"" shall mean any person who unauthorisedly occupies any tank, well,

spring or water-course or any property and to include--

(a) any person who is in occupation of property without the approval of the competent authority (sanctioning lease or mortgage or license) ; and

(b) any person who continues to remain in the property after the expiry of termination or cancellation of the lease, mortgage or licence granted to

him.

(2) Where on a perusal of the report received by him under Sub-section (1), the Joint Commissioner finds that there is a prima facie case of

encroachment, he shall cause to be served upon the encroacher a notice specifying the particulars of the encroachment and calling on him to show

cause before a certain date why an order requiring him to remove the encroachment before the date specified on the notice should not be made. A

copy of the notice shall also be sent to the trustees of the religious institution or endowment concerned.

(3) The notice referred to in Sub-section (2) shall be served in such manner as may be prescribed.

(4) Where, after considering the objections if any, of the encroacher received during the period specified in the notice referred to in Sub-section

(2) and after conducting such inquiry as may be prescribed, the Joint Commissioner is satisfied that there has been an encroachment, he may by

order and for reasons to be recorded require the encroacher to remove the encroachment and deliver possession of the property (land or building

or space) encroached upon to the trustee before the date specified in such order.

(5) During the pendency of the proceeding, the Joint Commissioner shall order the encroacher to deposit such amount as may be specified by him

in consideration of the use and occupation of the properties in question in the manner prescribed.

Section 79: Mode of eviction on failure of removal of the encroachment as directed by the Joint Commissioner--(1)
Where within the period

specified in the order under Sub-section (4) of Section 78, the encroacher has not removed the encroachment and has not vacated the property,

the Assistant Commissioner having jurisdiction over the division may remove the encroachment and obtain possession of the property encroached

upon, taking such police assistance as may be necessary. Any Police Officer whose help is required for this purpose shall render necessary help to

the Assistant Commissioner.

(2) Nothing in Sub-section (1) shall prevent any person aggrieved by the order of the Joint Commissioner under Sub-section (4) of Section 78

from instituting a suit in a Court to establish that the religious institution or endowment has no title to the property:

Provided that no Civil Court shall take cognizance of any suit instituted after six months from the date of receipt of the order under Sub-section (4)

of Section 78:

Provided further that no such suit shall be instituted by a person who is let into possession of the property or who is a lessee, licensee or mortgagee

of the religious institution or endowment.

(3) No injunction shall be granted by any Court in respect of any proceeding taken or about to be taken by the Joint Commissioner u/s 78.

17. As per Explanation to Sub-section (1) of Section 78, a person who remains in a property after expiry of the lease, is also an encroacher. So,

the appellant-plaintiff can be evicted only as per the provisions laid down u/s 78 of the Tamil Nadu H.R. & C.E. Act.
Learned Senior Counsel

appearing for the appellant-plaintiff would contend that, till then, the appellant-plaintiff's possession can be protected by way of granting injunction.

18. It is true that the appellant-plaintiff has made the averment in paragraph 5 of the plaint that he will have to be evicted except by due process of

law. But in the prayer of the suit, the expression ""except by due process of law"" is missing. But however, his possession is to be protected.

Moreover, considering the arguments and considering Sections 78 and 79 of the Tamil Nadu H.R. & C.E. Act, I am of the opinion that if the

injunction is granted, the appellant-plaintiff would prevent the respondents-defendants, the owners of the property, from proceeding in accordance

with law. In the above circumstances, as per Sections 78 and 79 of the Tamil Nadu H.R. & C.E. Act, the respondents-defendants are entitled to

evict the appellant-plaintiff. So, in pursuance of the decision of the Supreme Court reported in 2004 (3) L.W. 143 (cited supra) and considering

Sections 78 and 79 of the Tamil Nadu H.R. & C.E. Act, the appellant-plaintiff will have to be evicted only under due process of law. Hence, the

appellant-plaintiff is not entitled to injunction against the true owner. The respondents-defendants are directed to evict the appellant-plaintiff only in

accordance with law.

19. With the above observations and directions, the Second Appeal is dismissed. No costs. C.M.P. is closed.