

**(2011) 11 MAD CK 0112**

**Madras High Court (Madurai Bench)**

**Case No:** S.A. No. 445 of 2006 and C.M.P. No. 3756 of 2006

Karupayee @ Vellaithayee  
Ammal and Ramasamy

APPELLANT

Vs

Kathariya Tharka Trust

RESPONDENT

**Date of Decision:** Nov. 1, 2011

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 7
- Registration Act, 1908 - Section 49
- Tamil Nadu Court Fees and Suits Valuation Act, 1955 - Section 43(2)
- Transfer of Property Act, 1882 - Section 111
- Waqf Act, 1995 - Section 85

**Hon'ble Judges:** M. Venugopal, J

**Bench:** Single Bench

**Advocate:** P.T.S. Narendravasan, for the Appellant;

**Final Decision:** Allowed

### **Judgement**

The Honorable Mr. Justice M. Venugopal

1. The Appellant / Defendant have preferred this Second Appeal as against the Judgment and Decree, dated 15.06.2005, in A.S. No. 167 of 2004 passed by the Learned 3rd Additional Sub Judge, Madurai, in affirming the Judgment and Decree, dated 20.04.2004, in O.S. No. 526 of 1995, passed by the Learned Additional District Munsif Court, Madurai.

The Plaintiff averments:

2. According to the Respondent/Plaintiff, its a Muslim Public Religious and Charitable Trust. Many persons have endowed the properties to the Trust. The properties belonging to the Respondent /Plaintiff, including the suit scheduled property bearing S. No. 90/1 has been surveyed by the Commissioner of Wakfs as per Section

4(3) of the Wakf Act.

3. The Government of Tamil Nadu has forwarded the said survey report to the State of Wakf Board and the Board published the Respondent/Plaintiff's Trust in Official Gazette, dated 27.05.1969 in serial No. 98 and 115 of the Gazette. As per Section 6 of the Wakf Act, the character and nature of Wakf has become final and conclusive. The Respondent/Plaintiff's Trust is functioning under the General Supervision of the Tamil Nadu Wakf Board. The Trust is also paying contribution to the Wakf Board, as per Wakf Act.

4. The Respondent/Plaintiff/Trust has created for the purpose of commemorating the memory of Saint Mohaideen Abdul Khader Jolani for performing certain functions on the eleventh day of every month, performing Santhanakoodu every year free feeding to poor on the Ramjan days, conducting Moulooth and Kandoories in the month of Rabiyi Avval in the name of Prophet Mohammad and in the month of Rabiyul Akeer in the name of Saint Mohideen Abdul Khader Jilani and running Arabic School and other functions mentioned under the byelaws of the Trust.

5. The First Appellant / First Defendant has taken the Door No. 84 from the Respondent/Plaintiff on a monthly rent of Rs. 50/-and Door No. 84 A on a monthly rent of Rs. 50/-as per English Calendar month. For the rents paid by the First Appellant/First Defendant printed receipts have been issued to the First Appellant/First Defendant. The First Appellant / First Defendant is occupying the suit property as a tenant under the Respondent/Plaintiff. At the time of vacating the suit property, the First Appellant/First Defendant has to surrender whatever improvements made to the suit property to the Respondent/Plaintiff's Trust after removing the super structure. The First Appellant/First Defendant has paid the rent till February 1995 to the Respondent /Plaintiff and obtained the receipts on 11.03.1995.

6. The First Appellant/First Defendant has not paid the rent beginning from March 1995 till date. She has also vacated the suit property and has not surrendered the suit property to the Respondent/Plaintiff.

7. In law, the First Appellant/First Defendant is to handover vacant possession to the Respondent/Plaintiff when the First Appellant/First Defendant has illegally and unauthorisedly and even without the written consent of the Plaintiff/Trust transferred and handed over the possession of the suit property to the Second Appellant/Second Defendant. The occupation of the Second Appellant/Second Defendant in the suit property is neither legal nor proper. Also, it is not binding on the Respondent/Plaintiff.

8. There is no privity of contract between the Respondent/Plaintiff and the Second Appellant/Second Defendant. The Second Appellant/Second Defendant never obtained any written permission from the Respondent/Plaintiff to take any lease hold right over the suit property. By the conduct of the First Appellant/First

Defendant in allowing the Second Appellant/Second Defendant to occupy illegally and unauthorisedly the suit property, the Respondent/Plaintiff's Trust has been put to irreparable loss. The Second Appellant/Second Defendant has no right in law to put up the construction in the property of the Respondent/Plaintiff. The Office bearers of the Respondent/Plaintiff went to the spot and prevented the Second Appellant/Second Defendant in anyway putting up construction. The Respondent/Plaintiff informed the Madurai Municipal Corporation, on 17.06.1995 that the Second Appellant/Second Defendant is putting up the constructions unauthorisedly and illegally and also without the permission of the Respondent / Plaintiff and also any plan from the Corporation in the suit property.

9. The First Appellant/First Defendant is a tenant of the Respondent/Plaintiff's Trust. She has unauthorisedly and illegally without the written consent of the Respondent/Plaintiff's Trust vacated and handed over the possession to the third party, viz., the Second Appellant/Second Defendant. The First Appellant/First Defendant has no right to part away the property to the Second Appellant/Second Defendant. The First Appellant / First Defendant are not in occupation of the suit property and also not paid the loan from March 1995 to the Respondent/Plaintiff. Hence, the Respondent/Plaintiff has filed the present suit against the Appellants/Defendants praying for the relief that they are to handover the possession of the suit property to the Respondent/Plaintiff without any let or hindrance and also sought the relief of permanent injunction restraining the Second Appellant/Second Defendant, his men, agents and servants and his nominees from in anyway putting up any illegal and unauthorized constructions in the suit property. Also, the Respondent/Plaintiff has sought a direction against the Second Appellant/Second Defendant in the suit requiring him to pay damages for the use and occupation of the suit property from June 1995 till date of possession.

The Written Statement Pleas:

10. The Respondent/Plaintiff is no a Public Trust as alleged by it. The Respondent/Plaintiff is to prove that the suit property has been endowed to it and that the said trust has been supervised by the Commissioner of Wakf as per Section 4(3) of the Wakf Act. The Respondent/Plaintiff is not a public Religious and Charitable Trust.

11. The suit property is a site belongs to the Respondent/Plaintiff. The First Appellant/First Defendant has been inducted as a tenant of the vacant site in respect of the suit property, in the year 1954. The First Appellant/First Defendant at present has been paying the site rent of Rs. 100/-per month. There is no arrears of rent by the First Appellant/First Defendant, has averred by the Respondent/Plaintiff. There is no agreement to surrender with all the improvements made by the First Appellant/First Defendant to the Respondent/Plaintiff. The First Appellant/First Defendant has to be put up the super structure and she is the owner of the super structure. Further, the First Appellant/First Defendant is putting the super structure

tax to the Madurai Corporation. The First Appellant/First Defendant is a City Tenant entitled to the benefits as per City Tenants Protection Act 1921. The superstructure put up by the First Appellant/First Defendant is worth Rs. 1,50,000/- The First Appellant/First Defendant alone is in possession and enjoyment of the suit property from the year 1954.

12. The Respondent/Plaintiff claimed an increased rent of Rs. 200/-from the month of March 1995 and refused to receive the March 1995 rent which has been tendered to the Respondent/Plaintiff. The demand for an increase in rent of Rs. 200/-is without any basis and unreasonable.

13. The First Appellant/First Defendant has vacated the portion and the Second Appellant/Second Defendant is in occupation of the same. The Second Appellant/Second Defendant is an employee of the First Appellant/First Defendant. The First Appellant/First Defendant alone is the tenant. The Second Appellant / Second Defendant are helping the First Appellant/First Defendant. The suit property is a tiled structure and continues to be the same. Periodical repair works will have to be carried out.

14. The Second Appellant/Second Defendant has nothing to do with the suit property and the First Appellant/First Defendant is entitled to the benefits of the City Tenants Protection Act 1921 and therefore, she filed a Petition as per Section 9 of the Act in O.P. No. 2 of 1996.

15. The suit is not maintainable in law and it is liable to be dismissed in limini. Notice to quit has not been issued by the Respondent/Plaintiff to the First Appellant/First Defendant terminating tenancy. Without terminating the tenancy, the present suit filed by the Respondent/Plaintiff is not maintainable.

The averments of Additional Written Statement filed by the First Appellant/First Defendant (adopted by the Second Appellant/Second Defendant):

16. In as much as the suit is one for vacating the site tenant. Notice to quit as per Section 106 of the Transfer of Property Act is mandatory. No notice has been issued as per Section 106 of the Transfer of Property Act. Furthermore, the relief for recovery of possession as prayed by the Respondent/Plaintiff is not sustainable in law or on facts. Indeed, the Respondent/Plaintiff ought to have filed the suit for ejectment only.

Reply averments of the Respondent/Plaintiff:

17. The Respondent/Plaintiff/Trust never permitted the Second Appellant/Second Defendant as the tenant. The First Appellant/First Defendant is not in occupation of the suit site and only the Second Appellant/Second Defendant is in occupation of the suit site without any authority. The First Appellant/First Defendant after selling the super structure to the Second Appellant/Second Defendant is no longer a tenant of the Respondent/Plaintiff. The First Appellant/First Defendant is only a formal party

to avoid plurality of proceedings. The main relief has been sought against only the Second Appellant/Second Defendant.

18. Before the trial Court, in the main suit 1 to 6 issues have been framed for adjudication and also two additional issues have been framed. On the side of the Respondent/Plaintiff, witnesses PW 1 and 2 have been examined and Ex. A-1 and A-12 have been marked. On the side of the Appellants/Defendants, no witness has been examined and no documents have been marked.

19. The trial Court on an appreciation and analysis of the oral and documentary evidence on record, has come to a categorical conclusion that in the suit property the Appellants/Defendants have no right to put up new superstructure and resultantly held that the Appellants/Defendants will have to remove all the super structures in the suit property within a period of three months from the date of passing of the Judgment at their costs and they have been directed to handover vacant possession to the Respondent/Plaintiff. Also, the trial Court has held that in case of default committed by the Appellants/Defendants in removing the super structures in the suit property at their costs, then the Respondent/Plaintiff/Trust has right to remove the said superstructures at the cost of Appellants/Defendants and to get possession of the suit property. The trial Court has also granted the relief of permanent injunction to the effect that in the suit property, the Appellants/Defendants without permission of the Respondent/Plaintiff cannot construct any new constructions and as regards mean profits, its relegated the same as per Order 20 Rule 12 of the CPC by means of a separate proceedings. Accordingly, the trial Court passed a decree with costs in favour of the Respondent/Plaintiff.

20. As an aggrieved, the Appellants/Defendants have filed A.S. No. 167 of 2004 on the file of the First Appellate Court, viz., the 3rd Additional Sub Court, Madurai, in A.S. No. 167 of 2004.

21. The First Appellate Court, viz., the 3rd Additional Sub Court, Madurai, while passing the Judgment in A.S. No. 167 of 2004, dated 15.06.2005 has clearly held that as per Ex. A-12, sale deed, dated 15.03.1995, the First Appellant/First Defendant has sold the property, viz., super structure to the Second Appellant/Second Defendant and therefore she has no manner of right in the suit property and further she has not been in possession of the suit property at the time of filing of the suit by the Respondent/Plaintiff and that the observation of the trial Court that no notice required to be issued to the First Appellant/First Defendant is a welcome one and finally held that as per Section 106 of the Transfer of Property Act, no notice is required to be issued as per the finding rendered by the trial Court which is correct and the Appellants/Defendants have lost their status as a tenant and consequently, dismissed the Appeal, leaving the parties to bear their own costs.

22. At the time of admission of the Second Appeal, this Court has framed the following substantial question of law for determination:

Whether the Courts below are right in finding that the suit for recovery of possession is maintainable without a notice of termination of tenancy u/s 106 of the Transfer of Property Act, particularly when the Plaintiff paid the Court fee on annual rental value u/s 43(2) of the Tamil Nadu Court Fees and Suits Valuation Act?.

The Contentions, Discussions and Findings on Point:

23. The Learned counsel for the Appellants/Defendants urges before this Court that the Judgment and Decree passed by the both the Courts in the main suit as well as in the Appeal Suit are contrary to law, weight of evidence and also against the probabilities of the case.

24. Advancing his arguments, it is the contention of the Learned counsel for the Appellants/Defendants that a mere suit for recovery of possession is not per se maintainable in the absence of issuance of notice as per Section 106 of the Transfer of Property Act, which is a mandatory one. Both the Courts below have not appreciated this legal aspect which has resulted in serious miscarriage of justice.

25. Expatiating his submissions, the Learned counsel for the Appellants/Defendants submits that PW2 in evidence has categorically deposed that the super structure has been sold by the First Appellant/First Defendant to the Second Appellant/Second Defendant will not bind him and therefore, the Courts below should have held that the tenancy is still in existence. In any event, the Respondent/Plaintiff should have issued notice as per Section 106 of the Transfer of Property Act and without terminating the tenancy by issuance of notice, a suit filed by the Respondent/Plaintiff is not maintainable.

26. The Learned counsel for the Appellants/Defendants to lend support to the contention that in the absence of issuance of notice u/s 106 of the Transfer of Property Act by the Respondent/Plaintiff to the Appellants/Defendants, the suit is not maintainable, he placed reliance on the ingredients of Section 106 of the Transfer of Property Act, which reads hereunder:

106. Duration of certain leases in absence of written contract or local usage.-(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months" notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days" notice.

(2) Notwithstanding anything contained in other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

27. Adverting to Section 106(4) of the Transfer of Property Act 1882, the Learned counsel for the Appellants/Defendants strenuously contents that the issuance of notice must be in writing and signed or on behalf of the person issuing it and the said notice may sent either by post to the party who is intended to be binds by it or be tendered or delivered personally to such party or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed by conspicuous part of the property and in the instant case on hand, such a precedent notice has not been issued either to the First Appellant/First Defendant or to the Second Appellant/Second Defendant, who has purchased the super structure from the First Appellant/First Defendant as per Ex. A-12, sale deed, dated 15.03.1995.

28. To put it differently, on going the ingredients of Section 106 of the Transfer of Property Act, this Court opines that the existence of a valid lease is a condition precedent. It is true that the condition requiring the Lessee to give a months notice will not affect the right of the Lesser to terminate a lease on 15 days notice as per Section 106 of the Transfer of Property Act in a given case.

29. Indeed, the Rule embodied u/s 106 of the Transfer of Property Act, is a technical rule and the same is not applicable as a rule of Justice, Equity and Good conscience.

30. At this juncture, this Court worthwhile recalls the decision of Hon"ble Supreme Court in Satish Chand Makhan and others Vs. Govardhan Das Byas and others reported in AIR 1984 Supreme Court 143, at Page 144, wherein it is held as follows:

Where a suit for ejectment and mesne profits was filed without a notice to quit u/s 106 of the Transfer of Property Act against a tenant in occupation of the rented property after expiry of lease, the suit would not be maintainable. Such person is a tenant holding over and notice to quit u/s 106 of the T.P. Act was necessary. It cannot be said that on expiry of the specified term under the unregistered lease deed executed before the filing of the suit, he became tenant at sufferance u/s 111(a) of the T.P. Act and the suit was maintainable without notice u/s 106 of that Act. The unregistered lease deed cannot also be taken into consideration on the ground that such deed can be admitted in evidence for collateral purpose, invoking proviso to Section 49 of Registration Act, as terms of lease are not a collateral purpose within its meaning. There being no change in the circumstances by virtue

of such unregistered lease deed O. 7, R. 7 of Civil P. C., is also not attracted.

31. The fact that the provision for transfer of the cases from the Civil Code to Wakf / Tribunal is not provided for in the Wakf Act is also a pointer that the suits filed earlier to the constitution of the Tribunal shall continues to be dealt with by the Civil Court as per decision of [P. Rama Rao and others Vs. High Court of Andhra Pradesh and others,](#).

32. The Wakf Act indicates that pending suit at the time of introduction of Section 85 will continue, but no suit can be filed thereafter, even if cause of action arose earlier, after the introduction of the Act as per the decision of Mohammad Sahib Vs. Mohammed Ibrahim reported in 2007 (2) K.L.T 56 at Page 64 (Kerala).

33. As far as the present case is concerned, it is not in dispute that the First Appellant/First Defendant has been the tenant of the vacant site under the Respondent/Plaintiff as averred by the Respondent/Plaintiff's Trust itself in the plaint and has taken the vacant site Door No. 84 from the Respondent/Plaintiff on a monthly rent of Rs. 50 and Door No. 84 A on a monthly rent of Rs. 50 as per English Calendar month.

34. Subsequently, as per Ex. A-12, sale deed, dated 15.03.1995, the First Appellant/First Defendant has sold the super structure of the suit property to the Second Appellant/Second Defendant.

35. Admittedly, no prior notice to quit, before the filing of the suit has been issued by the Respondent/Plaintiff to either the First Appellant/First Defendant or the Second Appellant/Second Defendant. The suit has been filed on 19.06.1995 before the trial Court.

36. The Wakf of Act 1995 has been brought into force on 01.01.1996. As per Section 7(5) of the Wakf Act 1995, the Tribunal shall not have jurisdiction to determine any matter which is the subject matter of any suit or proceeding instituted or commenced in a Civil Court under subsection (1) of Section 6, before the commencement of this Act or which is the subject matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be.

37. It is to be noted that as per Section 3(q) of the Wakf Act 1995, the term Tribunal, in relation to any area is meant as the Tribunal constituted as per sub-section (1) of Section 83 having jurisdiction in relation to that area.

38. It is the contention of the learned counsel for the Appellants/Defendants, only after 01.01.1996 when the Wakf Act 1995 has been brought into force, a civil suit will have to be instituted before the Tribunal constituted as per Section 83 of the Wakf Act 1995 and prior to that a civil suit can be filed before the Civil Court based on the value of rent with proper Court fee being paid thereto by the concerned party.

39. This Court on going through the averments made in the plaint by the Respondent/Plaintiff opines that the Respondent/Plaintiff has sought a relief from the Appellants/Defendants requiring them to handover possession of the suit property (vacant site) to it without any let or hindrance and also the Respondent/Plaintiff has sought the relief of permanent injunction restraining the Second Appellant/Second Defendant, his men, agents, etc., in anyway putting up any illegal and unauthorized constructions in the suit property, etc. Therefore, it is candidly clear that the Respondent/Plaintiff in the plain seeks relief not only against the First Appellant / First Defendant but also against the Second Appellant/Second Defendant.

40. A cursory reading of the plaint shows that the Respondent/Plaintiff has not sought a relief of ejectment against the Appellants/Defendants, the Respondent/Plaintiff has obviously sought a recovery of possession, relief in the main suit merely and that too without issuance of any notice to quit, prior to the filing of the suit as required u/s 106 of the Transfer of Property Act. It cannot be said that Section 106 of the Transfer of Property Act is a mandatory in nature and as per Section 4 of 106 of Transfer of Property Act, a notice in writing is required to be issued by the Respondent/Plaintiff to the Appellants/Defendants. However, in the case before us, no notice as per Section 106(4) of the Transfer of Property Act has been issued to both the Appellants. Therefore, this Court comes to an inevitable conclusion that the suit filed by the Respondent/Plaintiff against the Appellants/Defendants without issuance of notice as per Section 106 of the Transfer of Property Act is not maintainable and the substantial question of law is answered against the Respondent/Plaintiff and in favour of the Appellants/Defendants.

41. In the result, the Second Appeal is allowed, leaving the parties to bear their own costs. Consequently, the Judgment and Decree passed by the trial Court in O.S. No. 56 of 1995, dated 20.04.2004 and the Judgment and Decree passed by the First Appellate Court in A.S. No. 167 of 2004, dated 15.06.2005, are hereby set aside to prevent an aberration of justice. The suit in O.S. No. 56 of 1995 on the file of the trial Court, viz., the learned Additional District Munsif Court, Madurai, is dismissed. The connected Miscellaneous Petition is closed.