
(1979) 11 MAD CK 0007
In the Madras High Court

A. Arunachalam Pillai

APPELLANT

Vs

Sri Mayuranathaswamy Temple, Mayuram

RESPONDENT

Date of Decision : 27-11-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12

Tamil Nadu Public Trusts (Regulation of Administration of Agricultural Lands) Act, 1961
— Section 51

Citation : (1980) 93 LW 497 : (1980) 2 MLJ 247

Hon'ble Judges : S. Natarajan, J

Bench : Division Bench

Judgement

S. Natarajan, J.—The first defendant in O.S. No. 114 of 1973 on the file of the Court of the Subordinate Judge of Mayuram, is the

appellant. The respondent herein, Sri Mayuranathaswamy Temple, Mayuram, by its sole and Hereditary Trustee, Sri-la-Sri Ambalavana

Pandarasannadhi Avargal, Adheenakartha, Thiruvaduthurai Adheenam, instituted the suit against the appellant and one Kandaswamy Pillai, the

second defendant in the suit, for recovery of possession of the suit property and a sum of Rs. 7,500 towards, past damages for three years and for

future damages. The case of the respondent is that the suit property, marked as A B C D E F G in the sketch attached to the plaint, belongs to it

and is a cocoanut tope of an extent of 4 acres and 25,465 sq. ft. and known as Sami Naicken Tope. The tope is said to contain 282"" cocoanut

trees besides two mango trees and a number of iluppai trees. The respondent used to lease out the usufruct of the trees periodically in open auction

and the last occasion when the tope was leased out was on 1st : August, 1956. The second defendant participated in the auction and was declared

the-highest bidder and the tope was leased out to-him for an annual lease of Rs. 1,032 for a period of three years. As per the terms of auction, the second defendant was bound to execute a lease deed, but the second defendant got into possession of the tope without executing any lease deed. He fell into arrears of lease for three faslis upto to fasli 1368 and for recovery of the lease arrears the respondent filed a suit, O.S. No. 32 of 1960 on the file-of the Court of the District Munsif, Mayuram-and obtained a decree and recovered the arrears of lease. Though the lease period expired after the lapse of three years, the second defendant continued to hold over possession of the tope. Hence from fasli 1369 onwards the second defendant was liable to pay damages for use and occupation of the tope and the total damages due from him till the end of fasli 1,382 came to Rs. 9,443. For the said period certain amounts were paid in part payment of damages. While so, the appellant, who has no right to enjoy the usufruct of the tope, had managed to gain possession and the respondent has reason to believe that the second defendant, who had gone away from Mayuram, should have allowed the appellant to be in possession of the tope as a care-taker. Having thus gained possession of the tope unlawfully, the appellant filed a petition in P. No. 276 of 1973 in the Revenue Court, Mayuram under Tamil Nadu Act XXI of 1972, and falsely claimed that he was a lessee or sub-lessee of the property and that he was contributing his personal physical labour for raising crops on the-land and hence he was entitled to the status of a cultivating tenant. Though the appellant is not entitled to be in possession of the tope or to claim the status of a cultivating tenant or invoke the aid of Act XXI of 1972, to perpetuate Ms unlawful possession of the property, yet to avoid unpleasant situations, the officers of the respondent have desisted from entering the land and demanding surrender of possession. On such averments, the respondent came forward with the suit for recovery of possession of the suit property and also for recovery of damages from the appellant and the second defendant for a period of three years at the rate of Rs. 2,500 per year and for future damages.

2. The appellant filed a written statement and set out the defence that he and the members of his family are cultivating tenants and they have been contributing their own physical labour in the cultivation of the suit land and they have been raising plants and vegetables on the land besides growing

trees like portia and drumstick. According to the appellant, when the Advocate-Commissioner appointed at the instance of the respondent

inspected the suit property, he showed him the seed-beds prepared by him for growing vegetables like brinjal, lady's finger, avarai, snake-gourd,

bitter gourd, etc., and the saplings of plants grown by him and also the areas where tapioca had been planted and paddy had been grown. It was

not correct to say that only the right of, enjoyment of the usufruct of the cocoanut and other trees was leased out to the second defendant, but the

lease was of a composite nature because there was no prohibition for raising crops in the suit property or the formation of a kitchen garden. Not

only the trees on the land, but the land also was in the possession of the appellant as a cultivating tenant and hence no suit for recovery of

possession or mesne profits could be filed against him. The further defence of the appellant was that in the survey number appended to the plaint

and in the boundaries mentioned therein, there are a number of huts occupied by tenants who were also cultivating tenants and, as such, they

should also have been impleaded as parties to the suit and the failure to implead them vitiated the suit for non-joinder of parties. The appellant

alleged that the second defendant had nothing to do with the suit property and he alone was in possession as a cultivating tenant and he had been

paying rents to the respondent and consequently, his status as a statutory cultivating tenant and his rights in law in accordance with that status

should be recognised and upheld by the Court. Lastly, the appellant contended that the suit property would not yield crop of a value of Rs. 2,500

per annum and as such, the respondent was not justified in claiming damages at that rate. The appellant thus alleged that the suit was not

sustainable and hence he prayed for its dismissal.

3. The second defendant entered appearance through counsel, but failed to file any written statement and allowed himself to be set ex-parte,

4. On the basis of the pleadings of the parties, the learned Subordinate Judge set for trial the following issues:

(1) Is the suit had for nonjoinder of necessary parties?

(2) Did the defendant (sic) trespass and if so, when?

(3) Is the first defendant a tenant of the plaintiff in respect of the suit property?

(4) Was there a lease of the suit property for the purpose of cultivation ?

(5) Was the auction dated 1st August, 1956 a lease of the usufruct of the cocoanut trees or land for the purposes of cultivation?

(6) Is the alleged sub-lease by the second defendant to the first defendant true? Had the second defendant any transferable right at all?

(7) Has the first defendant any right under the Cultivating Tenants Protection Act?

(8) To what profits is the plaintiff entitled? and

(9) To what reliefs?

After a detailed consideration of the case of the parties, the Subordinate Judge held under Issue 1 that the suit was not bad for nonjoinder of

necessary parties. He further held that the lease was not confined to the usufruct of the cocoanut and other trees, but also included the land for the

purpose of cultivation and that the appellant was not a trespasser but was a sub-lessee under the second defendant. He answered Issues 2 to 6

accordingly. However, under Issue 7, the trial Judge held that the land had been converted into a tope and therefore, the exemption contained in

Section 51 of the Tamil Nadu Public Trusts Act, LVII of 1961, would operate in favour of the respondent and hence the respondent was entitled

to recover possession of the tope. Under Issue 8, the finding was that the claim of damages at Rs. 2,500 per annum was a reasonable one and

therefore, the appellant should pay damages at that rate for a period of three years. In accordance with such findings, the Subordinate Judge, by

judgment and decree dated 25th November, 1975, upheld the claim of the respondent and decreed the suit. The quantum of future profits was left

open for determination in separate proceedings under Order 20, Rule 12, Civil Procedure Code. It is against that judgment and decree the

appellant has preferred this appeal.

5. Before us, Mr. Krishnamurthi, learned Counsel for the appellant, put forth only two contentions. The first was that the suit property had not

been leased out as a tope by the respondent, and the lease included within it a right of cultivation of the land as well and, further more, the appellant

had actually been doing cultivation in the land by growing vegetables and some crops and hence Section 51 of Act LVII of 1961 would not be

attracted to the case. The second contention was that, in any event, the respondent was not entitled to claim damages for a period of three years

before the filing of the suit, because there had been no demand on the appellant

before the filing of the suit to surrender possession and, in the absence of such a demand, the respondent! cannot say that the appellant was in unlawful occupation of the land and by reason of that, he was liable to pay damages.

6. Taking up the first of the contentions, it is, no doubt, seen from Exhibit A-2, the auction register maintained by the respondent for faslis 1366 to

1368, that the suit property had been leased out in public auction and the second defendant was accepted as the highest ,bidder and was granted a

lease of the property for a period of three years with effect from 1st August, 1956. The lease amount was to be a sum of Rs. 1,032 per annum. It

is not exactly known how the appellant came into possession of the land. While the respondent would say that the second defendant must have

colluded with the appellant and let him into possession of the land at some point of time when the second defendant was holding over as lessee

after the expiry of the lease period, the appellant would say that he had been in possession of the property for a number of years and such

possession was even anterior to the lease of the property in favour of the second defendant. The learned Subordinate Judge has held that the

second defendant must have inducted the appellant into possession of the land as a sub-lessee. For the purpose of this appeal, it is not necessary

to determine when exactly the appellant came into possession of the property and in what circumstances he was inducted into such possession.

Suffice it to say that the appellant does not dispute his being in possession of the property from a period of three years prior to the filing of the suit.

The real question for consideration is whether the suit property is a tope and whether it was leased out as a tope or as a cultivable land. It is

common ground that there are about 282 cocoanut trees in the property besides some mango trees and iluppai trees. According to the respondent,

what was leased out was only the usufruct of the trees. In support of this contention, the respondent relies upon a clause in the auction register that

the successful bidder at the auction will not be entitled to enter into possession of the leased property unless and until he executes a lease deed in

proper form. Reliance is also placed in Exhibit A-3, the pro forma lease deed, in which there is a clause, viz., Clause (14), which specifically

interdicts the lessee of the coconut tope from raising any crop in the site of the

tope. These factors are relied upon by the respondent to contend that what was leased out to the second defendant was only the right of enjoyment of the usufruct of the tope and therefore, the lease pertained to a tope and not to a cultivable land. The further contention is that the appellant, who has gained entry into the suit property with the connivance of the second defendant, without the consent and knowledge of the respondent, cannot claim better rights than what had been conferred on the second defendant. For the appellant it is not seriously disputed that the suit property contains a large number of coconut trees and the lease related to the usufruct of the coconut trees. It is, however, contended that portions of the suit property are capable of being used as cultivable land and as a matter of fact, the appellant had grown vegetables etc., on portions of the land and, having regard to such user of the land, it must be held that what was leased out was not only the tope, but also the cultivable land and, therefore, the appellant has acquired in Jaw the status of a cultivating tenant and is entitled to protection from eviction. From the nature of the suit property, there can be no doubt that it would, undoubtedly, constitute a tope, and, as we have already pointed out, even the appellant does not seriously dispute this. A tope has been defined in Clause (29) of Section 2 of the Tamil Nadu Public Trusts (Regulation of Administration of Agricultural Lands) Act, 1961 hereinafter referred to as the Act), in the following terms:

We may safely state that if the suit property is considered as a tope, then the appellant will not be entitled to claim rights as a cultivating tenant and seek the protection of statute to perpetuate his possession, because Section 51(iv) of the Act expressly takes away the rights of cultivating tenants in so far as orchards or topes or arecanut, gardens are concerned. The relevant provision of the Act reads as follows:

Section 51:

Nothing contained in this Act shall apply to:

(iv) lands converted into orchards or topes or arecanut gardens, whether or not such lands are contiguous or scattered:

Provided that such lands shall be exempt only so long as they continue to be orchard, topes or arecanut gardens.

7. To get over the effect of Section 51(iv), the appellant would say that though the suit property comprised of a large number of coconut trees, he

had been actually growing vegetables and even paddy over portions of the land. The claim of the appellant in this behalf is refuted by the

respondent and Mr. Kumar, learned Counsel for the respondent, drew our attention to the Commissioner's report filed in the case. The

Commissioner has stated in his report that except for a small patch of land, where 12 pine-apple plants had been grown, he found the earth hard

and unturned and it appeared to him that at least for more than a year a spade would not have been used to turn the earth. Here again, we do not

think it is necessary to make a fuller probe into the matter to find out whether the appellant had actually been raising vegetables and crops in some

portions of the land. Even assuming for argument's sake that the appellant had been raising vegetables and some crops over small portions of the

land, what falls for consideration is whether such acts of the appellant will change the character of the suit property from that of a tope into a

cultivable land, and take away the application of Section 51(iv) of the Act to the suit property. We are clearly of opinion that it will not. In

Panchanatheswaraswami Devasthanam v. Abdul Majid (1974) 87 L.W. 282. Ismail, J. (as he then was), had to consider the scope and effect of

Sections 2(15), 2(18) and 2(29) of the Act defining the expressions "land", "orchard" and "tope" respectively and Section 51(iv) of the Act. After

referring to the definitions, the learned Judge held as follows:

It can be seen immediately that the definition of the term "land" contained in Section 2(15) is inclusive in the sense it includes forest, pasture land,

plantation, orchard and tope. Whenever the statute uses "land" in contra-distinction with "orchard" and "tope", the definition of "land" cannot

include orchard or tope at all, because Section 2 opens by stating, "In this Act, unless the context otherwise requires". Therefore, once Section

51(iv) of the Act exempts orchards or topes or arecanut gardens from the scope of the Act itself, the expression "land" occurring in the

Explanation to Section 18 necessarily must exclude orchards, topes and arecanut gardens. Hence Section 18 will have no application to orchards,

topes and arecanut gardens and it will apply only to agricultural land, that is to say, the land which is used or is capable of being used for

agricultural purposes subservient thereto.

It has been further stated as follows:

Once the land, as defined in Section 2(15), so becomes an orchard or tope as defined in Sections 2(18) and 2(29), the land becomes converted

into orchard or tope as contemplated by Section 51(iv) and therefore, is outside the scope of the Act in view of Section 51(iv).

This judgment has been followed by Balasubrahmanyam, J., in *Thiagaraja Sendar Vs. Sri Pasupatheswararswami Devasthanam*, where a question

similar to the one before us arose for consideration. One of the items of leased property in that case was a cocoanut tope, for which the lessee had

to pay Rs. 100 per year as rent. The lease deed further provided that the lessee could utilise the inter-space in the tope for punja cultivation. In

accordance with that clause, the lessee raised some crops on the land and, on the basis of such cultivation, put forth a plea that the leased property

had ceased to be a tope and therefore, Section 51(iv) of the Act would not be attracted and, consequently, he had to be treated as a cultivating

tenant and insulated by statute from eviction. The learned Judge repelled the contention and held that the suit land was predominantly a cocoanut

tope and even if the lessee had raised some punja crops, that would not detract from the fact that the land was mainly or predominantly a cocoanut

tope and would, undoubtedly, attract the application of Section 51(iv) of the Act.

8. On our own analysis of the relevant provisions of the Act, we are of opinion that the two decisions referred to above lay down clearly the scope

and effect of Section 51(iv) of the Act. The definition of "tope" in the Act does not lay down that, for the purpose of treating a land as tope, the

land should have no other growth on it except "groups of fruit or nut-bearing trees including palmyra trees". On the other hand, what Section 2(29)

states is that for a land being treated as tope, it should contain "groups of fruit or nut-bearing trees including palmyra trees, constituting the main

crop in such land". (Italics supplied). Having regard to this feature, it follows that a land will constitute a tope so long as the main crop derived from

it comes out of groups of fruit or nut-bearing trees including palmyra trees. The Legislature has advisedly used the words, "constituting the main

crop in such land", as otherwise, the intention of the Legislature to exclude topes from the operation of the Act would get defeated by a lessee

raising vegetables or agricultural crops on small portions of the land and then contending that by reason of negligible portions of the land being used

for cultivation purposes the character of the land had become changed from tope to cultivable land. It is apposite to refer at this juncture to the

proviso to Section 51(iv). The proviso states that the exemption granted u/s 51(iv) will have force as long as the land continues to be orchard, tope

or arecanut garden. From this also, it can be deduced that by reason of some crops or vegetables being raised or grown in small areas of an

orchard, tope or arecanut garden, the land will not cease to be an orchard, tope or arecanut garden. Thus, reading together Section 2(29) and

Section 51(iv) along with its proviso, it is patently clear that a land which constituted an orchard, tope or arecanut garden at the inception of the

lease, will] not cease to be a land of the same character just because the lessee had put small portions of the land to some agricultural use. We are

therefore, in full agreement with the ratio laid down in Panchanathaeswaraswami Devastha-nam v. Abdul Majid (1974) 87 L.W. 282, that once a

land as defined in Section 2(29), became converted into a tope, then the land would fall outside the scope of the Act in accordance with Section

51(iv) and, likewise, with the ratio laid down in Thiagaraja Sendar Vs. Sri Pasupatheswararswami Devasthanam, , that as long as a land is

predominantly a cocoanut tope, the fact that the, lessee had raised some crops on portions of the land would not alter the character of the land.

9. Mr. Krishnamurthi, however, brought to our notice an unreported judgment of Ismail, J. (as he then was), in Amrithakateswaraswami Arthajama

Kattalai, Thirukkadaiyur, by its Trustee, Govindaswami Chettiar v. Kaliamuthy S.A. No. 1429 of 1975, dated 23rd February, 1979, where the

ratio in Panchanatheswara-swami Devasthanam v. Abdul Majid (1974) 87 L.W. 282, was not applied and, instead, the lessee of a cocoa-nut tope

was recognised to be a cultivating tenant and, as such, protected, from dispossession, by the Tamil Nadu Act XXV of 1955. Placing reliance on

this judgment, the appellant's counsel urged that the ratio contained in this judgment must be applied in the present case also. We are unable to

agree with this contention, because it overlooks the fact that the decision in the abovesaid case had been rendered with reference, to the peculiar

facts of that case. It was noticed in that case by the learned Judge, that the lease deed under which the property was leased expressly stated that if

the lessee raised punja crops on the land, he would be liable to pay waram to the lessor according to village custom and therefore, it was clear that

what was the subject-matter of the lease was not merely the usufruct of the cocoanut tope, but also the land itself. It was in view of this finding,

viz., that the lease was not confined to the usufruct of the cocoanut trees alone, but also extended to the agricultural land, it was held that Section

51(iv) would not apply. We do not therefore find any conflict between Panchanatheswara-swami Devasthanam v. Abdul Majid (1974) 87 L.W.

282, and Amrithakateswaraswami Arthajama Kattalai, Thirukkadaiyur by Trustee v. Kaliyamurthy S.A. No. 1429 of 1975, dated 23 February,

1979. We are accordingly of opinion that the raising of vegetables and some crops on portions of the land by the appellant, even if true, will not

have the effect of changing the character of the land from one of tope to one of cultivable land. In view of this position the logical conclusion is that

the suit property would fall outside the scope of the Act in terms of section. 51(iv) and, as such, the appellant cannot claim himself to be a

cultivating tenant and refuse to surrender possession of the land. The first of the contentions of Mr. Krishnamurthi has therefore to fail.

10. As regards the second contention, Mr. Krishnamurthi's submission is that even if the appellant is held to be neither a lessee nor a sub-lessee of

the suit property, yet the respondent cannot claim damages from him for use and occupation of the land because there had been no demand on the

appellant, prior to the filing of the suit, to surrender possession of the land. We think there is considerable force in this argument. The respondent

can claim damages from the appellant only if it is able to show that it had called upon him to surrender possession of the land and in spite of such

demand, the appellant continued to be in possession of the property so as to constitute such possession an unlawful one. The evidence on record,

far from showing that the respondent had made a demand on the appellant to surrender possession, is to the effect that the respondent had called

upon the second defendant, under the original of Exhibit B-1, to surrender possession of the land and such notice had been sent to the second

defendant, care of the appellant. This notice, therefore, shows to some extent that the respondent had not objected to the possession of the land by

the appellant till the suit in ejectment was filed. Hence the respondent is not entitled to claim damages from the appellant for a period of three years

prior to the filing of the suit. It can only claim the lease amount originally agreed to be paid by the second defendant, viz., Rs. 1,032 per year. The

Subordinate Judge has not considered this aspect of the matter and hence his award of damages to the respondent at the rate of Rs. 2,500 per

annum is clearly wrong. As already stated, the liability of the appellant will be only in a sum of Rs. 1,032 per year. If the appellant has deposited in

Court any amount to-wards the admitted arrears of lease, the respondent will be entitled to draw the money from Court. We therefore sustain the

second contention of the appellant's counsel.

11. In the light of our conclusions, we sustain the judgment and decree of the trial Court except for the modification regarding the amount payable

by the appellant towards profits for three years. Instead Rs. 7,500, the appellant's liability will be only in a sum of Rs. 3,096. To this extent, the

appeal will stand allowed, but in other respects it will stand dismissed. The quantum of future mesne profits will be determined in separate

proceedings under Order 20, Rule 12, Civil Procedure Code. Since the appellant has only succeeded in part, we direct the parties to bear their

respective costs in the appeal.