
(2011) 06 MAD CK 0143

In the Madras High Court

Case No : S.A. No. 113 of 2008 and M.P. No. 1 of 2008

E.K.M.G. Bakir Ali

APPELLANT

Vs

G. Sundarraj and Others

RESPONDENT

Date of Decision : 20-06-2011

Acts Referred:

Tamil Nadu Cultivating Tenants Protection Act, 1955 — Section 2, 2, 3, 3(3), 4(1)
Transfer of Property Act, 1882 — Section 111

Citation : (2011) 06 MAD CK 0143

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : N. Manokaran, for the Appellant; T. Murugamanickam, for RR1 to 3 and V. Thillaisamy, for R5, for the Respondent

Final Decision : Allowed

Judgement

G. Rajasuria, J.—This second appeal is focussed by the sixth Defendant, animadverting upon the judgment and decree dated 26.07.2006

passed by the learned I Additional Subordinate Judge, Erode in A.S. No. 16 of 2006 confirming the judgment and decree dated 22.09.2005

passed by the learned Principal District Munsif, Erode in O.S. No. 1517 of 2004.

2. The parties are referred to here under according to their litigative status and ranking before the trial Court.

3. A summation and summarisation of the facts giving rise to the filing of this second appeal and which are absolutely necessary and germane for

the disposal of this Second Appeal would run thus:

a] The Plaintiffs filed the suit seeking the following reliefs:

- to pass a decree granting permanent injunction restraining the Defendants, their men, assigns and agents in any manner interfering with the

Plaintiffs peaceful possession and enjoyment of the suit properties till the Plaintiffs are evicted from the suit properties under due process of law.

- to direct the Defendants to pay costs. (extracted as such)

b] Written statement was filed by the sixth Defendant resisting the suit.

c] Whereupon issues were framed. On the side of the Plaintiffs, the third Plaintiff examined himself as PW1 along with PW2 and marked Exs.A1

to A8. On the side of the Defendant, the sixth Defendant examined himself as DW1 and marked Exs.B1 to B14.

d] Ultimately the trial court decreed the suit. As against which, appeal was filed by the Defendants 2,3,4 and 6 for nothing but to be dismissed by

the appellate court confirming the judgment and decree of the trial court.

4. Challenging and impugning the judgments and decrees of both the courts below, this Second Appeal has been filed by the D6/4th Appellant on

various grounds suggesting the following substantial questions of law:

a. Whether the courts below have committed an error in holding that the Plaintiffs being the sons of the original tenant is entitled to claim the status

of cultivating tenants especially when there is no oral or documentary evidence to prove their contribution of physical labour to claim the status as

cultivating tenants and further more the tenancy is not heritable in nature?

b. Whether the courts below are right in law in overlooking the admission made by PW1 which would go against his own case, particularly when

the appointment of watchman, the management and the usage of the land by the Defendants have been categorically admitted in the evidence,

however the courts below have wrongly shifted the burden of proof on the Defendants unmindful of the settled proposition of law?

c. Whether the findings of the courts below in holding that the Plaintiffs are cultivating tenants is legally sustainable in law especially when the

Plaintiffs have not proved their case independently and they cannot take advantage of the weakness in the defence by relying upon some stray

sentences in the evidence of DW1, more particularly the Plaintiffs are permanently employed in the postal Department? (extracted as such)

5. After hearing both sides, I am of the considered view that the following substantial questions of law could be framed:

1. Whether both the courts below failed to decide the lis adhering to the principles governing the burden of proof?

2. Whether both the courts below in the absence of clinching legal evidence to prove the alleged possession of the Plaintiffs in respect of the suit

property, decided the lis in their favour?

3. Whether the judgments and decrees of both the courts below are bad for misreading of the evidence and applying wrongly the law relating to

evidence in proving the possession of the suit property?

4. Whether there is any perversity or illegality in the judgments and decrees of both the courts below?

6. Heard both sides on the aforesaid substantial questions of law.

7. A "resume" of facts, which are admitted or at least undeniable would run thus:

(i) The Defendants are the land owners in respect of the suit property. The Plaintiffs' father, viz., Ganapathy Thevar was cultivating the said suit

property till his death in the year 1993 by contributing his physical labour and as such, he was a cultivating tenant in respect of the suit property.

(ii) The contentions of the Plaintiffs are to the effect that consequent upon the death of their father Ganapathy Thevar, the Plaintiffs who are the

sons of Ganapathy Thevar, automatically became cultivating tenants by virtue of they being in possession and enjoyment of the suit property and

contributing their physical labour in growing crops thereon.

(iii) However, the contention of the land owners, viz., the Defendants, are to the effect that subsequent to the death of Ganapathy Thevar during the

year 1993, his sons viz., the Plaintiffs volitionally and voluntarily surrendered the land to the Defendants, as P1 and P3 were employed in part time

jobs in post office and P2 was owning a printing press in Coimbatore, 100 kms away from the suit property.

8. Tersely and briefly, the arguments of the learned Counsel for the Plaintiffs would run thus:

a. The adangal records Exs.B3 to B13 and the electricity receipts (Ex.A8 series) would unambiguously and unequivocally highlight and spotlight

the fact that ever since the death of the Plaintiffs' father, the Plaintiffs being the cultivating tenants, are cultivating the land by contributing their

physical labour. At any rate, they have been in possession and enjoyment of the suit property.

b. No steps have been taken to get mutated the adangal records by getting deleted the entry ""lease hold cultivation"". The burden of proof was on

the Defendants to prove that the Plaintiffs allegedly surrendered the suit property, but they failed to discharge the same. Both the courts below

appropriately and appositely held that the Defendants have not proved the plea of surrender as detailed and delineated by them in their written

statement.

Accordingly, the learned Counsel for the Plaintiffs would pray for dismissal of the second appeal by appreciating the point that as against

concurrent findings of fact, no interference in second appeal is warranted.

9. In a bid to torpedo and pulverise the arguments as put forth and set forth on the side of the Plaintiffs, the learned Counsel for the Defendant

would advance his arguments, which could pithily and precisely be set out thus:

(i) The Plaintiffs, on whom the burden of proof lies in proving their case, has failed miserably to prove as to what crops they cultivated for a

decade, so to say, from 1994 to 2004. There is no iota or shred, shard or miniscule, pint or scintilla of evidence to display and demonstrate that

the Plaintiffs paid the rent to the Defendant or at least tendered the rent or deposited the rent with the revenue authority concerned as per the Tamil

Nadu Cultivating Tenants Protection Act or any other law. P1 and P3 being part time employees in Postal Department and P2 being the press

owner in Coimbatore, which is 100 kms away from the suit property, by no stretch of imagination could be taken as the ones who contributed their

physical labour in raising cultivation in the suit property. Both the courts below fell into error in placing reliance on Ex.A6, which is not at all relating

to the impugned period so to say, from 1994 to 2004, but that was relating to the year 1987, when admittedly, Ganapathy Thevar, the cultivating

tenant was cultivating the crops in the suit property. As such, both the courts below failed to appreciate properly the concept burden of proof and

apply the same in deciding the lis.

(ii) Both the courts below failed to appreciate the fact that the Defendants abandoned the land even as early as in the year 1994 in favour of the

Plaintiffs because, they were not interested in cultivating the land. Now they cannot veer round and by having a volte face try to lay claim over the

suit property.

(iii) Both the courts below based on misunderstanding of the case and misreading of the evidence decided the lis, warranting interference in second

appeal.

10. I would like to fumigate my mind with the following principles as found enunciated and enshrined in the following decision of the Hon"ble Apex

Court reported in Hero Vinoth (minor) Vs. Seshammal,

24. ...

(iii) The general rule is that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the

well-recognised exceptions are where (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn

wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to

decision based on no evidence"", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the

evidence, taken as a whole, is not reasonably capable of supporting the finding.

The other decisions emerged in this regard are as under:

(i) Vijay Kumar Talwar Vs. Commissioner of Income Tax, Delhi, , certain excerpts from it would run thus:

19. It is manifest from a bare reading of the section that an appeal to the High Court from a decision of the Tribunal lies only when a substantial

question of law is involved, and where the High Court comes to the conclusion that a substantial question of law arises from the said order, it is

mandatory that such question(s) must be formulated. The expression ""substantial question of law"" is not defined in the act. Nevertheless, it has

acquired a definite connotation through various judicial pronouncements.

23. A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving

at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or

legal principles have not been applied in appreciating the evidence, or when the evidence has been misread.

(ii) Kashmir Singh Vs. Harnam Singh and Another, .

(iii) 2009 1 L.W.1 - State Bank of India and Ors. v. S.N.Goyal

11. Trite the proposition of law is that as against the concurrent findings of fact, there may not be any interference in second appeal but in

exceptional circumstances, the High Court is not niggard and bereft of powers to interfere with perverse finding of facts emerged out of misreading of the evidence and wrong applications of law relating to evidence.

12. I also recollect and call up the maxims,

Affirmantis est probare [He who affirms must prove]

(ii) Affirmanti non neganti incumbit probatio: The burden of proof lies upon him who asserts and not upon him who denies.

The burden of proof is on the Plaintiff who comes to court with a case of his own. Here the Plaintiffs' contentions are that they are the cultivating

tenants, continuing to cultivate the suit property following the cultivation of the lands by their deceased father, viz., Ganapathy Thevar. In such a

case, the burden of proof is on them to prove the same.

13. The learned Counsel for the Plaintiffs' contention to the effect that the Defendants having chosen to specifically plead that during the year

1994, there was surrender or abandonment of the land in favour of them, it is for them to prove it. In my opinion, such an argument is a far-fetched

one quite antithetical to the rule of evidence for the reason that the Plaintiffs should at the first instance prove that consequent upon the death of

their father, who happened to be the cultivating tenant in respect of the suit property, they continued to cultivate the suit property as cultivating

tenants or at least as tenants. This Court has tried its level best to find out as to whether there is any jot or pint of evidence, which would

demonstrate and display, evince and evidence that the Plaintiffs actually had cultivated during the period ranging from 1994 to 2004 ie., till they

filed the suit. I could see no miniscule or molecular extent of evidence in their favour.

14. If at all a person, as a tenant, has been cultivating a land for a decade or so, certainly there would be some records, which would enable him to

prove before the court objectively that he cultivated the said piece of land. But in this case, the Plaintiffs could not produce any such evidence.

15. Indubitably and indisputably, for the said 10 years period, no rent was paid by the Plaintiffs, who claim to be the cultivating tenants/tenants

under the admitted land owners, viz., the Defendants.

16. The law is clear on the point that a tenant is expected to pay the rent to the landlord and if there is refusal or even if there is any dispute relating

to the rent, it is for the tenant to deposit it with the revenue authority concerned under the Tamil Nadu Cultivating Tenants Protection Act or the court under the general civil law. But, in this case, no such event occurred at all. If really for 10 years, the Plaintiffs had been cultivating the said land, then the Defendants would not have kept quiet without even demanding for rent. The Plaintiffs also could not have continued in possession for 10 years without paying rent.

17. I hark back to the legal adage ""Preponderance of probabilities would govern the adjudication in civil cases""; here, those preponderance are in favour of the Defendants and not in favour of the Plaintiffs.

18. The learned Counsel for the Plaintiffs would place reliance on the adangal records, viz., Exs.B3 to B13 and point out that no steps have been taken by the Defendants to get mutated the said adangal by getting deleted the phrase ""lease hold cultivation"" and that itself is indicative of the fact that in reality, the Defendants have not been in possession.

19. I would like to point out that in the adangal records, there is no specification of any tenant's name. What is found mentioned therein is the phrase ""lease hold cultivation"". However, one other important point should be noted that no where it is found stated that a particular kind of crop was cultivated during the said long 10 years" period. However, anterior to that, so to say, during the year 1993, in the adangal pertaining to the

said land, it is found specified that Turmeric crop was cultivated therein. After 1993, that is to say, after the death of the cultivating tenant-

Ganapathy Thevar, were there any cultivation continued, certainly that would have found place in the adangal. The Plaintiffs while vociferously

finding fault with the Defendants for having not taken steps to get mutated the revenue records, have forgotten as to why they had not taken such

steps to get incorporated their names in such records including the crops, which they allegedly cultivated in the suit property. As such, the Plaintiff

cannot approbate and reprobate and blow hot and cold. The adangal extracts, which the Plaintiffs tried to place reliance bespeak against them.

Both the courts below without au fait with law and au courant with facts, simply proceeded on the footing that the Plaintiffs being the sons of

deceased Ganapathy Thevar should be taken as the ones continuing in possession of the suit property.

20. The learned Counsel for the Defendant would invite the attention of this Court to the depositions of PWs.1 and 2 and point out that PW1

happened to be the third son of deceased Ganapathy Thevar and PW2 is none but the close relative of PW1 and their evidence is nothing but their

ipse dixit, which in no way throws light on the issue relating to possession. As claimed by PW1 were there any such physical contribution of labour

by the Plaintiffs in raising crops, then necessarily there would have been some documents in their favour. But no such document is available. The

averments on Plaintiffs" side are nothing but a load of baloney, which fails to carry conviction with this Court.

21. Relating to payment of electricity charges is concerned, the learned Counsel for the Plaintiffs would place reliance on Ex.A8 series and argue

that ever since 1993, the Plaintiffs were paying the electricity charges and nothing could be shown by the Defendants that they paid the electricity

charges.

22. At this juncture, I would like to point out that were any electricity supply utilised for cultivating the crops in an extent of 1 acre and 3 cents,

certainly, the consumption charges would not have been so low, but it would have been more.

23. The learned Counsel for the Defendant would try to expound and explain away that Ex.A8 series, which were in the possession of the

Defendants and filed in court, by pointing out that those receipts had been received by the Plaintiffs from the Defendant"s servant, who was put in

charge as watchman to look after the suit property.

24. Be that as it may, the electricity receipts by themselves for the reasons set out supra, do not in any way evince and evidence that the Plaintiffs"

have been cultivating the suit property during the said period.

25. Axiomatic and obvious that proving a particular individual is a cultivating tenant, is different from proving that a person is in possession of the

suit property as a tenant.

26. Here, I need not even go to the extent of expecting that the Plaintiffs ought to have proved that they were cultivating tenants, so to say, they

were cultivating the suit property by contributing their physical labour, but at least they ought to have established that during the aforesaid period,

they were in possession and enjoyment of the suit property. In order to

probabilise the defence, the Defendants have gone to the extent of pointing out convincingly and acceptably that P2 who is owning a printing press in Coimbatore, which is 100 kms away from the suit property could not have been physically contributing his labour or personally cultivating the suit property. So far as P1 and P3 are concerned, the contention of the Plaintiffs is that during their free time they were contributing their physical labour and raising crops in the suit property and in support of the same, not even the Village Administrative Officer or any other prominent person of that locality was examined. In order to buttress and fortify their claim what is required under law is that there should be some reliable oral or documentary evidence.

27. My mind is reminiscent and redolent of the maxim ""In re dubia magis infitatio quam affirmatio intelligenda. [In a doubtful matter, the negation is to be understood rather than the affirmation]. But in this case, I could see no such reliable piece of evidence. Both the courts below misunderstood the gamut of the case and they proceeded on the mere assumption having no legs to stand that Ganapathy Thevar was the cultivating tenant and the Plaintiffs being the sons should be presumed to have been in possession and enjoyment of the suit property. In my considered opinion, such a finding is not legally acceptable.

28. En passante, at this juncture, it would not be out of context to refer to some other more or less similar laws prevailing in some part of India other than Tamil Nadu; in those legislations, there are express provisions to the effect that there cannot be any resumption at all of a lease hold land by the land owner except through the intervention of the revenue authority; but in the Tamil Nadu Act, even though there are provisions for such resumption through Revenue authorities by citing and proving legal grounds, yet there is no legal embargo to the effect that even if there is any voluntary abandonment or surrender of the lease hold land, yet the landlord should not take possession of it.

29. Wherefore, I am of the considered view that there is no embargo on the part of the Plaintiffs in contending that they took back the land from the heirs of the deceased because they surrendered possession.

30. On the side of the Defendant, the following decisions have been cited and certain excerpts from those decisions would run thus:

(i) AIR 1966 Rajasthan 89 [Noratmal v. Mohanlal]

5. The first point of law to be examined in this appeal is whether service of such a notice by Debilal on Mohanlal operates as implied surrender.

The term "surrender by operation of law" or "implied surrender" is the expression used to describe all those cases where the law implies a

surrender from unequivocal conduct of both parties which is inconsistent with the continuance of the existing tenancy. ** ** (Such surrender is the

act of the law, and takes place independently of and even in spite of the intention of the parties". Woodfall on Landlord and Tenant, 25th Edition,

pages 966-67: para 2074).

Such a surrender is valid u/s 111(f) of the Transfer of property Act. Such a surrender may come into being in a number of ways. There may be

surrender by acceptance of a new lease, surrender by re-letting to another person by the landlord. Even acceptance by the landlord of the sub-

lessee as a tenant would amount to surrender....

(ii) Shah Mathuradas Maganlal and Co. Vs. Nagappa Shankarappa Malage and Others,

19. ...Surrender can also be implied from the consent of the parties or from such facts as the relinquishment of possession by the lessee and taking

over possession by the lessor. Relinquishment of possession operates as an implied surrender. There must be a taking of possession, not

necessarily a physical taking, but something amounting to a virtual taking of possession. Whether this has occurred is a question of fact. In the

present case if the mortgagor was not able to redeem the Appellant mortgagee was to enjoy the property in accordance with the terms of the

mortgage and also to sell the property for recovery of debts. This feature shows that the Appellant surrendered the tenancy from 7 November

1953.

(iii) AIR 2001 KERALA 177 [A,Sulaikha Beevi v. K.C. Mathew and Ors.]

20. The agreement of the learned Counsel for the Appellant is that the lease between the parties is one created by Ext.A1 dated 01.01.1962. In

other words, the contention is that the lease of 1120 M.E. as well as the lease created under Ext.B9 were surrendered and a fresh arrangement

had been arrived at under Ext.A1. The argument of the learned Counsel for the Respondents is that since the leases are void, the earlier lease

subsists and hence, there is no surrender. The Respondents further contended that there was no physical handing over of the property in favour of

the Appellant and hence it cannot be said that there was surrender of the property. In this connection, we refer to Section 111(e) and (f) of the

Transfer of Property Act, which reads as follows:

111. A lease of immovable property determines:

(a) to (d)

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease, to the lessor by mutual agreement between them.

(f) by implied surrender.

Mulla on the Transfer of Property Act, Seventh Edition at Page 741, it is stated thus: "'A surrender is an yielding up of the term of the lessee's

interest to him who has the immediate reversion or the lessor's interest. It takes effect therefore like a contract by mutual consent, on the lessor's

acceptance of the act of the lessee'". The surrender is either express or implied. The Author further states as follows: "'Express surrenders are in

England required by the Statute of Frauds to be in writing. No such formality is necessary in India. A deed of surrender need not be registered, if

there are facts dehors. No particular form of words is essential to make a good surrender'". At page 742, the Author describes regarding the

implied surrender which reads thus: "'Implied surrender or surrender by operation of law occurs: (1) by the creation of a new relationship, or (2) by

relinquishment of possession.... If the lessee accepts a new lease, that in itself is a surrender of the old lease, for the new lease could not be granted

unless the old was surrendered'".

21. In *Kamlabai and Others Vs. Mangilal Dulichand Mantri*, , the Supreme Court held as follows (at Pp.383-384 of AIR):

It is thus clear that when the parties surrendered the tenancy and substituted it by a fresh arrangement merely because physically the possession

was not handed over is of not much consequence. Apparently in the present case also by mutual agreement, the tenancy came to amend and by

arbitration what was sought was an arrangement for time on payment of damages for use and occupation. Admittedly, it did not either continue the

old tenancy or started any new one. This substitution of new arrangement and the determination of the old by mutual agreement clearly indicates

that the tenant surrendered his tenancy rights and the court below was not right in coming to the conclusion that the surrender is not there as possession was not handed over.

To the same effect is the decision in *Konijeti Venkayya v. Thammana Pada Venkata Subbarao*, AIR 1957 Andh Pra 619. Thus, it can be seen

that an implied surrender can be inferred from the conduct of the parties. If we look into the recitals in Ext.A1, it can be seen that the Respondent

has agreed that the property leased belongs to the Appellant's father and that he has taken it on rent from 01.01.1962. According to us, the

recitals in that document are that he has surrendered the building and premises to the landlord and he is taking the building and premises again for

carrying on his business and that he will be vacating the building premises at the end of the term. Thus, according to us, a new relationship was

created between the parties. Thus, we infer that the old lease has been surrendered. Thus we are of the view that the lease exists between the

parties. It can be seen that the relationship has come to an end.

(iv) 2003-3-L.W.745 (Madras High Court) [*Subbiah Pillai (died) and Ors. v. M.A. Thirunavukarasu Pillai (died) and Ors.*)]

46. Tenancy of the Plaintiff in the suit property is not proved. Nor has he proved that he is contributing his own physical labour in cultivation of the

suit property. When his status as cultivating tenant is denied, as found earlier, the suit O.s. No. 392 of 1975 itself is not maintainable. Case of the

Defendants that the Plaintiff was only engaged for supervision in the irrigation of the plantain and other crops and that he was removed for his

unsatisfactory work is very probable. Further case of the Defendants that the Plaintiff trespassed into the suit property in August 1974 is also

accepted by the lower appellate court on the evidence of DW4. The case set up by the Plaintiff that he is in possession as tenant was rightly

disbelieved by the lower appellate court.

47. Since the Plaintiff is found to be a trespasser in the suit property, the lower appellate court rightly granted decree for recovery of possession.

Rightly Plaintiff was found to be wrongful possession and that he is bound to deliver vacant possession. It is submitted by the learned senior

counsel for the Appellant/Plaintiff that the only remedy available to the Plaintiff is to approach the cultivating Tenancy Tahsildar/Record Officer to

get recovery of possession as contemplated under the provisions of the Act. The fallacy in this argument is per se clear. The Plaintiff is not

registered as cultivating tenant in the Record of Tenancy nor his name would be found in the Registry. While so, the land owner cannot approach

the Tenancy Tahsildar seeking for eviction of the tenant of recovery of possession.

48. Having found to be a trespasser, Plaintiff has not legitimate right to be in possession. Without any right, Plaintiff cannot seek permanent

injunction. The parties seeking injunction must possess some right and prove that the opponent is trying to invade in his possession. No such

legitimate right of the Plaintiff is set forth or proved without any right or possessory title, Plaintiff is not entitled to seek for the equitable relief of

injunction in O.S. No. 392 of 1975. Before a party can ask a court to exercise discretion in his favour, must show that he has some equities in his

favour which would impel a court to exercise discretion in his favour. In the alternative the party seeking injunction must possess some right which

the opposite-party is trying to invade or there must exist an obligation in its favour whether contractual or otherwise in respect of which the

opposite party is trying to commit a breach. It is settled position that no injunction could be granted against the true owner at the instance of the

person, who is in unlawful possession.

(v). 2008-1-L.W.323 (Before the Madurai Bench of Madras High Court) [J.M. Jeyachandran Samuel v. G.S.S. Masilamani]

20. Therefore mere entry in the Record of Tenancy Rights register does not confer by itself any right on a person as a cultivating tenant unless he

satisfies the other requirements. It is common knowledge that there may be several persons fulfilling the requirements of the definition of a

cultivating tenant, but their names may not be recorded in the Record of Tenancy Rights Register. One more aspect is that the sale agreement was

supported by Ex.A4 and the consideration was supported by PW2, an attesting witness to the sale agreement. The evidence in Ex.A5 would also

show that there was a balance sale consideration. Therefore, the Plaintiff has proved that he was a cultivating tenant of the suit property. The non-

entry of the record of tenancy rights will not defeat the claim of the Plaintiff. Therefore, the trial court concluded that the Plaintiff was a tenant and

the only question that has to be decided is that the finding of the civil court has

been completely vested from the jurisdiction is correct or not.

(vi). 1978 TLNJ 531 [Sri Annamalai nathaswamy Devasthanam, Anthanapettai by its Executive Officer v. Nagammal (died) and Ors..

...As the essential requirements of Section 3(3) of the Act (1972) has not been satisfied, we are unable to agree with Mr. R.G. Rajan that even if

the "current rent" has been paid by the heirs of Manickam Pillai his legal heirs and as persons aggrieved by the decree, they cannot claim

advantage of such payment and secure a benefit in the nature of relief in payment of arrears of rent contemplated in Section 3 of the Act.

(viii). Un reported judgment of this Court dated 07.12.2001 passed by the learned Single Judge in W.P. Nos. 9344 and 17923 of 1994] [T.P.

Mayavan v. The District Revenue Officer, Tiruchirapalli and Ors.]

12. It is clear that if a tenant wants to include the lands under his cultivation in the approved record of tenancy u/s 4(1) of Act X of 1969, first he

has to establish that he is a cultivating tenant within the meaning of Section 2 (aa) of Act XXV of 1955. I have already referred to the definition of

cultivating tenant"" in Section 2(aa) of Act XXV of 1955. It is clear that if a person claims that he is a cultivating tenant, it must be established that

he contributes his own physical labour or any member of his family in the cultivation of any land belonging to another, under a tenancy agreement,

either express or implied. According to the Petitioner he was inducted as a tenant by the 4th Respondent under a lease deed dated 23.06.1984.

The said lease deed has been marked as Ex.P.1 before the third Respondent. According to the Petitioner it is a lease agreement. On the other

hand, the 4th Respondent ? Trust pleads that it is not a lease agreement and in and by which he was asked to remove bushes in his land. Even

though the terms of the document is not clear, whether it is a lease agreement or a muchalika to do certain things, I shall consider whether there is

any material to show that the Petitioner is contributing his own physical labour or any member of his family assisting him in the cultivation work.

Similar question was considered by this Court in a case of Subbiah Nadar v. Nallaperumal reported in AIR 1973 Madras 432. While considering

Section 2(aa) of Act XXV of 1955, Ramanujam, J., has held that the said Section provides that a person is said to carry on personal cultivation on

a land when he contributes his own physical labour or that of the members of his

family in the cultivation of that land. In view of these provisions the learned Judge has held that a person claiming to be a tenant has to establish that he has contributed his own physical labour or that of the members of his family in the cultivation of the land in question so as to become a cultivating tenant as defined in the Act. The learned Judge has also held on the question as to whether the person in fact had contributed physical labour in the cultivation of the lands, the status of the person concerned, is relevant.

13. In a case of Angu alias Angammal v. the Record Officer and Additional Tahsildar reported in 1988 II L.W. 41, Swamikkannu, J., has held that unless a person proves that he so physically applies the body for the purpose of cultivating the land, he cannot go anywhere near the definition of Section 2(b) of the Tamil Nadu Cultivating Tenants' Protection Act, 1962.

14. In a case of Sathu Konar v. Duraisami reported in 80 Law Weekly 406, Ramaprasada Rao, J., (as he then was) has held that a person who renders assistance to a cultivating tenant as defined in Section 2 of the Madras Cultivating Tenants Protection Act, would not himself, by reason of such collaboration or assistance, become a cultivating tenant himself.

15. In a case of Abubucker Lebbai v. Zamindar of Ettayapuram reported in 1960 (1) M.L.J. 256, a Division Bench of this Court has held that in order to fall within the definition of cultivating tenant a person should carry on personal cultivation which again requires that he should contribute physical labour. The use of physical labour connotes the idea of physical strain—the use of muscles and sinews and implies a distinction from mental or intellectual work. Mere supervision of the work of cultivation or maintaining of account or disbursement of wages will not be such contribution of physical labour as to attract the definition.

16. In a case of Arumugam Pillai v. Tulasi Konar reported in 1960 (II) M.L.J., 145, while considering the very same provision, Ramaswami, J., has held that the Act seems to be designed to protect from eviction only the actual tillers of the soil and not the intermediaries.

17. It is clear from the definition of Section 2(aa) of Act XXV of 1955 as well as from the various decisions that cultivating tenant used in that

Section refers only the actual tillers of the soil either by himself or through any member of his family. Likewise, a person who carry on personal

cultivation which requires that he should contribute physical labour. Mere supervision of work of cultivation or maintaining of accounts or

disbursement of wages to various persons who does cultivation work will not attract the definition. To put it clear, unless he physically applies the

body for the purpose of cultivating the land, he cannot be called as a cultivating tenant.

18. I have already referred to that the status of the person claiming to be a cultivating tenant is also a relevant factor. Mr. V. Raghavachari, learned

Counsel appearing for the contesting 4th Respondent has brought to my notice the evidence before the Record Officer, which shows that the

Petitioner was a Municipal Chairman for certain period and he also own a car. It is also clear from the materials placed that he was residing at

Srirangam i.e. 30 kms., away from the cultivable land. This aspect has not been disputed. It is further seen that at the relevant time his wife is aged

about 22 years, his first son is aged about 20 and after completion of his course in Aircraft Engineering at Coimbatore, was in Bombay for a period

of six months as apprentice. It is further seen that after completion of studies in Bishop College in 1988 he went to Coimbatore. His second son is

aged about 14 years. He is studying Leather Technology Course in Chennai. His third son is studying in Tiruverumbur R.S.K. High School. The

above factual details clearly show that his family members are not contributing anything for his cultivation.

(viii). Un reported decision of the Division Bench of this Court dated 29.06.2007 passed in W.A. Nos. 693 and 694 of 2002] [T.P. Mayavan v.

The District Revenue Officer, Tiruchirapalli and Ors.]

10. From the above said provision, a tenant who wants to include the lands under his cultivation in the approved record of tenancy u/s 4(1) of the

Act 10 of 1969 must establish that he is a cultivating tenant within the meaning of Section 2(aa) of Act XXV of 1955. To say in other words, if a

person claims that he is a cultivating tenant, he must establish that he contributes his own physical labour or any member of his family in the

cultivation of the land in question.

12. As such, either in the order of the second Respondent or in the order of the first Respondent, there is no finding that the Appellant was

contributing his own physical labour in the cultivation work of the land in

question. As rightly contended by the learned Counsel for the fourth

Respondent, it is a sine quo non that only in the event of the person engaging himself in personal cultivation he is entitled to the benefit of the Act

but as referred above, there is no whisper either in the order of the first Respondent or in the order of the second Respondent that either the

Appellant or his family members had their physical labour in the cultivation of the land in question. As such, the Appellant had not fulfilled the

mandatory requirement to include the land in question in the approved record of tenancy u/s 4(1) of Act X of 1969.

13. The contention of the learned Counsel for the fourth Respondent that since the Appellant was an MLA and also Chairman of the Municipality

he could not have cultivated the land personally at any point of time is concerned, basing on the social status of a person, it cannot be presumed

that he could not have contributed his physical labour in the cultivation process in the land in question. But on the facts admitted, the twin conditions

laid down under the statute are not satisfied in the case of the Appellant. That apart, as per the judgment reported in 80 L.W. 406 (Sathu Konar v.

Duraisamy), it has been held, a person who renders assistance to a cultivating tenant as defined in Section 2 of the Madras Cultivating Tenants

Protection Act, would not himself, by reason of such collaboration or assistance, become a cultivating tenant himself.

13. In the judgment reported in 1969 I SCR 508 (Abubucker Lebbai v. Zamindar of Ettayapuram) it has been held that in order to fall within the

definition of cultivating tenant, a person would carry on personal cultivation which again requires that he should contribute physical labour. The use

of physical labour includes physical strain, the use of muscles and sinews. Mere supervision of the work or maintaining of accounts or disbursement

the wages will not be such contribution of physical labour as to attract the definition.

14. In AIR 1972 Madras 171 (V. Reddiar v. Sundaramoorthy) it has been repeatedly held that in order to get the benefit of the Act, it is

necessary for the tenant to establish that some one in his family is contributing his physical labour in the cultivation of the land. So also in the

judgment reported in 1961 M.L.J. 256, in order to fall within the definition of the cultivating tenant a person who carry on the personal cultivation

which again requires that he should contribute his physical labour. The use of physical labour connotes the idea of physical strain , use of muscles

and sinews and implies a distinction from mental and intellectual work.

Those decisions would exemplify and demonstrate that in order to hold that a particular individual is a cultivating tenant, the individual should prove

that there was physical contribution of labour in raising crops in the property concerned. There is no quarrel over such a proposition.

31. In the result, the substantial question of law No. 1 is decided to the effect that both the courts below failed to decide the lis adhering to the

principles governing the burden of proof.

32. The substantial question of law No. 2 is decided to the effect that both the courts below erred in deciding the lis in favour of the Plaintiffs in the

absence of clinching legal evidence to prove their alleged possession.

33. The substantial question of law No. 3 is decided to the effect that both the courts below misread the evidence and applied the law wrongly

relating to evidence in proving the possession of the suit property.

34. The substantial question of law No. 4 is decided to the effect that since there was perversity and illegality in the judgments and decrees of both

the courts below, I am of the view that interference in second appeal is warranted.

35. Accordingly, this second appeal is allowed and the judgments and decrees of both the courts below are set aside and the original suit shall

stand dismissed. However, there shall be no order as to costs.