
(1984) 07 MAD CK 0013
In the Madras High Court
Case No : C.R.P. 690 of 1984

Malayappa Nadar

APPELLANT

Vs

Masjid E. Hafeeziah by Secretary Mohammed Iqbal

RESPONDENT

Date of Decision : 27-07-1984

Acts Referred:

Citation : (1984) 07 MAD CK 0013

Hon'ble Judges : Ratnam, J

Bench : Single Bench

Advocate : M.R. Narayannasami for Mr. C. Lakshmi Narain, for the Appellant;

Judgement

Ratnam, J.—The tenant is the petitioner. The property in dispute measures 77" x 21" in No. 48, Strahans Road, Madras 12. Admittedly,

this property belongs to the respondent Masjid. In Ejt. Suit No. 179 of 1975, the respondent herein prayed for a decree against the petitioner

directing him to vacate and deliver vacant possession of the property in his occupation. After the service of summons in that suit, the petitioner

herein filed M.P. 2265 of 1975 claiming benefits under S. 9 of the Tamil Nadu City Tenants Protection Act (hereinafter referred to as the Act).

Two objections were raised by the respondent in that application. The first was that as per G.O. Ms. No. 1252. Commercial taxes and Religious

Endowments, dated 27th November, 1980, a lessee of a wakf land will not be entitled to claim any compensation for any building put up by him

while surrendering possession of the land to the wakf and since no compensation is payable in respect of the superstructure, the tenant cannot also

seek the benefits of S. 9 of the Act. The second was that the land in question being part of a mosque would partake the character of res extra

commercium and therefore inalienable and cannot from the subject-matter of an application under S. 9 of the Act. Before the Court below on

behalf of the petitioner Exs. P1 to P23, were marked and the petitioner and another Civil Engineer were examined as P.W. 1 and P.W. 2, while on

behalf of the respondent Exs. D1 to D7 were filed and D.W. 1 and D.W. 2 gave evidence. The learned IV Judge, Court of Small Causes,

Madras, on a consideration of the oral as well as the documentary evidence found that the G.O. relied on by the respondent cannot be pressed

into service to deprive the petitioner of the rights under S. 9 of the Act and having regard to the use of the property in dispute by the petitioner as a

firewood depot for nearly 40 years and the sale of an adjacent property to one Alwar Nadar under S. 9 of the Act, S. 9 of the Act would apply

even with reference to the property in dispute. In that view, the application filed by the petitioner claiming the benefits of S. 9 of the Act was

allowed and a Commissioner was appointed to value the land. Aggrieved by this, the respondent herein preferred Ejectment appeal No. 11 of

1982 before the Chief Judge, Court of Small Causes, Madras. With reference to the plea raised by the respondent that G.O. No. 1252

Commercial Taxes and Religious Endowments dated 27th November, 1980 would apply to deprive the petitioner of the benefits of S. 9 of the

Act, the appellate court was of the view that the rights available under S. 9 of the Act cannot be defeated by the G.O. and that the petitioner can

claim such benefits. However, the appellate Court was of the view that the property in question is res extra commercium and inalienable and

therefore, the petitioner cannot claim that such property should be sold to him under S. 9 of the Act. In that view, the appeal was allowed and the

application filed by the petitioner claiming the benefits under S. 9 of the Act was dismissed. It is the correctness of this order that is challenged in

this civil revision petition.

2. The learned counsel for the petitioner contends that the appellate Court was in error in having concluded that the property in dispute would be

res extra commercium and pointed out that in order to be land appurtenant to the mosque, the land should also have been used by the mosque for

its benefit. Reliance in this connection was also placed upon the meaning of the word "appurtenant" as given in Black's Law Dictionary, 5th Edn.

at page 94. The learned counsel further pointed out that the evidence on behalf of the respondent disclosed the requirement of the property in the occupation of the petitioner for its own purposes and that having regard to the exclusive use of the property by the petitioner as a firewood depot for nearly forty years, it could not have been used at all by the respondent as an appurtenant land and the mere requirement of the respondent for its own purposes would not render the property inalienable as *res extra commercium*. Though the respondent in this civil revision petition had been served, it had not appeared either through an advocate or by any other person duly authorised.

3. In considering the question whether the property in dispute is appurtenant to the mosque, the appellate Court has not adverted to the

requirements to be satisfied or fulfilled before such property can be really termed as an appurtenant one. In this case, there is no dispute that that

the petitioner has been in exclusive possession, occupation and enjoyment of the disputed property for over 40 years as a lessee under the

respondent. The respondent could not have, therefore, been using the land either for its purposes or for its benefit. The mere circumstance that the

property in question is next or contiguous to the mosque will not by itself make it *res extra commercium*. Indeed it is seen from the documents that

the immediate adjacent property formed the subject matter of an application under S. 9 of the Act at the instance of one Alwar Nadar and this is

shown by Ex. D.6 . Unfortunately, there is no reference in the order of the appellate court to Ex.D.6 at all. Besides, the admission of D.W. 1 , the

photographer, who had taken the photographs Exs. D.3 and D.4, would show the existence of a wall between the mosque and the property in the

occupation of the petitioner. Even D.W. 2 , states in the course of his chief-examination that there is a wall in between the property leased out to

the petitioner and the mosque. P.W. 1 also in the course of his chief examination has stated that there is a wall in existence between the property

leased out to him and the mosque land and in the course of his cross-examination, he has reiterated the existence of the compound wall by stating

that the property in his possession is on one side of the wall. P.W.2 would also state in his chief examination that there is an intervening wall

between the mosque and the property in the occupation of the petitioner. The evidence of P.W. 1 and P.W.2 and D.W. 1 and D.W. 2 referred to

above would thus disclose the existence of a wall between the property in the possession and enjoyment of the petitioner and the mosque and if

that be so, then, the property in the occupation of the petitioner could not have been used by the respondent for the purpose of the mosque for its

benefit. This is also probable in view of the admitted exclusive occupation and enjoyment of the property in dispute by the petitioner as a lessee for

more than 40 years. The report of the Commissioner has not been properly considered and appreciated. The bulk of the report of the

Commissioner is devoted to physical features of the building, viz, the mosque which was really unnecessary for purposes of considering the

application of the petitioner under S. 9 of the Act taking into account the character of the property forming the subject matter of such an

application. Towards the concluding portion of the report the Commissioner has stated that the western side wall divided the mosque and the

respondent's (petitioner herein) portion, that the mosque and the respondent's (petitioner herein) portion had separate main entrances and that

there was no doorway outside the western wall. Recently in Palani Roman Catholic Mission through Rev. Father A. Kulandaiswami v. Murugan

and Co. 97 L.W. 74 I had occasion to examine the question of the applicability of S. 9 of the Act to certain properties owned by a church claimed

by it to be appurtenant to the church. In doing so, a decision of this Court in Sambandam Chetti v. St. Francis Xavier's Church 1973-2-M.L.J. 2

= 86 L.W. 516, was referred to and it was held that there was clear demarcation of the church and its appurtenant properties by compound walls

and fences and the property which formed the subject matter of the application under S. 9 of the Act cannot be considered to be a property

appurtenant to the church. The decision in Sambandam Chettiar v. St. Francis Xavier's Church 1973-2-M.L.J. 2 = 86 L.W. 516 was held to be

inapplicable to the facts, as in that case it was found that the property forming the subject matter of the application under S. 9 of the Act was within

the church compound itself, which was not the case in Palani Roman Catholic Mission v. Murugan and Co. 97 L.W. 74. In order therefore to as

certain the true character of the property whether it is really appurtenant to the church or is otherwise clearly demarcated therefrom by compound

walls and other fences or ridges, it would be necessary to record a clear finding of fact touching upon that aspect on the basis of the materials

made available to the Court. In this case, as seen earlier, vital pieces of oral as well as documentary evidence have not been taken into account and their evidentiary value assessed and that had led to the appellate court to come to an erroneous conclusion regarding the character of the property forming the subject matter of the application under S. 9 of the Act, as if it is res extra commercium. In order to precisely ascertain the character of the property, it would be necessary to consider in detail the features of the property in the occupation of the petitioner particularly whether it is cut off or excluded from the mosque portion of the property by walls or fences, as the case may be. The mere existence of a closed doorway or the opening out of the windows would not be decisive of the question, if the property in the occupation of the petitioner had not been put to use by the mosque for its benefit and its purposes along with its other lands, as in such a case, it cannot be called appurtenant to the mosque. In as much as these aspects have not been referred to or considered by the appellate Court, its conclusion that the property in the occupation of the petitioner is res extra commercium cannot be sustained and has to be set aside with a direction that the question should be considered afresh in the light of the observations contained in this order and also the available evidence on record. Consequently, the civil revision petition is allowed and the order of the appellate Court dismissing M.P. No. 2265 of 1975 filed by the petitioner under S. 9 of the Act is set aside and Ejectment Appeal No. 11 of 1982 is remitted to the lower appellate Court for a reconsideration on its merits and in the light of the observations contained herein. There will, however, be no order as to costs.