

(2008) 11 MAD CK 0095

In the Madras High Court

Case No : S.A. No's. 354 and 355 of 2008 and C.R.P. No's. 774 and 775 of 2008

T. Nalini and V.S. Thirunavukkarasu

APPELLANT

Vs

Sri Sai Baba Baktha Samajam and Commisioner, Corporation
of Chennai

RESPONDENT

Date of Decision : 19-11-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 4
Evidence Act, 1872 — Section 114
Madras City Municipal Corporation Act, 1919 — Section 75
Transfer of Property Act, 1882 — Section 106

Citation : (2008) 11 MAD CK 0095

Hon'ble Judges : R. Banumathi, J

Bench : Single Bench

Advocate : K.P. Gopalakrishnan, for the Appellant; R. Muthukumarasamy for S.PL. Palaniappa, for R1 and G.T. Subramanian, for R2, for the Respondent

Final Decision : Dismissed

Judgement

R. Banumathi, J.—Second Appeals are directed against common Judgment in A.S. Nos. 531 and 532/2004 reversing the Judgment of the

trial court/XIII Assistant Judge, City Civil Court, Chennai in O.S. No. 9044/1996 and O.S. No. 4720/1993 dismissing the suit filed by Appellants

for permanent injunction and decreeing the suit filed by Plaintiff-Samajam for declaration that Plaintiff Samajam is the lessee and for recovery of

possession.

2. Since both the Second Appeals arise out of common Judgment and involve common questions, both Second Appeals were taken up together

and shall stand disposed by this Common Judgment. For convenience, parties are referred as per their array in O.S. No. 9044/1996.

3. Property in dispute was the subject matter of several rounds of litigation. Briefly stated factual background which gave rise to the Second

Appeals are as follows:

The subject matter of dispute is T.S. No. 10/2, West Club Road measuring 3600 sq. ft. One Purushothaman was a tenant in the pump room for a

period of one year from 10.01.1956 on a rent of Rs. 5/- per month subject to the usual condition of lease under the Corporation. The said

Purushothaman had encroached a part of the land leased out to the Plaintiff-Sri Sai Baba Baktha Samajam (herein after referred as Plaintiff-

Samajam). Corporation of Chennai served notice u/s 220 of Madras City Municipal Corporation Act (for short MCMC Act) to the encroacher

Purushothaman which was challenged by the said Purushothaman in O.S. No. 608/1973. In O.S. No. 608/1973, Purushothaman has sought for

permanent injunction against the Corporation restraining it from enforcing notice dated 22.01.1973. Court dismissed the suit O.S. No. 608/1973

filed by the said Purushothaman with an observation stating that notice issued u/s 220 of MCMC Act is invalid. Thereafter, eviction notice was

served upon to Purushothaman and encroachment had been removed on 19.09.1975. 1st Defendant-Corporation leased out the property to the

Plaintiff-Samajam from 01.03.1976 for a period of 30 years as per resolution No. 1093/1972 dated 18.10.1972 and the possession of the land

marked as "C" in Ex. A-4.

4. O.S. No. 5851/1992: Purushothaman has filed O.S. No. 5851/1992 against "Shirdi Sairam Samajam" for bare injunction alleging that he was a

lessee of land in the suit property from Corporation of Madras and obtained an exparte order of interim injunction (Ex. A-12). It is alleged that

after obtaining exparte order of injunction, Purushothaman with his henchmen trespassed into the suit property which was in possession of Plaintiff-

Samajam and unlawfully occupied the same and is alleged to have put up a name board ""Chitra Tailors"" and also alleged to have constructed a

compound wall on the eastern boundary of the property trespassed by him.

5. O.S. No. 9044/1996 (City Civil Court, Chennai

C.S. No. 1026/1992 (High Court, Madras)

Plaintiff Samajam has filed C.S. No. 1026/1992 against Corporation and Purushothaman for declaration that Plaintiff-Samajam is a lessee of

Corporation of Madras and for recovery of possession. Advocate-commissioner was appointed by the High Court. Advocate-commissioner has

inspected the suit property and took photographs in the presence of Purushothaman. It was noticed that Halogen lamp installed by Samajam in the

middle of western boundary of the suit property was noticed. In C.S. No. 1026/1992 Plaintiff-Samajam had alleged that Purushothaman had

trespassed into the suit property and Plaintiff- Samajam sought for recovery of possession. After institution of the suit, it was reported that

Purushothaman had sold the property to the Defendants 3 and 4/Appellants and they were impleaded in the suit C.S. No. 1026/1992. Due to

enhancement of pecuniary jurisdiction of City Civil Court, C.S. No. 1026/1992 was transferred to City Civil Court/XIII Assistant Judge, Civil

Civil Court, Chennai and re-numbered as O.S. No. 9044/1996.

6. Case of the Plaintiff-Samajam is that they are in lawful possession of the suit property since 01.03.1976 under deed of lease entered by

Corporation with the Plaintiff-Samajam and therefore, Plaintiff-Samajam is entitled for declaration that they are lessee from the Corporation and

for recovery of possession. During pendency of the suit, Purushothaman had sold the property to Defendants 3 and 4 and the purchase is hit by lis

pendens and the sale deeds in favour of the Defendants 3 and 4 would not prejudicially affect the rights of the Plaintiff-Samajam over the suit

property and Plaintiff-Samajam sought for declaration that the Plaintiff- Samajam entitled to the suit property as lessee from Corporation and for

delivery of possession and also sought for permanent injunction restraining the Defendants 2 to 4 from putting up any construction.

7. O.S. No. 4720/1993: Appellants/Defendants 3 and 4 have filed this suit against Plaintiff-Samajam for permanent injunction restraining Plaintiff-

Samajam from interfering with their possession of the property. In O.S. No. 4720/1993, it was alleged that Purusothaman was a lessee in respect

of the land bearing Municipal Door No. 5, West Club Road, Shenoy Nagar, Madras-30. It is the further case of the Appellants that Corporation

treated Purushothaman as trespasser and after the Judgment in O.S. No. 608/1973, the said Purushothaman was in continuous and uninterrupted

possession and enjoyment of the suit land from 1956 and thus perfected his title by adverse possession. Appellants have purchased the suit

property under two documents dated 28.12.1992 (Doc. No. 6501/1992) and another sale deed dated 08.01.1973 (Doc.No.91/1993).

Appellants are said to have purchased total extent of 3600 sq. ft. from the said Purushothaman. Alleging that the Plaintiff-Samajam is trying to

disturb their possession and enjoyment, Appellants filed O.S. No. 4720/1993 for permanent injunction restraining the Plaintiff-Samajam from

interfering with their possession.

8. On the above pleadings, trial court framed relevant Issues and taken up both the suits together. Trial court held that Judgment and decree in

O.S. No. 608/1973 would be binding upon the Corporation and Plaintiff-Samajam, as the Corporation had not filed appeal against the Judgment

in O.S. No. 608/1973. Trial court held that there was no evidence showing that encroachment of Purushothaman was removed and possession

was taken by the Corporation from Purushothaman. Trial court took the view that so long as lease in favour of Purushothaman had not been

determined in accordance with law, Corporation cannot lease out the property afresh in favour of Plaintiff-Samajam. Observing the plea of

encroachment by 2nd Defendant is unacceptable, trial court held that 2nd Defendant had sold his entitlement to Defendants 3 and 4 and

Defendants 3 and 4 having purchased under valid sale deeds are entitled to permanent injunction and decreed the suit O.S. No. 4720/1993. In so

far as, O.S. No. 9044/1996, trial court held that the suit filed by Plaintiff-Samajam is barred by res-judicata in view of Judgment and decree in

O.S. No. 608/1973.

9. Aggrieved, Plaintiff-Samajam filed A.S. Nos. 531 and 532/2004. The learned lower Appellate Judge held that Defendants 3 and 4 have taken

inconsistent pleas viz., title through sale deeds and at the same time claiming title through adverse possession. The learned Appellate Judge held

that lease in favour of Purushothaman has come to an end and dismissal of earlier suit O.S. N. 5851/1992 (as withdrawn) would be binding upon

the parties.

10. Lower Appellate court inter alia held that the documents and evidence on record would go to show that there had been a lease of the suit

property by the Corporation to the 1st Respondent based on the resolution and a registered lease deed and that the various receipts of rent and

the erection of the Halogen lamp would prove that the suit property had been granted to the 1st Respondent-Samajam and that 1st Respondent-

Samajam had been in possession of the suit property from 01.3.1976.

11. In the lower Appellate court, C.M.P. No. 2219/2007 was filed under Order XLI, Rule 27 C.P.C. to receive the Proceedings DOSC No.

EC1/022564/75 as additional evidence. The said document was the Proceedings for removal of construction put up by Purushothaman and taking

possession by the Corporation and handing over possession of the vacant land to Plaintiff-Samajam. While allowing Appeals, by the order dated

14.12.2007, learned Appellate Judge dismissed C.M.P. No. 2219/2007. As the additional document is very crucial document for determining the

real controversy between the parties, earlier by order dated 21.7.2008 in M.P.No.2/2008 this Court allowed M.P. No. 2/2008 and called for a

report from the lower Appellate court on the following question:

Whether construction put up by Purushothaman has been removed by the Corporation and Whether Corporation had taken possession of the

vacant land as alleged by the Corporation.

12. In its finding, lower Appellate Court held that Ex.A35 is an ancient document and is maintained in the lawful custody of the Corporation.

However, lower Appellate Court was of the view that Ex.A35 not being the Order or Proceedings, but only Notings recorded would not be

sufficient to conclude that the superstructure was removed by the Corporation and that Corporation had taken over possession.

13. Challenging the findings of the lower Appellate court, Mr. K.P. Gopalakrishnan, learned Counsel for the Appellants has submitted that

possession of Purushothaman was recognized in O.S. No. 608/1973 and the Judgment in O.S. No. 608/1973 is binding upon the Corporation

and without determining the lease in favour of Purushothaman, the alleged lease in favour of Plaintiff-Samajam dated 1.3.1976 is nothing but a

paper lease and unsustainable. The learned Counsel for the Appellants inter alia contended that without recourse to Section 106 of T.P. Act,

attempt of Corporation to lease out the property to Plaintiff-Samajam is not sustainable. The learned Counsel for the Appellants further submitted

that Corporation and Plaintiff-Samajam could not have been in possession of the suit property when injunction order was in force in O.S. No.

608/1973. The learned Counsel for the Appellants further urged that the trial court has rightly held that Judgment and decree in O.S. No.

608/1973 would operate res-judicata and the lower Appellate court erred in reversing the same.

14. Taking me through the evidence of P.W.5 in respect of Ex.A35, Mr. K.P. Gopalakrishnan, learned Counsel for the Appellants has submitted

that neither the evidence of P.W.5 nor Ex.A35 would substantiate the claim of Corporation that Corporation has removed the superstructure put

up by Purushothaman and taken vacant possession. Learned Counsel for the Appellants would further submit that Purushothaman was allowed to

continue from 1975 onwards and the lease hold right of Purushothaman is transferable. It was further argued that Defendants 3 and 4 having

derived lease hold right, they can be evicted only under due process of law.

15. Taking me through various dates and events Mr. Muthukumarasamy, the learned Senior Counsel for Plaintiff-Samajam has submitted that in

O.S. No. 5851/1992 when Purushothaman himself claimed as tenant, Defendants 3 and 4 cannot claim title to the suit property. Laying emphasis

upon the additional document (Ex.A35), the learned Senior Counsel for Plaintiff-Samajam further submitted that there is positive material to show

that possession of vacant land was delivered to the Plaintiff-Samajam and document produced by Plaintiff-Samajam would show continuous

possession and enjoyment of Plaintiff-Samajam. The learned Senior Counsel would further submit that the findings of the lower Appellate court

that Purushothaman could not have been in possession of the suit property is a factual finding and the same cannot be interfered with.

16. Insofar as, the further findings (dated 18.9.2008) in respect of Ex.A35, Mr. R. Muthukumarasamy, learned Senior Counsel for 1st

Respondent has submitted that lower Appellate Court erred in not raising presumption u/s 114 of Indian Evidence Act and the lower Appellate

Court traversed beyond the questions for which findings were called for. Learned Senior Counsel for 1st Respondent would further submit that

even dehors Ex.A35, Plaintiff-Samajam has proved its lease.

17. During the course of arguments the following substantial questions of law were formulated for consideration:

1. Whether the Lower Appellate court committed an error in going into the

validity/title of the Defendants 3 and 4 by virtue of Sale Deeds Exs.B4 and B5?

2. Whether the Lower Appellate Court was not right in upholding the lease deed executed by the Second Respondent-Corporation in favour of

the First Respondent without terminating the lease in favour of Purushothaman?

3. Whether the Corporation was not justified in leasing out the Suit property along with other property to the First Respondent-Samajam, which

according to the Appellants is not valid, since lease in favour of Purushothaman was not terminated in accordance with law?

4. Whether the Lower Appellate Court was not right in saying that the judgment and decree in O.S. No. 608 of 1973 would not operate as res

judicata in O.S. No. 9044 of 1996?

5. Whether the Second Respondent-Corporation is justified in seeking transposition as Appellants in the Appellate stage?

6. Whether the Lower Appellate Court ignored the evidence and whether the judgment of the Lower Appellate Court is vitiated due to non-

appreciation of oral and documentary evidence?

18. In O.S. No. 4720/1993, Defendants 3 and 4 as Plaintiffs claimed title as:

(i) Purushothaman was a lessee under the Corporation and Corporation treated him as lessee and the suit O.S. No. 608/1973 was decreed.

(ii) After decree in O.S. No. 608/1973, Purushothaman continued to be in possession in his own right and perfected title by adverse possession.

(iii) Under Exs.B4 and B5 sale deeds, 1800 sq. ft. each was sold to the Defendants 3 and 4.

19. Defendants 3 and 4 mainly based their title upon Exs.B1 and B2 Judgment and decree in O.S. No. 608/1973. Trial court also held that the

Judgment and decree in O.S. No. 608/1973 would be binding upon the Corporation. In O.S. No. 608/1973, notice issued u/s 220 of MCMC

Act for removing projection and encroachment in the pump room was the subject matter of challenge. In the said suit Purushothaman claimed as

tenant in respect of shop portion belonging to the Corporation. Corporation resisted the suit contesting that Purushothaman unauthorisedly

occupied the pump room and used it as tailor shop and the Corporation had issued notice u/s 220 of MCMC Act. In O.S. No. 608/1973, Court

has held that Purushothaman was a tenant under the Corporation of the premises in question. Be it noted in O.S. No. 608/1973 Purushothaman

himself has alleged that he is a tenant of the shop and that Corporation is taking steps to lease out the entire vacant place surrounding the shop in

favour of Sai Baba Baktha Samajam and that Corporation is taking steps to evict him.

20. u/s 220 of MCMC Act, no one shall build any wall or erect any fence or other obstruction or projection or make any encroachment in or over

any street. The control of which is vested in the Corporation. Observing that Purushothaman is tenant of pump room, in O.S. No. 608/1973 Court

has held that there was no encroachment by Purushothaman so as to sustain notice issued u/s 220 of MCMC Act and on those findings, Court has

held that notice dated 22.1.1973 u/s 220 of MCMC Act as invalid. In other words to put it shortly, declaration was to the limited extent of

declaring notice issued u/s 220 of MCMC Act is invalid. In so far as, injunction is concerned court has refused permanent injunction and dismissed

the suit in other aspects.

21. From the Judgment in O.S. No. 608/1973 (Ex.B1), the following aspects emerge:

(i) Even according to Purushothaman, he was in occupation of pump room and his lease relates to only shop and not to appurtenant.

(ii) Decree was granted to the limited extent of declaring notice u/s 220 of MCMC Act as invalid.

(iii) Permanent injunction was refused to Purushothaman.

22. The present suit property relates to 3600 sq. ft. As pointed out earlier, even in O.S. No. 608/1973 Purushothaman has alleged that

Corporation is taking steps to grant long term lease of vacant place surrounding the suit shop in favour of Plaintiff-Samajam.

23. As rightly submitted by Mr. Muthukumarasamy, the learned Senior Counsel, only document produced by the Defendants 3 and 4 is Exs.B1

and B2 Judgment and Decree in O.S. No. 608/1973 wherein Purushothaman claimed to be lessee under the Corporation of shop premises.

Neither notice issued u/s 220 of MCMC Act nor suit O.S. No. 608/1973 related to appurtenant/land surrounding the shop.

24. It is significant to note here that no document has been produced either in

that suit (O.S. No. 608/1973) or in the present suits (O.S. Nos. 9044/1996 and 4720/1993) to show that the said Purushothaman was granted lease or possession of 3600 sq. ft. of vacant land. There is also no averment, much less any proof or finding, in the Judgment in O.S. No. 608/1973 (Ex.B1) to the effect that the said Purushothaman was granted a lease of about 3600 sq. ft. of land by the 2nd Respondent or that he was in possession of the same.

25. No scrap of evidence has been produced to show that the said Purushothaman was in possession of the alleged shop portion (pump room) or that he had continued to be a tenant of that shop portion paying rent to the 2nd Respondent-Corporation after the Judgment dated 19.12.1974 in O.S. No. 608/1973.

26. Substantial Questions of Law Nos. 1 to 3:

Lease in favour of the 1st Respondent-Samajam:

Inasmuch as, 2nd Respondent-Corporation is the owner of the suit property. It is absolutely competent to grant lease of the suit property to the 1st

Respondent. On 30.11.1971, 1st Respondent-Samajam made a request to the Corporation to grant lease of adjacent lands on both sides of the

property of Samajam. P.W.1 Narasimhan, P.W.2 Subramanian, Secretary and President of Sri Sai Baba Baktha Samajam, D.W.1

Sampathkumar, Asst. Executive Engineer of Corporation of Chennai have sworn to the fact that pursuant to the resolution No. 1093/1972 dated

18.10.1972 (Schedule B to Ex.A5) passed by the Council of Corporation, 2nd Respondent granted lease of 7.8 grounds on both sides of

Samajam for a period of 30 years.

27. Only the Notings in 1975 was initially produced before the High Court and marked as Ex.A35. When the parties adduced evidence before the

lower Appellate Court, Corporation has produced the file containing Ex.A35 which contains 112 pages of details and official proceedings in

respect of grant of lease to Samajam and incidental proceedings.

28. The following facts are discernible from Ex.A35 and the relevant file:

Resolution No. 1093/72 passed by Corporation to grant 7.8 grounds on both sides of Samajam as lease to Sai Baba Samajam for 30 years.

Revenue Officer of Corporation by Proceedings No. R.D.C. G8/11797/75

determined the tenancy of Purushothaman with the expiry of 31.3.1975 and called upon him to deliver vacant possession.

Construction put up by Purushothaman in suit property was removed by Corporation observing all formalities on 19.9.1975.

Vacant possession of land of the extent of 1 ground 1200 sq.ft. without any superstructure was handed over by the Corporation to Samajam

(Ex.A4).

Registered Lease deed dated 09.6.1977(Ex.A5) was executed between the Commissioner, Corporation of Madras and the 1st Respondent.

Grant of the aforesaid lease by 2nd Respondent in favour of 1st Respondent was in conformity with the procedure laid down u/s 75(3) and 81 of

MCMC Act r/w. 107 of T.P. Act.

29. The fact that 1st Respondent was in possession of the suit property as lessee of the 2nd Respondent from 01.03.1976 till 02.08.1992 is

fortified by the payment of annual rent made by the 1st Respondent to the 2nd Respondent for the period from 1976 to 1993 vide Exs.A6 to A10.

The assertions of P.W.1 and P.W.2 that the 1st Respondent was in possession of the suit property from 01.03.1976 to 02.08.1992 and during

that period it had put up a wire fence and iron tubular gate on the boundary facing the West Club Road in the western portion of the suit property

and installed a Halogen lamp in the middle of the western boundary of the suit property, focussing on the Gopuram of Sri Shiridi Sai Baba Mandir

of the Samajam situated in the east of the suit property and had erected a shed have been confirmed in the Report (Ex.C1) of Advocate-

commissioner appointed in the suit on inspecting the suit property in the presence of Purushothaman on 06.09.1992 to note down its physical

features, and is supported by the Bill dated 27.10.1979 for purchase of Halogen lamp (Ex.A11).

30. Upon analysis of facts and circumstances, lower Appellate Court rightly held that 1st Respondent was put in possession of the property on

01.03.1976 as lessee of the suit property under Ex.A4 and the lease deed Ex.A5 dated 09.06.1977 entered between Corporation and 1st

Respondent. As rightly contended by the learned Senior Counsel Mr. Muthukumarasami, no contra evidence has been adduced by the Appellants.

31. Mr. K.P. Gopalakrishnan, learned Counsel for the Appellants contended that

the Judgment and Decree in O.S. No. 608/1973 has been in force and while so, the alleged lease deed in favour of 1st Respondent-Samajam is not valid in law. It was further argued that without terminating the lease in favour of Purushothaman, Corporation could not have handed over possession in favour of Samajam on 19.09.1975 and while so, lower Appellate Court erred in saying that possession has been handed over to 1st Respondent-Samajam.

32. In support of his contention, learned Counsel for the Appellants mainly placed reliance upon the further finding (dated 18.09.2008) of the Appellate Judge in respect of Ex.A35. Before advertent further finding of the Appellate Judge (in respect of Ex.A35 file) certain aspects need to be noted. As pointed out earlier, Ex.A35 would make it clear that vacant possession was handed over by the Corporation to Samajam on 01.03.1976. It is abundantly clear from the sketch contained in the said Proceedings of handing over possession of the suit property (extent of 1 ground 1200 sq.ft.) handed over to 1st Respondent (Ex.A4). The recital in Ex.A5 registered lease deed dated 09.06.1977 would further strengthen the case of 1st Respondent. If, notwithstanding Exs.A4 and A5, Purushothaman continued to be in possession of the suit property, the Appellants could have very well filed the documents to prove the possession of Purushothaman. But for the period from 1976-1992, no documents of possession of Purushothaman are forthcoming.

33. It is pertinent to note that Purushothaman filed O.S. No. 5851/1992 (dated 13.7.1992) on the file of V Asst. Judge, City Civil Court, Chennai against Sri Shiridi Sairam Samajam for bare injunction alleging that he was a lessee of the land in the suit property from the Corporation and he has obtained an ex-parte order of interim injunction (Ex.A12) in I.A. No. 13357/1992. On behalf of the 1st Respondent, it was contended that on the strength of ex-parte order of injunction, Purushothaman trespassed into the suit property which was then in possession of Samajam and unlawfully occupied the same by putting up name Board "Chitra Tailors" and he has also alleged to have put up a compound wall on the eastern boundary of the property trespassed by him, despite objection of the Samajam. It was in that situation, Samajam has filed C.S. No. 1026/1992 [re-numbered as O.S. No. 9044/1996 on the file of XIII Asst. City Civil Court, Chennai] before

Madras High Court against the Corporation and

Purushothaman for declaration that Samajam is lessee of Corporation of Madras and for recovery of possession from Purushothaman. In the said

suit, advocate-commissioner was appointed who has noted the presence of 15"" Halogen lamp post. Only on the strength of ex-parte interim

injunction, Purushothaman is said to have obtained electricity service connection which was duly objected by the 1st Respondent-Samajam by

issuing legal notice Ex.A15 on 11.02.1993.

34. From the various Proceedings in O.S. No. 5851/1992 and C.S. No. 1026/1992, Purushothaman has hotly contested the suits. In O.S. No.

5851/1992, Purushothaman had filed I.A. Nos. 23649 & 23650/1992 to substitute Sri Sai Baba Baktha Samajam as Defendant in the place of

Shirdi Sairam Samajam which was dismissed by V Asst. Judge, City Civil Court, Chennai.

35. Like wise, Purushothaman had also forcibly contested C.S. No. 1026/1992 and various applications filed thereon. In O.A. No. 188/1999 in

C.S. No. 1026/1992 temporary injunction was granted against Purushothaman not to alienate the suit property (order dated 15.03.1993).

However, Purushothaman has already alienated the property to the Appellants under Exs.B4 and B5 (dated 28.12.1992 and 08.01.1993). Even

while Purushothaman had so hotly contested both the suits, strangely Purushothaman has withdrawn O.S. No. 5851/1992 on 06.07.1993 as not

pressed. Withdrawal of O.S. No. 5851/1992 would strongly militate against the Appellants and against the maintainability of the suit O.S. No.

4720/1993.

36. Be it noted, Purushothaman had not obtained permission of the Court to withdraw the suit and file a fresh suit. Both in O.S. No. 5851/1992

and 4720/1993 the claims are same i.e. claiming title and right to the property. Though, there is change in the parties, that cannot alter the character

and nature of the suit. Purushothaman himself could have obtained relief regarding determination of his title to the property by proving title or right

in the earlier suit O.S. No. 5851/1992.

37. Considering the scope of Order 23, Rule 1(3) CPC in Hari Ram Vs. Lichmaniya and Others, , learned single Judge of Rajasthan High Court

has held as under:

If in the earlier and later suits the foundation of the claim like title and right to the property are the same, the slight change in the ground cannot alter

the character and nature of the suit. If a plaintiff could have obtained relief regarding determination of his title to the property or right to the

property by proving title or such right only and if suit is withdrawn without leave of the Court under Order 23, Rule 1(3) C.P.C. to institute fresh

suit, then whatever has been claimed in the suit shall stand abandoned by the plaintiff because of the reason that after institution of a suit by the

plaintiff, the suit can either be withdrawn unconditionally or may be compromised or decreed or dismissed or may abate or Court may return it for

presentation in proper court or even court may permit the plaintiff to avail other remedy. Under Order 23, Rule 1 C.P.C. and in all those cases

where Plaintiff withdraws suit, the plaintiff is precluded from filing another suit. The plaintiff can file fresh suit only when the law permits plaintiff to

file fresh suit under specific provisions of law like Order 23, Rule 1(3) C.P.C. and Order 9, Rule 4 C.P.C....

25. It is immaterial whether plaintiff files another suit with respect to the subject matter against the same party during the pendency of his earlier suit

or after withdrawal of the earlier suit without leave of the court to file fresh suit, consequence is the same and i.e., abandonment of his claim with

statutory restriction against second suit as provided in Sub-rule (4) of Rule 1 of Order 23 C.P.C. Even if, the principles of res judicata cannot be

applied still the plaintiff cannot have any permission to walk in Court and go out of the Court after inflicting injury upon the defendant and even

upon the Court of dragging in litigation and wasting precious time without having any consequence of coming into the Court and compelling other

party to face the litigation may it be for long period or for shortest period....

(underlining added)

38. Sale deeds in favour of the Appellants (Exs.B4 and B5) are hit by doctrine of lis pendens. P.W.1 had no valid right to convey under the sale

deeds. Appellants are not right in contending that lower Appellate court ought not to have gone into the question of title under Exs.B4 and B5, in

my considered view the lower Appellate Court has not committed any error in going into the title of the Defendants 3 and 4 and the 1st substantial

question of law is answered accordingly.

39. Whether Purushothaman continued to be in possession of the suit property:

Learned Counsel for the Appellants contended that Purushothaman continued to be a tenant under Corporation and without terminating the lease,

Corporation could not have executed the lease deed in favour of 1st Respondent-Samajam. Learned Counsel for the Appellants further contended

that even the sale deeds (Exs.B4 and B5) cannot convey right to the Defendants 3 and 4, sale deeds are to be upheld for the limited purpose of

upholding the leasehold right. Therefore, the stand of the Appellant is that they having purchased the possessory right/lease hold right under Exs.B4

and B5, Appellants could be evicted only under due process of law by terminating their tenancy.

40. The above contention is in striking contrast to the pleadings of the Appellants. In O.S. No. 4720/1993, Appellants have averred that their

vendor Purushothaman was in continuous, open and uninterrupted possession and enjoyment of the suit property from 1956 and in any event from

1973 when the suit O.S. No. 608/1973 was dismissed on the ground that notice dated 22.01.1973 was not a valid notice. Case of the Appellants

that after dismissal of the suit, Purushothaman was in open possession of the suit property asserting the title. As pointed out earlier, no document

had been produced to show that Purushothaman had been in possession of the suit property from 1976 to 1992. As discussed earlier,

construction put up by Purushothaman in the suit property was removed by the Corporation as seen from Ex.A35 Notings dated 19.09.1975. The

Notings in Ex.A35 reads as under:

DOSC No. EC1/022564/75

Submitted to AEB

This is to report that the construction put up by one Thiru. C. Purushotham on the Corporation land next to Sai Baba temple has been removed on

19.9.75 after observing all formalities and the possession of vacant land was handed over to temple authority on 1.3.76.

41. By reading of the above endorsement, it is clear that after serving eviction notice, encroachment by Purushothaman had been removed on

19.09.1975 and possession of the suit property was handed over to the 1st Respondent-Samajam on 01.03.1976.

42. To prove the Entries and Notings in the file containing Ex.A35, P.W.5

Kamalakannan, Assistant working in the Land and Estate department of Corporation was examined to prove the notings and entries and to show that Ex.A35 is maintained in the lawful custody of Corporation of Madras. In a further finding (dated 18.09.2008), the lower Appellate Court recorded findings that evidence of P.W.5 and the entries in Ex.A35 would not substantiate the Corporation's plea in handing over possession to 1st Respondent-Samajam. In the said further finding (dated 18.09.2008), lower Appellate Court has stated that though Ex.A35 is an ancient document, there is nothing to show that procedure has been followed before removing the superstructure and handing over of possession.

43. Lower Appellate Court has recorded its further finding dated 18.09.2008 in response to the following questions formulated by this Court:

Whether the alleged construction put up by Purushothaman has not been removed by the Corporation and Whether Corporation had not taken possession of the vacant land as stated by the Corporation?

44. As rightly pointed out by the learned Senior Counsel for 1st Respondent instead of answering the question, lower Appellate Court referred prior and posterior events of Ex.A35 and appears to have traversed beyond the questions for which the finding was called for. Further finding of lower Appellate Court refers to the evidence of P.W.5 in extenso. Be it noted, P.W.5 was examined only for the limited purpose to show that Ex.A35 and the file thereon is maintained in the regular official course. While so, while recording further finding (dated 18.09.2008), lower Appellate court erred in attaching undue weight to the oral evidence of P.W.5.

45. Ex.A35 (dated 17.3.1976) and related files thereon is an ancient and public document. P.W.5 has spoken about Ex.A35 and that it is being maintained in the lawful custody of Corporation of Madras. Ex.A35 being an ancient document and has been maintained in the usual course of business, Secs.19 and 35 and illustration (e) to Section 114 of Indian Evidence Act would stand attracted.

46. u/s 114 illustration (e) of Indian Evidence Act, if an official act is proved to be done, it will be presumed to have been regularly done.

Presumption u/s 114 will come into aid to the party if the party proves the fact that the judicial or official act has been in effect done or performed.

Performance of the act i.e. whether judicial or official will have to be proved first

and if it is proved, then the presumption arises that the said act was performed in accordance with law. Without proving the fact of the act having been performed, the party cannot ask the court to raise that presumption. "Regularly performed" means performed in accordance with the form and procedure the presumption is rebuttable. Presumption can be over turned only by exceptionally strong evidence. When Ex.A35 file has been produced and P.W.5 was examined to show that it is regularly maintained during the official course, presumption has to be raised under illustration (e) to Section 114 of Indian Evidence Act.

47. To rebut the said presumption under illustration (e) to Section 114 of Indian Evidence Act, Appellants have not adduced any evidence, nor evidence was adduced to over turn the Entries/Notings in Ex.A35 file. In the absence of any rebuttal evidence, lower Appellate Court was not right in saying that entries in Ex.A35 cannot be taken as such. The further finding (dated 18.09.2008) recorded by the lower Appellate Court is perverse and unsustainable.

48. Ex.A35 being an ancient document and being maintained in the official course, much weight has to be attached to the entries thereon. As per Ex.A35, construction put up by Purushothaman was removed by the Corporation on 19.09.1975. Vacant possession of the land to an extent of 1 ground 1200 sq.ft. without any superstructure was handed over by the Corporation to 1st Respondent (Ex.A4) on 01.03.1976. Thereafter, under Ex.A5 dated 09.06.1977 lease deed was entered between the Corporation and 1st Respondent-Samajam for a period of 30 years.

49. Execution of lease deed was pursuant to the Resolution No. 1093/1972 passed by the Corporation. In General Merchant Association and others Vs. The Corporation of Chennai, , the Division Bench of this Court while dealing with the power of the Corporation of Chennai to grant lease of its property under the Chennai City Municipal Corporation Act, 1919 has held as under:

...for a lease of the Corporation property, compliance of Sections 75 and 81 of that Act is mandatory and it requires a document in writing and such lease could not be granted unless it is approved by a resolution of the Corporation Council or the Committee, as may be and any contract without compliance of the formalities prescribed will not bind the Corporation and

an action which is ultra vires is without jurisdiction, null and void and of no legal effect whatsoever.

The Division Bench has further held as under:

...a contract which does not conform to the requirements and statutory formalities of that Act, is not enforceable either by the contracting party or by the Corporation and no right arises from such contract.

50. In Dr. H.S. Rikhy and Others Vs. The New Delhi Municipal Committee, the Hon"ble Supreme Court while dealing with pari materia

provisions of the Punjab Municipal Act, 1911 under which the New Delhi Municipal Committee had been constituted, is also to the same effect

that strict compliance of the requirements of the statute is mandatory to create a legally enforceable relationship of lessor and lessee.

51. In the light of this legal position, it is necessary to decide upon the existence of a valid lease only on the basis of documentary evidence

produced under Sections 91 and 92 of the Indian Evidence Act, 1872, regarding compliance with the aforesaid statutory requirements dehors of

even any admission in the oral evidence adduced in that regard.

52. Lease deed in favour of Purushothaman was duly terminated and after removal of superstructure, Corporation had executed lease deed Ex.A5

in favour of 1st Respondent and the substantial questions of law 2 and 3 are answered accordingly.

53. Substantial Question of Law No. 4:

While dismissing the suit O.S. No. 9044/1996, trial court has held that Judgment and Decree in O.S. No. 608/1973 would not be binding upon

the 1st Respondent-Samajam and the Corporation. Trial court took the view that in O.S. No. 608/1973, Purushothaman was found to be a lessee

under the Corporation and the same was not challenged and that finding has become conclusive, binding upon the 1st Respondent-Samajam and

Corporation.

54. As pointed out earlier, in O.S. No. 608/1973 Purushothaman has challenged the notice dated 22.01.1973 issued u/s 220 of MCMC Act and

to restrain the Corporation from interfering with the terms of notice dated 22.01.1973 except under due process of law. Whether Purushothaman

was a lessee or not was the only issue which arose for determination in the said

suit. In answering Issue No. 1, the Court found that

Purushothaman only was a lessee under Corporation and that Purushothaman was paying the rent to the Corporation for the premises. In O.S.

No. 608/1973 Court has further held that Corporation cannot invoke Section 220 of MCMC Act which could be invoked for removal of

encroachment. When the matter was in issue directly and substantially in a prior litigation and decided against a party, then the decision would be

res judicata in a subsequent proceeding.

55. As held by the Supreme Court in Sajjadanashin Sayed Md. B.E.Edr. (D) By Lrs. Vs. Musa Dadabhai Ummer and Others, the test to

determine whether an issue was directly and substantially in issue in earlier proceedings or collaterally or incidentally, is that if the issue was

"necessary" to be decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially" in

issue. One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in

issue. It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue.

56. Whether a matter was directly and substantially in issue in the former suit has to be decided a) on the pleadings in the averment of the suit; b)

issues involved therein; c) the decision in the suit. Further it depends upon where decision of such an issue will materially affect the decision of the

suit.

57. In the earlier suit in O.S. No. 608/1973, Purushothaman challenged the notice issued u/s 220 of MCMC Act. The main issue involved was

whether Purushothaman was a lessee and whether Section 220 of MCMC Act could be invoked. Court has held that Purushothaman was a lessee

under the Corporation and therefore, Section 220 of MCMC Act cannot be invoked. In the present suits O.S. Nos. 9044/96 and 1420/1993,

plea of the Appellants is that Purushothaman has prescribed his title by long and adverse possession and that by virtue of Exs.B4 and B5 sale

deeds, they have purchased the property and thereby derived title to the property. The issue involved in O.S. No. 608/1973 cannot be said to be

substantially in issue in the present suits. While so, trial court erred in saying that suit in O.S. No. 9044/1996 is hit by doctrine of res judicata.

Pointing out the facts and circumstances of the case, lower Appellate Court rightly held that Judgment and Decree in O.S. No. 608/1973 would

not operate as res judicata and rightly reversed the findings of the Trial Court. The substantial question of law No. 4 is answered accordingly.

58. Substantial Questions of Law No. 5 & 6 and C.R.P. Nos. 774 & 775/2008:

The supporting affidavit in CMP. Nos. 1693 & 1694/2007 in A.S. No. 531 & 532/2004 was sworn in by the Commissioner himself. Alleging that

Purushothaman had no right, title or interest over the property in question and referring to the lease granted in favour of 1st Respondent-Samajam,

Commissioner has filed affidavit seeking transposition of Corporation as 2nd Appellant in the appeals. Referring to the decision in Mukesh Kumar

and Others Vs. Col. Harbans Waraich and Ors, and other decisions, learned III Addl. Judge, City Civil Court, Chennai has allowed transposition

of Corporation as 2nd Appellant in the appeals.

59. Court has power to order transposition of parties for the purpose of complete adjudication of the questions involved. The Court has also the

power to order transposition of parties for the purpose of complete adjudication of the questions involved.

60. As pointed out by the lower Appellate Court, Corporation is virtually interested in the litigation and ultimately the decree passed in the suit and

has rightly allowed transposition of Corporation, the impugned order do not suffer from infirmity warranting interference.

61. Only question to be considered is whether question of possession is essentially one of fact. Based on the evidence, lower Appellate Court has

recorded factual finding holding that lease deed was executed in favour of 1st Respondent-Samajam and that it is entitled to be in possession. That

finding of fact recorded by the lower Appellate Court is based on materials and documents and the same cannot be interfered with. As

demonstrated supra, the further finding (dated 18.09.2008) of lower Appellate Court has over looked the presumption to be raised under

illustration (e) to Section 114 of Indian Evidence Act and the said further finding would not in any way militate against the earlier finding of the

lower Appellate Court.

62. S.A. No. 354 & 355/2008:

In the result, the Common Judgment and decree of the lower Appellate court

passed in A.S. No. 531 & 532/2004 dated 14.12.2007 on the file of III Addl. Judge, City Civil Court, Chennai is confirmed and these Second Appeals are dismissed. No costs.

63. C.R.P. Nos. 774 & 775/2008:

In the result, both the C.R.Ps. are dismissed. No costs.