

(1976) 10 MAD CK 0001
In the Madras High Court
Case No : S.A. No. 244 of 1974

V.K.S. Mohammed Noorudeen

APPELLANT

Vs

Sri Bava Oushadeeswaraswami Devasthanam,
Thiruthuraipoondi

RESPONDENT

Date of Decision : 11-10-1976

Acts Referred:

Citation : (1976) 10 MAD CK 0001

Hon'ble Judges : V. Ramaswami, J

Bench : Single Bench

Advocate : T. Rangaswamy Ayyangar for Mr. K. Raman, for the Appellant; R. Gopalaswamy Iyengar, for the Respondent

Judgement

V. Ramaswami, J.—The defendant is the appellant. The suit was filed by the respondent for delivery of possession of the site after removing

the superstructure on it and directing the defendant to pay past and future mesne profits. The plaintiff's case was that it is the owner of suit

property, that the defendant's father executed a lease deed on 4th November, 1946 for a period of five faslis at certain rates of rent and after his

death his second son, the defendant, attorned to the plaintiff and continued in possession as tenant. The rent was periodically enhanced according

to the then prevailing conditions and the defendant had paid rent at such rates upto the end of fasli 1374 (13th June, 1965). The defendant

thereafter defaulted in the payment of rent and he was also denying the title of the plaintiff and setting up title in himself. The plaintiff issued the

notice, dated 25th November, 1968 terminating the tenancy with effect from 31st December, 1968 and claiming possession and for payment of

arrears of rent.

2. The defence was that the suit property is part of a minor inam governed by the Madras Act 30 of 1963 and that the building belongs to the defendant since he was the owner of the building before the commencement of the Minor Inams Act 30 of 1963 and continued as such on the date when the Act came into force and thereafter and that therefore, he had become the owner of the site under S. 13 of the Act. The plaintiff ceased to have any right or interest in the site from and after the appointed day under the Act. The defendant filed an additional written statement in which he claimed that he and his deceased brother purchased the superstructure with the paguthi rights in the land under a sale deed, dated 8th February, 1943 executed by the previous owner of the superstructure and the paguthi right in a partition between him and his brother, the building and the site with the paguthi rights therein were allotted to the defendant. He therefore, claimed that the lease deed, dated 4th November, 1946 executed by his father in respect of the suit property was not valid and binding on him in other words, he pleaded that the tenancy did not originate under the lease deed, dated 4th November, 1946 executed by his father and the suit based on that lease deed was not maintainable and has to be dismissed in limine.

3. Relying on a decision of this Court in R.S. Veerappa Chettar v. Thiruthuraipoondi Sri Bava Oushadheeswaraswami Devasthanam by its Executive Officers, Thiruthuraipoondi, etc. S.A. 369 of 1966 and C.M.A. Nos. 46 of 1967 and 62 of 1969, in which it was held that "unless the owner of the building is also the owner of the site, the building inclusive of the site will not vest in the owner of the building", the courts below held that the defendant could not claim to be the owner of the site under S.13 of the Act 30 of 1963. Since the defendant, even as per the additional written statement purchased only the superstructure and the paguthi right in the suit property, the Courts below held that he was a tenant only, in respect of the land and that therefore, he was liable to be evicted. Accordingly the suit was decreed as prayed for. Mesne profits was awarded at the rate of Rs. 120 per fasli year.

4. In this second appeal the learned counsel for the defendant appellant contended that the lease deed, dated 4th November, 1946 executed by the father of the defendant was not the document under which the tenancy right

had originated and that the defendant was not claiming any tenancy right under that document. It was his further case that the suit lands are part of the minor inam lands and that the origin of the tenancy in respect of the site was unknown, but the evidence showed that it had been in the possession and enjoyment by the person to whom the superstructure belonged for quite a long number of years, and this will clearly establish that the tenancy was of a permanent nature. It was also contended by the learned counsel that when the origin of the tenancy was not known and the evidence showed that the original tenancy must have been for the purpose of constructing a building thereon by the tenant, the burden is on the plaintiff to show that it was a precarious tenure liable for termination at will in support of this contention the learned counsel relied on two decisions of the Supreme Court in *A. Veeraraju v. Venkanna* 1967 I.S.C.J. 17 = 1966 S.C. 629 and *Sivayogeeswara Cotton Press v. Panchaksharappa* AIR 1962 S.C. 413 and the decision of the Privy Council in *Lakshmana v. Venkateswarlu* ILR 1950 Mad. 567=1949-2-M.L.J. 500. Per contra, the learned counsel for the respondent contended that whatever may be said in respect of other tenancies, in the case of a Hindu Religious Endowment the manager of the endowment has no power to grant a permanent lease in the absence of legal necessity and that the burden is on the defendant to establish a claim of permanent tenancy. The learned Counsel also strenuously contended that in the written statement the defendant had not specifically pleaded any right of permanent tenancy and in the absence of such a plea, he should not be permitted to raise the same for the first time in second appeal.

5. It is true that the defendant did not set up any right of permanent tenancy specifically in the written statement and no issue was framed. It is also true that if such a plea had been raised in the written statement probably the plaintiff might have produced documents which would show or prove the origin of the tenancy. But, in this case, the plaintiff came forward with the suit on the basis that the defendant is in possession and enjoyment of the site under a lease deed, dated 4th November, 1946 executed by the father of the defendant. Thus, the basis of the claim was as if the tenancy originated only with the lease deed, dated 4th November, 1946 executed by the father of the defendant. But, in the additional written statement the

defendant stated that he and his brother purchased the superstructure and the paguthi rights in the site from one Sundaresa Mudaliar under a sale

deed, dated 8th February, 1943 and the vendor in his turn purchased the paguthi right and the superstructure under another sale deed, dated 27th

February, 1943. Accordingly, it was claimed that the defendant and his predecessors-in-title had been in possession and enjoyment by virtue of

the purchase of the paguthi rights under the sale deed, dated 8th February, 1943 and the sale deed, dated 27th February, 1933 and that they were

not in possession as per the lease deed, dated 4th November, 1946. They further stated that the suit based on that lease deed is not maintainable

and has to be dismissed.

6. It is now accepted by the plaintiff as seen from the evidence of P.W.1 that the defendant and his brother did not come into possession in

pursuance of the lease deed, dated 4th November, 1946, but they came into possession by virtue of their purchase of the paguthi right (leasehold

right) under the sale deed, dt. 8th February, 1943. P.W.1 also admitted that the superstructure now existing on the site so existed for generations

and that whoever is the owner of the superstructure will be recognised as the tenant in respect of the site and the rent will be collected at certain

rate per square yard. This will clearly show that though the defendant did not say that he has got a permanent right of tenancy, he pleaded that the

tenancy had been there for a long number of years and had been the subject-matter of sales and ultimately he was the purchaser and that he had

not become a tenant under the deed, dated 4th November, 1946 in these circumstances, the plaintiff cannot now contend that the defendant

cannot raise the plea of permanent tenancy at this stage in second appeal. As rightly pointed out by the learned counsel for the appellant he is not

relying on any other material, apart from the evidence which is on record which would, according to the learned counsel, show that it must be a

tenancy of a permanent nature.

7. In A. Veeraraju v. P. Venkanna 1967-I S.C.J. 17 it was held: ""If the origin of the tenancy is not known, the tenant may lead circumstantial

evidence to establish his permanent right of occupancy. The evidence of long possession coupled with other circumstances, such as construction of

permanent successive structures, devolutions of property by transfer and

inheritance may lead to the inference that the tenancy is permanent. The Supreme Court also held that the court may refuse to draw the inference of permanent tenancy where the land demised belongs to a Hindu religious endowment as the manager of the endowment has no power to grant such a lease in the absence of legal necessity and the Court will not presume a breach of duty on his part. At the same time, the Supreme Court also held that if by other evidence, the tenant established the grant of a permanent lease and the validity of a lease comes into question after a long lapse of time when direct evidence of the circumstances under which the grant was made is no longer available, the Court will make every presumption in favour of its validity and may assume that the grant was made for necessity.

8. In the other decision in *Sivayogeswara Cotton Press v. Panchaksharappa* AIR 1962 S.C. 413, it was held that if the tenancy is for building

purposes, prima facie it may be arguable that it is intended to be a permanent lease in (sic) intended to be a tenancy at will (sic) self.

9. In *Lakshman v. Venkateswaralu* ILR 1950 Mad. 567 = 1949-2-M.L.J. 500 The Privy Council held that in a suit by a holder of a minor inam

to eject the tenants from the holding, the burden is on the plaintiff to make out the right to evict by proving that the grant included both melvaram

and kudivaram rights, or that the tenants or their predecessors were let into possession by the inamdar under a terminable lease.

10. In this case we have the evidence, as already pointed out that the building on the site was in existence for generations. The site is part of a

minor inam land. Therefore, even if the original grant is of the entirety of the interest in the land and not merely the melvaram, the land must have

been leased for the purpose of construction of a building in fact, P.W. 1 stated that whoever is the owner of the superstructure was being

recognised as the tenant of the land. The tenancy right was made the subject-matter of sale and inheritance as seen from the sale in favour of the

defendant and his vendor which was also admitted. These facts clearly show that the tenancy in its origin must have been one of a permanent

nature subject only to the liability of the tenant to pay rent to the plaintiff.

11. The learned counsel for the respondent contended that the rent was not uniform or fixed but that it was variable as seen from the admission of

the defendant as D.W. 1 and this fact shows clearly that it could not have been a permanent tenancy in its origin. It is true normally in the case of a

permanent tenancy rent payable will beat a uniform rate. But, the fact that a uniform rent was not paid, but the rent was variable, does not by itself

conclude the question that it was not a permanent tenancy in fact, in the decision of the Supreme Court *Sivayogeswara Cotton Press v.*

Panchaksharappa ILR 1950 Mad. 567 = 1949-2-M.L.J. 500, the deed provided for variable rent, for the first 20 years at one rate and the next

10 years at another rate and thereafter at a different rate. But, the Supreme Court held that did not in any way affect the permanent nature of the

tenancy. The Privy Council also in the decision reported in *Lakshmanan v. Venkateswaralu* ILR 1950 Mad. 567 = 1949-2-M.L.J. 500, pointed

out that

when such payments are made by cultivators whose families have been in possession of land from time immemorial they may well be attributed to a

desire on their part to cling to the land of their ancestors at all costs. Illiterates as they are, they may not have realised that such payments may be

used against them to force them out of the land at some future dateXXX What is important is that no tenant has been at any time ejected from

his land in such circumstances the payment of increased rent loses much of its force as a factor for consideration.

In our case there is also no evidence to show that at any time, the tenant of this land was evicted and a different tenant was put in possession. But,

what appears to be from evidence is that the tenancy right was subject matter of inheritance and transfers and it was not for any particular or

definite term. This, in my opinion, would clearly show that the tenancy in its origin must have been of a permanent nature and for the purpose of

putting up the superstructure. The plaintiff is therefore, only entitled to the rent as prayed for and not for the eviction of the defendant. The second

appeal is accordingly allowed and the judgment and decree of the Court below in so far as it directed delivery of possession of the suit property is

set aside, but the plaintiff will be entitled to arrears of rent, though not as mesne profits. The arrears of rent will be as fixed by the courts below at

Rs. 120/- per fasli. The plaintiff will also be entitled to future rents at the same rate from the date of suit. The decree is accordingly modified. The

Second Appeal is allowed in part. There will be no order as to costs. No leave.