

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27/09/2002

CORAM

THE HONOURABLE MR.JUSTICE A.K. RAJAN

S.A.No. 1332 of 1992 and S.A.No. 1333 of 1992

S.A.No.1332 of 1992

Sri Manneswarar and Karivaradaraja  
Perumal Temple, represented by its  
Executive Officer, Annur, Avinasi Taluk,  
Coimbatore District. .. Appellant

-Vs-

1. Lakshmi  
W/o late Kaliappa Mudaliar,  
No.8, Market Road, Annur,  
Avinasi Taluk, Coimbatore District.

2. The District Collector,  
Coimbatore District, Coimbatore. .. Respondents

S.A.No.1333 of 1992:

Sri Manneswarar and Karivaradaraja  
Perumal Temple, represented by its  
Executive Officer, Annur,  
Avinasi Taluk, Coimbatore District. .. Appellant

v.

Lakshmi  
W/o late Kaliappa Mudaliar,  
No.8, Market Road,  
Annur, Avinasi Taluk,  
Coimbatore District. .. Respondent

These appeals are filed against the judgment in Appeal Suit Nos.125 of 1991 and 126 of 1991 passed by the II Additional Sub-Judge, Coimbatore, as stated therein.

!For appellant : Mr. R.T.Doraisamy,  
For both the appellants.

^For Respondents : Mr.G.R.Swaminathan,  
For R.1 in both the appeals  
ï Mr.M.C.Swamy,  
for R.2 in S.A.1332 of 1992

## :C O M M O N J U D G M E N T

The second appeals are filed by the Executive Officer of Sri Manneswarar and Karivaradaraja Perumal Temple.

2. This appellant-temple filed O.S.No.1454 of 1984 for permanent injunction not to interfere with the possession and enjoyment of the property in its possession. The defendant in that suit filed O.S.1625 of 1984 praying for declaration of title over the suit property and for injunction restraining the temple from interfering with her possession.

3. For the purpose of convenience, the temple is referred as plaintiff and the plaintiff in O.S.1625 of 1984 is referred as defendant.

4. The suit property situate on the southern side of the temple. It was a vacant site (government poromboke), in which according to the temple, it constructed in all eight shops and rented it; six shops were rented out to its employees; two were given to private persons. This property was leased out to one Angannan. The extent of the suit property is four cents; "B" Memo was issued and penalty was paid for being in occupation of this poromboke land.

5. This property was leased out to one Angannan. According to the defendant, the construction was put up by her husband; Property tax was also levied by Annur Municipality in the name of her husband. "B" Memo was issued in the name of her husband. The Special Deputy Tahsildar, Hindu Religious Endowment Board, visited the place and recognized the possession of her husband and also submitted a report to that effect. While so, the Executive Officer of the temple had given a petition to the District Revenue Officer that "B" Memo should be issued in the name of the temple. Inasmuch as "B" Memo has been issued in the name of the defendant's husband, the action of the Executive Officer trying to get "B" Memo in the name of the temple is not valid. When a dispute was raised by the District Revenue Officer, he passed an order to settle the matter before the civil Court. The husband of the defendant was in enjoyment of the property over ten years and put up the construction and therefore, the defendant has prayed for declaration of title and injunction restraining the temple from interfering with her enjoyment.

6. On the basis of these pleadings, issues were framed. Two witnesses were examined on each side; On the side of the plaintiff in documents Exs.A.1 to A.14 were marked and on the side of the defendant,

Exs.B.1 to B.21 were marked.

7. Considering the evidence, both oral and documentary, the trial Court dismissed O.S.1454 of 1984, but decreed the suit O.S.1625 of 1984 . Against the dismissal of O.S.1454 of 1984, the temple preferred appeal-A.S.No.125 of 1991 and against the decree granted in O.S.1625 of 1984, the temple preferred appeal-A.S.126 of 1991. The appellate Court dismissed the appeal, A.S.No.125 of 1991; in the appeal, A.S.126 of 1991, the trial Court's decree was modified; With respect to the rear portion of the building, the appeal was dismissed; But with respect to the front portion, the appeal was allowed. Against the dismissal of the claim by the temple, the temple preferred these two second appeals. Second Appeal No.1332 of 1992 is against A.S.125 of 1991 and Second Appeal No.1333 of 1992 is against A.S.No.126 of 1991.

8. The following substantial questions of law were framed:

S.A.1332 of 1992:

- 1) Whether the Courts below are right in allowing the suit for bare injunction without declaring the title when the right over the suit property is in dispute ?
- 2) Whether the lower appellate Court is right in granting injunction in favour of the first respondent after having found that the first respondent is not in possession of both the residential and nonresidential portions ?
- 3) Whether the lower Appellate Court is right in granting injunction in favour of the first respondent after having found that the first respondent cannot pray for injunction for Angan, the brother of her husband ?

S.A.No.1333 of 1992

- 1) Whether the Courts below are right in allowing the suit for bare injunction without declaring the title when the right over the suit property is in dispute ?
- 2) Whether the lower appellate Court is right in granting injunction in favour of the first respondent after having found that the first respondent is not in possession of both the residential and nonresidential portions ?
- 3) Whether the lower appellate Court is right in granting injunction in favour of the first respondent after having found that the first respondent cannot pray for injunction for Angan, the brother of her husband ?

9. The counsel appearing for the temple/plaintiff submitted that the construction was put up by the temple in a poromboke land in Survey No.316/4. The temple constructed eight shops; six were leased to its servants and two were leased out to others. The dispute is with regard to the Shop No.8. It was leased out in 1968 to one Angannan who is the brother of the defendant's husband. Since the dispute arose between Angannan and the temple, he is now colluding with the defendant, in order to get title declared in the name of his brother's wife. The judgment and decree of the trial Court as well as the first Appellate Court is erroneous as it has not taken into account the documents filed on the side of the temple. Even as early as 1977, notice under Section 7 of Act 8 of 1905 (Land Encroachment Act) in the name of the temple had been issued. Subsequently, the defendant managed to get a notice

issued to him under Section 5 of the same Act. Similar notices were also obtained for the subsequent years, under Section 5 of the Act. Learned counsel for the appellant submitted that that the suit property was in occupation of the temple even prior to 1973 is proved by Ex. A.14. Further, the fact that notice under Section 7 was issued to the temple under Ex.A.3 and A.1 respectively in the years 1976 and 1977 itself, proves that the temple was in occupation of the suit land during that period; Exs. A.1, A.3 and A.14 together, proves that the property is in occupation of the temple from the year 1973. No further steps were taken pursuant to that notice by the revenue authorities; that proves that the occupation of the temple has not been disturbed by the Government; the suit land being Government poramboke land, unless the previous occupant is dispossessed validly by the Government in accordance with law, that possession is the legal possession, vis-a-vis any other person. Therefore, the "B" Memo issued to the defendant in the year 1978 has no effect.

10. The argument of the counsel for the appellant has force. The fact that the revenue authorities issued notices under Section 7 of the Land Encroachment Act, proves that it was the temple which was in possession from 1973 till 1977. It appears that the defendant and her husband managed somehow to get such a "B" Memo issued in their name. Having got the "B" Memo issued in the year 1978, they continued to get it subsequently. The plaintiff being a temple, and the trustees of the temple had not taken proper steps, that situation continued. Even the defendant in her plaint has stated that steps were taken by the authorities to cancel "B" Memo issued in the name of the defendant. Therefore, it appears that for some time, the persons who were in the management of the temple did not take proper steps to protect the properties of the temple. Inasmuch as the earliest, "B" Memo is in the name of the temple, it is proved that initially it was the temple which occupied the suit property (the Government land) even prior to 1973. Having issued the notice under Section 7, no further proceedings were initiated or no further order was passed by Revenue authorities. Therefore, the possession of the temple over the suit property was not disturbed; therefore, the temple is presumed to continue to be in possession. From the documents, Exs.B.1 to B.5, it is seen that notices were issued to the defendant, under Section 7 and 5 of Act 1905. When already the Government has recognized the temple as the occupant and issued notice under Section 7, unless that possession was brought to an end by a legal process, the notices Exs.B.1 to B.5 issued to defendant in the year 1978 and subsequent thereof will not be of any value; further steps were taken to cancel those "B" Memos. The other documents, Exs.B.10 to B.21, kist receipts and receipt for licence fee paid by the defendant's husband, have no relevance for proving possession. Kist can be paid by any person. This suit has been filed in the year 1984; Therefore, the documents, Exs.B.14 to B.19 which are subsequent to the suit are irrelevant. Therefore, in between two rival claims who claims to be in occupation of the Government land, the person who occupied the land earlier will get a better title than the person who claims to have occupied the land on a later date. The earlier occupation did not come to an end by any legal process or in accordance with law. Therefore, the possession of the temple is to be recognized as legal and valid possession and the claim of the defendant cannot be recognized against the temple. Therefore, "B" Memos, Exs.B.1 to B.5 cannot be recognized as

valid in view of the notices already under Exs.A.1 and A.3. The occupation of the defendant and her husband is only as a tenant under the temple and not as encroacher of the Government land independently of the temple.

11. On the perusal of the record, it appears that the cause for this dispute is only the issuance of "B" Memos, in favour of the defendant. Therefore, it is the authorities who issued "B" Memos to defendants are responsible for this dispute. Strangely, the District Collector, Coimbatore has also filed the written statement as if the defendant is in occupation and the temple was not in possession on any date prior to the date the when defendant came to possession; While filing the written statement, the second defendant was not even aware of the above notices issued to the temple in the years 1976 and 1977.

12. Though written statement was filed, during the trial, they did not pursue the matter and therefore, the second defendant was set ex parte.

13. The counsel appearing for the first defendant submitted that inasmuch as the suit has been filed against the District Collector without issuing notice under Section 80 C.P.C., the suit is to be dismissed as against the second defendant. The counsel for the appellant submitted that notice under Section 80 C.P.C. can be waived by the Government. In the case *Bishandayal v. State of Orissa* (A.I.R. 2001 S.C. 544), following the earlier decision of the Supreme Court in *Gangappa Gurupadappa Gugwad v. Rachawwa*, reported in A.I.R.1971 S.C. 442, it was held that in law, the notice under Section 80 C.P.C. can be waived. Even in the written statement filed by the second defendant, no objection was raised for filing the suit without issuing notice under Section 80 C.P.C. Learned counsel for the appellant also relied upon the decision of this Court in *Commissioner for H.R. & C.E. v. Kanniappa Naicker* (1989-2-L.W.238), where this Court has held that,

" The question of issuance or non-issuance of notice under Section 80 of the Code of Civil Procedure cannot be strictly characterized as a pure question of law and, it will be wholly inequitable, unjust and unfair to permit the learned Special Government Pleader appearing for the appellant to raise this point as he does before us. "

He also relies upon the decision in *Nani Amma v. State of Kerala* (A. I.R. 1963 Kerala 114), where it is held,

" Section 80 is not a provision of public policy but one for the benefit of particular parties who are competent to waive or disregard it. " From the above decisions, it is clear that the provisions of Section 80 C.P.C. can be waived. Therefore, the suit is not bad for not issuing notice under Section 80 C.P.C. When no objection was raised by the second defendant (who alone can raise such an objection), the defendants cannot raise that objection; that too in appeal. Therefore, the suit as filed is not bad.

14. Therefore, the judgment of the trial Court as well as the first Appellate Court dismissing the claim of the temple is not legally sustainable. The first Appellate Court ought to have allowed the appeal in A.S.No.125 of 1991 and decreed the suit in O.S.No.1454 of 1984 as prayed for and dismissed

the suit in O.S.No.1625 of 1984.

15. Therefore, the judgment and decree of the first Appellate Court in A.S.No.125 of 1991 is set aside and hence the Second Appeal 1332 of 1992 is allowed.

16. The judgment and decree in A.S.126 of 1991 is modified and the entire prayer in the suit, O.S.1454 of 1984 is decreed. Therefore, S.A.1333

of 1992 is also allowed.

In the result, the substantial questions of law are answered in favour of the appellant/temple. Both the second appeals are allowed.

27-09-2002.

Index: Yes

Web Site: Yes

vs

A.K. RAJAN, J.

□