

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21 - 04 - 2015

CORAM

THE HON'BLE TMT. JUSTICE PUSHPA SATHYANARAYANA

Second Appeal No. 1582 of 2010
and
M.P. No. 1 of 2010

1. Mrs. Ambika
2. Sekar @ Kallan ...Appellants

vs.

1. M. Shamshad
2. S.S.M. Mubeen Sait ...Respondents

Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 22.07.2010 in A.S. No.7 of 2009 on the file of the Court of Subordinate Judge, Tambaram reversing the judgment and decree dated 30.08.2006 made in O.S. No.156 of 2003 on the file of the District Munsif Court, Tambaram.

For Appellants : Mr. V. Lakshminarayanan

For Respondents : Mr. C. Krishnan, SC
for Mr. M. Mayakrishnan

JUDGMENT

Defendants in the suit filed by the respondents herein, have filed this Second Appeal challenging the judgment and decree dated 22.07.2010 in A.S. No. 7 of 2009 passed by the First Appellate Court / Subordinate Judge, Tambaram wherein and by which the judgment and decree dated 30.08.2006 passed by the trial Court / District Munsif, Tambaram, in O.S. No. 156 of 2003, were reversed allowing the First Appeal at the instance of the plaintiffs, who filed the suit for recovery of possession.

2. According to the plaintiffs / respondents herein, two adjacent plots, viz., Plot Nos. 35 and 36 which belong to the Tamil Nadu Slum Clearance Board [for short, 'Board'], were allotted to them for which they had also paid the first instalment on 21.7.1995 and as there was an intention that the plots would be allotted free of cost, they did not pay any further sum. Thereafter, on demand by the Board, they paid the entire amount in instalments subsequent to which on 02.9.2003, they were given the allotment order by the Chairman of the Tamil Nadu Slum Clearance Board. It is stated that a Lease - cum - Sale Agreement dated 24.8.2003 was entered into as per which the plaintiffs have to pay Rs.67/- per month with effect from 01.3.1997 for a period of 20 years. While so, according to the plaintiffs, the defendants had encroached the properties during February 2003 and despite their request, the defendants refused to vacate the premises. Hence, they filed the suit for recovery of possession.

3. The first defendant traversed the plaintiffs' claim and set up the case in the written statement that the defendants are in actual possession of the property and that she had filed a suit in O.S. No. 43 of 2003 against the father of the second plaintiff and obtained a decree for permanent injunction on 16.9.2003. It is stated that in the said suit, the father of the second plaintiff had deposed that he has not claimed any right over the suit property and that he has nothing to do with the same besides admitting possession of the defendants. The defendants also contended that the suit is not maintainable by virtue of the bar under Section 29 of the Tamil Nadu Slum Areas (Improvement and Clearance) Act, 1971 [hereinafter, referred to as 'the Act'] and that the Board ought to have been made as a necessary party to the suit. Further contending that the suit for eviction is not maintainable in the absence of prayer for declaration of title, the defendants sought for dismissal of the suit.

4. Before the trial Court, one witness was examined as P.W.1 and Exs. A.1 to A.20 were marked. On the side of the defendants, the first defendant was examined as D.W.1 besides examining one Asokan as D.W.2 and Exs. B.1 to B.5 were marked.

5. The Trial Court / learned District Munsif, Tambaram, on consideration of the evidence adduced and the materials available thereon, finding that the plaintiffs had not followed the procedure as per the Act, dismissed the suit as not maintainable. On appeal, the First Appellate Court / learned Sub-Judge, Tambaram, on appreciation of the facts and law, concluded that the plaintiffs are entitled to eject the defendants and recovery of possession as they

have established that they are the lawful allottees and accordingly, allowed the appeal by setting aside the judgment and decree of the Trial Court. Aggrieved by the reversal of decision, the defendants have come up with this second Appeal.

6. The points that arise for consideration in this Second Appeal are:-

1. Whether the Lower Appellate Court is justified in decreeing the suit, when the defendants are in possession of the property anterior to the letter of allotment produced by the plaintiffs?
2. Whether the suit as framed is maintainable in law?
3. When the Lower Appellate Court has rendered a finding that the property belongs to the Slum Clearance Board, is it right in entertaining the suit and should it not have held that the suit is barred under the provisions of Section 29 of the Act?

7. Heard Mr. V. Lakshminarayanan, learned counsel appearing for the appellants / defendants and Mr. C. Krishnan, learned Senior Counsel appearing for the respondents / plaintiffs and perused the records.

8. Before going into the merits of the case, it would be worthwhile to refer to Section 29 of the Act, which deals with the maintainability of the suit. Section 29 of the Act is a bar if no sanction is taken from the prescribed authority. For better appreciation of the case, Section 29 of the Act is usefully extracted below:-

"29. Proceedings for eviction of [occupants] not to be taken without permission of the prescribed authority:-- (1) Notwithstanding anything contained in any other law for the being in force, no person shall except with the previous permission in writing of prescribed authority-

(a) institute, after the commencement of this Act any suit or proceedings for obtaining any decree or order for the eviction [an occupant] from any building or land in such area; or

(b) where any decree or order is obtained in any suit or proceeding instituted before such commencement for the eviction of [an occupant]

from any building or land in such area, execute such decree or order.

(2) Every person desiring to obtain the permission referred to in sub-section (1) shall make an application in writing to the prescribed authority in such form and containing such particulars as may be prescribed.

(3) On receipt of such application, the prescribed authority after giving an opportunity to the parties of being heard and after making such summary enquiry into the circumstances of the case as it thinks fit shall, by order in writing, either grant or refuse to grant such permission.

(4) In granting or refusing to grant permission under sub-section (3), the prescribed authority shall take into account the following factors, namely:-

(a) Whether alternative accommodation within the means of the [occupant] would be available to him if he were evicted:

(b) Whether the eviction is in the interest of improvement and clearance of the slum area;

(c) such other factors, if any, as may be prescribed.

5. Where the prescribed authority refuses to grant the permission, it shall record a brief statement of the reasons for such refusal and furnish a copy thereof to the applicant."

9. The suit revolves on the two plots bearing Nos. 35 and 36 which are situate adjacent to each other in Mahakavi Bharathi Nagar, Perungaluthur, Tambaram. Admittedly, the suit properties are classified as Eri poramboke and they were acquired by the Tamil Nadu Slum Clearance Board by virtue of G.O. No. 1246 dated 19.9.1988, for the purpose of allotting houses to the landless poor. Before the First Appellate Court, the plaintiffs, who claim to be the members of the Mahakavi Bharathi Nagar Slum Dwellers' Welfare Association, produced Exs. A.3 and A.4 subscription receipts to prove that they were allotted the suit property besides pleading that the defendants

had encroached into the suit property and made some unauthorised construction on the same. According to the plaintiffs, the suit property was a vacant site and there was no fencing around the same and taking advantage of the same, the defendants have encroached the suit property. Hence, the suit came to be filed.

10. Admittedly, the suit property is a slum area and the respondents / plaintiffs claim to be an allottee of the same. The appellants / defendants also claim the same right to be in occupation of the suit property. It is also admitted by both the parties that the suit land is an eri poramboke, which was subsequently acquired by the Slum Clearance Board and as such, the said Board is the lawful owner of the suit property. Both the plaintiffs as well as the defendants claim right over the suit property as they have been in occupation of the same. The respondents / plaintiffs produced Exs. A.5 and A.6 series of receipts issued by the Board. Exs. A.7 and A.8 are the Allotment - cum - Demand Orders issued by the Board in favour of the plaintiffs 2 and 1 respectively.

11. The first objection raised by the learned counsel appearing for the appellants / defendants is that whether the plaintiffs can maintain a suit for eviction in view of bar under Section 29 of the Act, 1971. He further contended that while the earlier suit in O.S. No. 43 of 2003 filed by the first defendant was decreed on 16.9.2003 against the father of the second plaintiff / second respondent herein, the present suit was filed on 10.9.2003 which, according to him, is pending the earlier proceedings and hence, they are not entitled to a decree for eviction.

12. Learned counsel appearing for the appellants placed reliance on the decision in Vijayalakshmi and another vs. Pushparani and others [2011 (2) MWN (Civil) 71] and relied on paragraph 22 of the judgment wherein this Court had, following the decisions reported in Parthasarathy vs. Kuppammal [AIR 1980 Madras 246] and Laxmi Ram Pawar vs. Sutabai Balu Dhotre and another [2011 (1) MLJ 1152 (SC)], held as follows:-

"I would like to point out that such an argument cannot be countenanced for the reason that once a final decree is passed after dividing the property by metes and bounds, then the parties are entitled

to file directly E.P and take possession. So, if half share by metes and bounds is allotted to each of the parties, then the parties who are not allotted shares could be got vacated with the help of such a decree. Hence, a word of caution has to be left here, for the reason that unless the plaintiff approaches the authority concerned under Section 29 of the Tamil Nadu Slum Areas (Improvement and Clearance) Act, 1971 and gets permission, the question of evicting D1 and D2 would not arise and that is found exemplified and demonstrated in the aforesaid decisions. Apart from this, there is no other defect in the judgments and decrees of both the Courts below."

13. Per contra, learned Senior Counsel appearing for the respondents / plaintiffs contended that the appellants / defendants have not filed any document to show their possession of the suit property prior to the respondents / plaintiffs whereas the respondents / plaintiffs had produced the receipts issued by the Mahakavi Bharathi Nagar Slum Welfare Association from 1992 onwards.

14. In support of his contention, learned Senior Counsel appearing for the respondents / plaintiffs produced copy of the order passed in Mahakavi Bharathi Nagar Hut Dwellers Welfare Association, rep. by its President vs. The State of Tamil Nadu and others [W.P. No. 10249 of 1993 disposed of on 13.12.2001] in which the said slum Dwellers' Association had sought for an interim injunction restraining the respondents therein from removing or demolishing the huts in Mahakavi Bharathi Nagar.

15. I have perused the order of this Court dated 13.12.2001, wherein this Court had only given liberty to the Association to approach the concerned authority highlighting their grievance. Therefore, there was no positive right or direction given in the said order as claimed by the learned Senior Counsel for the respondents. Even otherwise, the burden of proof of any right or possession over the property is only on the plaintiffs and they cannot take advantage of the lacuna in the case of the defendants.

16. Insofar as the maintainability of the suit and Section 29 of the Act is concerned, the learned Senior Counsel appearing for the respondents / plaintiffs contended that by virtue of the allotment orders, viz., Exs. A.17 and A.18, issued by the Board in favour of the plaintiffs, they had become the owners of the property. Therefore, according to the learned Senior Counsel, the question of seeking permission is not required.

17. The said argument of the learned Senior Counsel appearing for the respondents / plaintiffs is only to be rejected. It is to be noted that admittedly, Exs. A.17 and A.18 are only Lease - cum - Sale Agreement issued by the Board in favour of the plaintiffs and the same would not amount to sale of a property which would give title in favour of the purchaser. In a Lease - cum - Sale Agreement, the sale is deemed to have taken place only after the payment of the final instalment and registration of the sale deed has taken place. Unless and until the final instalment is paid, the sale is not complete and it is only an unsold property. Therefore, the respondents / plaintiffs cannot claim absolute right over the suit property to circumvent the provisions of Section 29 of the Act.

18. Section 29 occurs in Ch. VII of the Act under the heading protection of occupants in slum areas from eviction. The marginal note of the Section is "Proceedings for eviction of occupants not to be taken without permission of the prescribed authority". That section says that notwithstanding anything contained in any other law for the time being in force, no person shall, except with the previous permission in writing of the prescribed authority, where any decree or order is obtained in an suit or other proceedings instituted before such commencement for the eviction of the occupant from any building or land in a slum area, exercise such a decree or order. It also prohibits an owner of a land from instituting a suit for eviction of an occupant from any building or land from the slum area after the Commencement of the Act. Sub-section (2) of S. 29 provides for an application for obtaining the permission from the prescribed authority.

19. A conjoint reading of all the subsections of Section 29 of the Act would clearly indicate that the Legislature intends to impose a restriction on the owner of the land either executing the decree obtained earlier or instituting a suit for eviction against an occupant of slum area by imposing a pre-condition that the owner of the slum area should get the permission of- the requisite authority

either for filing the suit for eviction or for executing the decree that had already been obtained. Section 29, in express terms, prohibits the owner of the slum area from instituting a suit for eviction or executing a decree obtained earlier against an occupant without such permission. One of the facts to be taken into account by the prescribed authority for granting the sanction under sub-section (4) is whether alternative accommodation within the means of the occupant would be available to him if he was evicted. The above restriction is only to safeguard the interests of the occupant by securing him an alternative accommodation within his means, if a suit for eviction or the execution of a decree for eviction is to be permitted. Therefore, it is clear that the object and purpose of the Act is to give protection to the occupants in slum areas from eviction and the same cannot be overlooked or ignored.

20. In the instant case, it is not in dispute that no permission has been obtained from the competent authority under Section 29 of the Act by the respondents / plaintiffs. In view of the pre-condition of permission from the prescribed authority as per Section 29 of the Act, it is clear that persons like the respondents / plaintiffs herein, cannot claim the right in their favour.

21. During the course of argument, learned counsel appearing for the appellants vehemently assailed the correctness of Ex. A.19 dated 25.9.2003, letter sent by the Board to the second plaintiff, contending that it is concocted and created one for the purpose of the case. Since the validity of the document Ex. A.19 is the basis of the suit, this Court feels it necessary to re-produce the same:-

"Requisition letter reg for removal of encroachers in TNSCB - Mahakavi Bharathi Nagar Planning area Plot. no. 35 and 36 and for necessary allotment of yours were considered.

In the above said planning area, plot no. 35 and plot no. 36 area allotted in your name and 1st part payment also received from you. The above said plots will be allotted in your name if you take necessary action with the help of the police and send out the encroachers from the plots and

live there and submit necessary proof, your request will be considered."

The veracity of the above direction was attacked by the learned counsel for the appellants as such direction could not have been issued by the Government machinery.

22. A perusal of Ex. A.19 dated 25.9.2003 reveals that such a direction could not have been issued by the Board as the Board could not have issued such a free hand to the plaintiffs to evict a person in occupation deeming the occupant to be the encroacher. It is trite position of law that even a trespasser should be evicted only by due process of law. While so, the plaintiffs cannot claim any right to be an allottee based on the strength of the above letter.

23. It is also seen from a perusal of the records that the respondents / plaintiffs had been living in Pulianthope whereas the suit property is situate in Mahakavi Bharathi Nagar, Perungalathur. Therefore, by any stretch of imagination, the respondents / plaintiffs cannot claim that the suit plots were allotted in their favour in view of their prior occupation. The second respondent / second plaintiff also had clearly deposed before the trial Court that till 02.9.2003, he had been living with his wife in Pulianthope, Chennai besides admitting that that in the earlier suit which was filed against his father, a decree was passed in favour of the defendants / appellants. Further, though there is a decree for injunction against the second plaintiff's father which came to be passed on 16.9.2003, the respondents / plaintiffs have filed the present suit on 10.9.2003, pending the earlier proceedings, for eviction of the appellants / defendants from the suit property. It is also pertinent to point out that the second plaintiff himself has deposed in his evidence before the trial Court recalling the evidence of his father to the effect that either he or his family has got nothing to do with the suit property and they have no right in the same. Besides, the documents that were produced by the respondents / plaintiffs to base their claim were all pending suit in O.S. No. 43 of 2003 and just a few days prior to the institution of the present suit. In view of the same, this Court is of the opinion that there is no bona fide in the claim of the respondents / plaintiffs.

24. There is also another important as well as crucial factor involved in this case. Section 57 of the Act, which deals with powers of eviction, should be taken note of and it is extracted hereunder:-

"57. Powers of eviction.-- Notwithstanding anything contained in this Act, where the prescribed authority is satisfied either upon a representation from the owner of a building or upon other information in its possession that the occupants of the building have not vacated it in pursuance of --

(i) any notice, order or direction issued by the prescribed authority; or

(ii) any notice or direction issued by the owner;

the prescribed authority shall, if satisfied that such eviction is necessary to carry out the purposes of the Act, by order, direct the eviction of the occupants from the building, in such manner and within such time as may be specified in the order and may for that purpose use or cause to be used such force as may be necessary:

Provided that, before making any order under this section, the prescribed authority shall call upon the occupants of the building to show cause why they should not be evicted therefrom and after considering the cause if any, shown by any occupants, the prescribed authority may pass such orders as it deems fit."

25. Added further, it is settled that if once the properties have been declared as slum area by the Tamil Nadu Slum Clearance

Board, the prior written permission of the Board is a must and mandatory requirement as per Section 29 of the Act and no proceedings can be instituted against the occupants in the property owned by the Board and unfortunately, these factual and legal position have not been adverted to by the First Appellate Court properly while passing the judgment. In such circumstances, the judgment and decree the decreeing the suit by the First Appellate Court cannot be sustained in view of the prohibition contained in the provisions of the Act.

26. In the above factual matrix, when the plaintiffs have not established that they were in possession of the suit property on the date of letters of allotment under Exs. A.17 and A.18, their allotment itself cannot be deemed to be valid whereas the defendants have established their possession in the suit property and to evidence the same, she had also filed Exs. B.4 and B.5 judgment and decree passed in O.S. No. 43 of 2003 wherein the second plaintiff's father was a party and hence, the decree is binding on the plaintiffs. It is also clearly demonstrated by the appellants that pending the above lis, the documents have been created by the respondents / plaintiffs for the purpose of the suit. When once the respondents / plaintiffs claim right under the Slum Clearance Board Act, the suit filed without the sanction of the prescribed authority is also not maintainable and the said issue also finds favour with the appellants / defendants.

27. Viewed in the above perspective, this Court comes to an irresistible conclusion that after a specific finding has been rendered by the trial Court, the First Appellate Court cannot enter a directly contrary finding in the Appeal Judgment and more particularly, when the respondents / defendants have categorically admitted that the suit property has been acquired by the Slum Clearance Board and that they have not obtained any permission from the prescribed authority prior to the institution of the suit, no triable issue arises in this regard and accordingly, the points are answered in favour of the appellants / defendants. Hence, the finding of the First Appellate Court in this case directing the occupants, the appellants herein, to surrender possession of the property to the respondents / plaintiffs, cannot be sustained in law and, therefore, it has to be set aside and it is, accordingly, set aside. Consequently, the Second Appeal succeeds.

In the result, the Second Appeal is allowed leaving the parties to bear their own costs. Consequently, the judgment and decree of the First Appellate Court dated 22.7.2010 in A.S. No. 7 of 2009 are hereby set aside by this Court for the reasons assigned in this

Appeal. As a logical corollary, the judgment and decree of the trial Court dated 30.8.2006 passed in O.S. No. 156 of 2003 are restored dismissing the suit. As a sequel thereto, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

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To

1. Subordinate Judge,
Tambaram.
2. District Munsif,
Tambaram.
3. The Section Officer,
V.R.Section, High Court,
Madras.

1 CC to Mr.V.Raghavachari, Advocate SR.No. 21456

2 CCs to Mr. M. Mayakrishnan, Advocate SR.No. 21905

S.A. No. 1582 of 2010

CNR (CO)

PSI (08.06.2015)

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