

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.09.2015

CORAM

THE HON'BLE MS. JUSTICE K.B.K.VASUKI

C.R.P.Nos.1601 of 2008 and 4771 of 2013
and MP.Nos.1 of 2008 and 1 of 2013

CRP.No.1601 of 2008

The Thyagaraya Nagar Social
Club by its Secretary Mr.Somasundaram
No.1, Nageswara Rao Road,
T.Nagar, Chennai-17.

.. Petitioner/Respondent

V.

1.The Woodlands Tiffin Room
rep by K.Krishnamoorthy
No.3, Nageswara Rao Road,
T.Nagar, Chennai-17.

.. Respondent/Petitioner

This Revision Petition is filed under Article 227 of the Constitution of India against the fair and decreetal order dated 04.07.2007 made in CMA.No.11 of 2004 on the file of the I Additional City Civil Judge, Chennai reversing the order and decreetal order made in I.A.No.13689 of 1999 in O.S.NO.2494 of 1999 dt. 21.11.2003 on the file of XI Assistant Judge, City Civil Court, Chennai.

CRP.No.4771 of 2013

The Thyagaraya Nagar Social
Club by its Secretary
No.1, Nageswara Rao Road,
T.Nagar, Chennai-17.

.. Petitioner/Plaintiff

V.

1.The Woodlands Tiffin Room
rep by K.Krishnamoorthy
No.3, Nageswara Rao Road,
T.Nagar, Chennai-17.

2.Bank of Maharashtra
rep by its Branch Manager,
No.3, Nageswara Rao Road,
T.Nagar, Chennai-17.

.. Respondents/Defendants

This Revision Petition is filed under Article 227 of the Constitution of India against the fair and decreetal order dated 01.03.2013 made in IA.No.965 of 2012 in OS.No.2494 of 1999 on the file of XI Assistant City Civil Court, Madras.

For Petitioner : Mr.Jyothi, Sr.Counsel
for K.Govi Ganesan in both the CRPs.

For Respondents : M/s.R.Mohan in both the CRPs.for R1

COMMON ORDER

Both the civil revision petitions are filed by the plaintiff in OS.No.2494 of 1999. While CRP.No.1601 of 2008 is filed against the order made in CMA.No.11 of 2004 reversing the order made in IA.No.13689 of 1999 filed by the first defendant in the suit under Section 9 of the Madras City Tenants Protection Act, CRP.No.4771 of 2013 is filed against the order made in IA.No.965 of 2012 in and under which the petition for amendment filed by the plaintiff was rejected by the trial Court.

2.The few facts which are relevant for consideration herein are as follows : the plaintiff club namely Thyagaraya Nagar Social Club is the owner of the property measuring 14 grounds comprised in Old.S.Nos.37 and 41 and new resurvey Nos.6174 and 6177 in Nageshwararao Raod, T.Nagar, Chennai. After having purchased the property from the Corporation of Madras the plaintiff club put up construction for housing the club. During 1975 the first defendant M/s.Woodlands Tiffin Rooms represented by its Managing Partner by name K.Gopal Rao entered into a lease agreement in respect of an extent of 5263sq.ft facing Nageswararao Road to carry on hotel business. The regular lease agreement was entered into between the plaintiff club represented by its President and M/s.Woodlands Tiffin Rooms represented by its Managing Partner K.Gopal Rao and the lease agreed was for a period of 35years from 28.06.1975 for the purpose of running restaurant for monthly rent of Rs.24,000/-p.a. for the first five years subject to periodical increase once in five years. The other terms and conditions agreed between the parties were duly entered into in the lease agreement, one of which is the lessor will not assign or sublet or otherwise part with the land demised or any constructions erected thereon or any part thereof without the permission in writing of the lessor. The lessee sought permission to sublet the portion of the building to the second defendant/Bank of Maharashtra, to avail bank facilities and however, the lease deed was entered into with the same clause and no permission was given in writing to the first defendant to sublet the portion of the building to the second defendant/Bank of Maharashtra. The same compelled the plaintiff club to file CS.No.392 of 1989 for declaring that the defendants 1 and 2 are not entitled to sub let the premises under the cloak of partnership and for consequential permanent injunction restraining the defendants 1 and 2 from subletting it to the

defendants 3 to 8 therein. The suit was thereafter, transferred to City Civil Court, Chennai and renumbered as OS.No.4561 of 1996 and the same was subsequently dismissed for default.

3. Whiles, the plaintiff club has come forward with the present suit in OS.No.2494 of 1999 arising out of which are the present CRPs and the relief sought for in the suit is for directing the defendants to surrender the possession of the suit property measuring about two grounds and 463 sq.ft equivalent to 5263 sq.ft within the four boundaries mentioned therein, on the same ground that the first defendant sublet the demised property to the second defendant in gross violation of the terms of the agreement and on the ground that the first defendant was collecting huge rent and obtaining loan facilities with the security of the property belonging to the plaintiff club. The suit was filed along with IA.6986 of 1999. The first defendant/M/s.Woodlands Tiffin Room on receipt of the notice in IA and before receiving summons in the suit came forward with IA.No.13689 of 1999 seeking the benefits under Section 9 of the Madras City Tenants Protection Act for directing the plaintiff respondent to sell entire land measuring 5263sq.ft which is the subject matter of the lease agreement, for the price to be fixed by the Court.

4. The application under Section 9 was seriously contested by the respondent plaintiff by denying the right of the first defendant to maintain a claim under Section 9 of the City Tenants Protection Act. The trial Court after serious contest having found that the subletting was without any written consent and the so called oral permission granted by the respondent/plaintiff will not be an act in accordance with Clause 5 of the lease agreement and the petitioner tenant was not in possession of the building or portion of the land in which the building was constructed by the defendant on the date of the petition and the defendant having waived his right over the building is not entitled to claim compensation on the basis of the waiver and is not entitled to claim any right under Section 9 of the City Tenants Protection Act and the petitioner is hence disentitled to claim any relief and dismissed the application. Aggrieved against the same, the petitioner tenant preferred CMA.No.11 of 2004 before the Principal Judge, City Civil Court, Chennai. The Principal Judge, City Civil Court, Chennai by the impugned order dated 04.07.2007 disagreed with the findings of the trial Court and set aside the same and allowed the petition filed by the tenant. The lower appellate Court in the impugned order after narrating the respective contentions raised on both sides finally arrived at a conclusion that the plaintiff has not challenged the subletting to Bank of Maharashtra in the earlier suit in CS.No.392 of 1998 and as per the averments stated earlier the subletting was completed by change of constitution of the first defendant tenant firm. The lower appellate Court is of the further view that as per the City Tenants Protection Act, the defendant is entitled to claim right under Section 9, as such, the trial Court finding is liable to be interfered with by the lower

Appellate Court and by saying so the Civil Miscellaneous Appeal was allowed. Aggrieved against the same is the present CRP.No.1601 of 2008 by the plaintiff/Club before this Court.

5. Pending CRP.No.1601 of 2008, the plaintiff came forward with IA.No.965 of 2012 seeking permission to amend the plaint by including one paragraph before the cause of action paragraph. The averments contained in the affidavit filed in support of the petition for including proposed additional paragraph relate to the change in the constitution effected in the tenant firm periodically which is according to the plaintiff clearly established that the same was done in systematic planning thereby the firm is now in the new hands with new name and the same amounts to subletting or assignment of the tenancy without the permission of the lessor in writing. The amendment application was seriously opposed by the respondent/defendant by denying any act of subletting or assignment of the tenancy. It is further contented therein that the plaintiff/club having accepted the rent paid in advance for land from one Krishnamoorthy who sworn in the counter in his capacity as tenant is estopped from denying the tenancy relationship. It is also contended that the proposed amendment is likely to change the character of the suit and the averments raised therein are an after thought to prolong the proceedings. The trial Court after due contest dismissed the IA on the ground that pending civil revision petition against the order allowing Section 9 application, the present application was not maintainable. Aggrieved against the same, the plaintiff club has come forward with another revision in CRP.No.4771 of 2013.

6. Heard the rival submissions made on both sides and perused the records.

7. The issue involved in CRP.No.1601 of 2008 is relating to the right of the first defendant/lessee to maintain a claim under Section 9 of the City Tenants Protection Act and his right to get the benefit available under section 9 of the Act. For better appreciation, Section 9 of the City Tenants Protection Act is extracted below :

9. Application to Court for directing the landlord to sell land - (1) [(a) (i)] : Any tenant who is entitled to compensation under Section 3 and against whom a suit in ejectment has been instituted or proceeding under Section 41 of the Presidency Small Causes Courts Act, 1862, taken by the landlord may, [within one month of the date of the Madras City Tenants' Protection (Amendment) Act, 1955, coming into force or of the date with effect from which this Act is extended to the municipal town or village in which the land is situate or within one month after the service on him of summons, apply to the Court for an order that the landlord shall be directed to sell for a price to be fixed by the Court, the whole or part of, the extent of land specified in the application.]

(ii) Notwithstanding anything contained in clause (a) (i) of this sub-section, any such tenant as is referred to in sub-clause (ii) (b) of clause (4) of section 2 or his heirs, may within a period of two months from the date of publication of the Madras City Tenants' Protection (Amendment) Act, 1973 apply to the court [whether or not a suit for ejectment has been instituted or proceeding under Section 41 of the Presidency Small Causes Courts Act, 1882 (Central Act XV of 1882) has been taken by the landlord or whether or not such suit or proceeding is pending] having jurisdiction to entertain a suit for ejectment or in the City of Madras either to such court or to the Presidency Small Causes Courts, for an order that the landlord under the tenancy agreement shall be directed to sell for a price to be fixed by the Court the whole or part of the extent of land specified in the application."]

(b) On such application, the Court shall first decide the minimum extent of the land which may be necessary for the convenient enjoyment by the tenant. The Court shall then fix the price of the minimum extent of the land decided as aforesaid, or of the extent of the land specified in the application under clause (a) whichever is less. The price aforesaid shall be the average market value of the three years immediately preceding the date of the order. The Court shall order that within the period to be determined by the Court, not being less than three months and not more than three years from the date of the order, the tenant shall pay into Court or otherwise as directed the price so fixed in one or more instalments with or without interest.....

8. It is now well settled that the person seeking protection under Section 9 of the Act should fulfill the following conditions :

(a) he should be the actual tenant in possession of land;

(b) such tenant should have erected superstructure on land in respect of which tenant would be entitled to claim compensation under Section 3;

(c) Landlord should have taken suit or proceeding against such tenant; and

(d) Tenant should have applied to Court for direction in that regard within one month from the date of service of summons in suit.

The above guidelines are laid down by the Hon'ble Supreme Court in the judgment reported in 2003 (3) CTC 448 - SR. Radhakrishnan and others V. Neelamegam.

9. It is not in dispute that the first defendant M/s. Woodlands Tiffin Room represented by its Managing Partner entered into the lease deed on 28.06.1975 and the lease is in respect of vacant land

measuring 5263sq.ft. It is equally not disputed that after taking vacant land on lease, the first defendant/tenant put up construction in the same. Though there are more than one suits filed by the plaintiff club regarding subletting one application is filed under Section 9 by the tenant seeking benefit under Section 9 of the City Tenants Protection Act. The particulars regarding the nature and extent of the building and the number and extent of the building and the total measurement of the same are not furnished either by the Plaintiff/Bank or by the defendant. As the suits filed by the plaintiff are only against subletting and recovery of possession in respect of the entire vacant land leased out to the first defendant/tenant, the particulars regarding the construction put up on the demised property are but relevant for deciding the right of the tenant to get the benefit under Section 9 of the Act. However, no particulars regarding the same are furnished in the petition filed by the tenant. Except stating that pucca construction was put up in the demised vacant site at huge cost for putting up falls ceiling, carrying out interior decoration, air conditioning unit and laying flooring tiles, other particulars are not available in the petition filed by the tenant. Further, Under Section 9(1)(b), the Court shall first decide the minimum extent of the land which may be necessary for the convenient enjoyment by the tenant. The minimum requirement of the land cannot be decided without ascertaining the extent of the constructed portion in the occupation of the tenant and the minimum requirement of the land for the convenient enjoyment of such building put up by the tenant.

10.The Hon'ble Supreme Court has in paras 10 and 11 of the judgment reported in (1987) 2 SCC 429 - P.Ananthakrishnan Nair and another V. Dr.G.Ramakrishnan and another held as follows :

"Section 9 confers an additional statutory right on a tenant against whom suit for ejection is filed to exercise an option to purchase the demised land to that extent only which he may require for convenient enjoyment of the property. The tenant has no vested right in the property instead; it is a privilege granted to him by the statute which is equitable in nature. The policy underlying Section 9 of the Act, is directed to safeguard the eviction of those tenants who may have constructed superstructure on the demised land, so that they may continue to occupy the same for the purposes of their residence or business. The Section contemplates that the tenant requires the land for the convenient enjoyment of the property. Whenever an application is made by a tenant before the court for issuance of direction to the landlord for the sale of the whole or part of the land to him, the court is under a mandatory duty to determine the minimum extent of the land which may be necessary for the convenient enjoyment by the tenant. For this determination the court must hold an enquiry, having regard to the area of the demised land and

the extent of superstructure standing thereon, and the tenant's need for the land for the beneficial enjoyment of the superstructure which he may have constructed thereon. The enquiry presupposes that the tenant making the application has been in the occupation of the land and the superstructure wherein he may be either residing or carrying on business, and on his eviction he would be adversely affected. The court has to consider the need of the tenant and if it finds that the tenant does not require any part of the land, it may reject the application and direct eviction of the tenant, in that event the landlord has to pay compensation to the tenant for the superstructure."

11. This Court by applying the principle laid down by the Hon'ble Apex Court to the facts of the present case, is of the considered view, that Section 9 application is lacking in material particulars and the same does not fulfill the statutory requirements. The relevant particulars are also not mentioned in the proof affidavit filed by PW1. It is vaguely stated in the petition and the same is reproduced in the proof affidavit that the entire extent of the land is necessary for convenient enjoyment of the first defendant and the averments to that effect without the other particulars are not sufficient enough to hold any effective enquiry and to decide the minimum extent of the land required for the convenient enjoyment of the superstructure put up by the tenant. On this score alone, Section 9 application is liable to be dismissed.

12. The trial court, in its order dated 21.11.2003 dismissed the petition, mainly by relying on clause 5 at page 4 of the lease agreement dated 28.06.1975 as per which the petitioner agreed to surrender to the lessor demised premises together with the existing superstructure at that time, after removing the electrical fittings, air conditions, flooring tiles. That means the tenant agreed not to claim any right over the construction at the end of lease period. The contention raised before the trial Court was that the tenant who agreed to waive his right over the building is not entitled to claim compensation for the building under Section 3 of the Act and the benefit under Section 9 is available only to such tenant, who is entitled to claim compensation under Section 3 and against whom the suit for ejectment is instituted and Section 9 application is not maintainable by the tenant, who waived his right over the building. The trial Court also accepted such contention and decided the same in favour of the lessor.

13. In my considered view, the finding so rendered by the trial Court is reversed by the lower appellate court, by saying that as per the amended City Tenant's Protection Act, the defendant is entitled to claim the right under Section 9 of the Act. The lower appellate Court referred to the amended Act, while narrating the contention raised on the side of the appellant/tenant and the relevant

provisions of law relied on by the petitioner/appellant is proviso to section 12 which was deleted by Act 4/1972. The unamended Section 12 reads as follows : nothing in any contract made by a tenant shall take away or limit his right under this Act. Before the enactment of Amendment Act 4/1972, under the proviso to Section 12 the prohibition contained in the main section shall not affect any stipulation made by the tenant in writing as to the erection of the building, insofar as they relate to building erected after the contract. After the deletion of proviso, the main provision of law stands good and the same renders clause 5 of the agreement to be legally ineffective.

14.The other ground on which the lower Court dismissed the petition is that the tenant is not in entire portion of demised land but portion of the same was leased out to third party on the date of the petition. It is contended before the lower appellate court that the second defendant/Bank of Maharashtra to whom the portion was leased out vacated the building and handed over the possession of the building. Here again, Section 9 petition and the proof affidavit of PW1/tenant are silent about the extent of land and building leased out to sub tenant/Bank of Maharashtra. Though the copy of the sanctioned plan for the proposed additional building to be constructed by the tenant was produced in the course of enquiry in IA, the particulars contained in the same shows that the proposed plinth area in the ground + first and second floors are each 2904 sq.ft. Except producing the same, the PW1 has neither in his proof affidavit, nor in his cross examination explained the nature and area of construction in each floor and the portion in the occupation of the sub tenant and the main tenant.

15.Thus the facts remain undisputed are that the suit property was taken on lease by the first defendant on 28.06.1975 and the property was sublet to the second defendant/Bank of Maharashtra in the same year 1975 and thereafter the second defendant/sub tenant had been in the occupation of the portion of the building for nearly 25years and the subtenant continued to be in the occupation on the date of Section 9 application and the subtenant vacated the building only on 30.05.2000 and handed over the possession, during the pendency of Section 9 application. If that is so, the main tenant was not in occupation of the entire building from 1975 to 2000. The factum of the occupation of the sub tenant of the portion of the building for more than 25years and as on the date of Section 9 application would go to show that the main tenant was not in need of the entire superstructure for his business activities and the same state of affairs continued as on the date of Section 9 application. As such, the claim made by the tenant that he is in need of entire extent of vacant land for convenient enjoyment of the entire superstructure as contended at the time of enquiry is lacking in bonafide and lacking in particulars for want of extent of the building in the occupation of the main tenant and the extent of the building in the occupation of the sub tenant on the date of Section 9 application.

16. In this context, this court is inclined to recollect the observation of the Hon'ble Supreme Court in the decisions reported in (1987) 2 SCC 429 - P. Ananthakrishnan Nair and another V. Dr. G. Ramakrishnan and another and 2003 (3) CTC 448 - S. R. Radhakrishnan and others V. Neelamegam to the effect that the enquiry to be held by the Court must be having regard to the area of the demised land and the extent of superstructure standing thereon and the tenants need for the land for the beneficial enjoyment of the superstructure. Without ascertaining the extent of superstructure in his occupation, no effective enquiry can be conducted into the minimum requirement of the land for the beneficial enjoyment of such extent of the superstructure. As such, the failure to furnish the relevant particulars would render the claim made herein to be defective.

17. Similar view is expressed in the judgment reported in (1987) 2 SCC 429 - P. Ananthakrishnan Nair and another V. Dr. G. Ramakrishnan and another, wherein also, the Supreme Court is of the view that the enquiry presupposes that the tenant making the application has been in the occupation of the land and the superstructure wherein he may be either residing or carrying on business.

18. The Supreme Court in para 13 of the judgment reported in 2003 (3) CTC 488 - S. R. Radhakrishnan and others V. Neelamegam observed that the tenant should be in possession of the premises with respect to which the right to purchase is sought to be exercised in the context of the relevant provisions of the Act. In the same paragraph, earlier Supreme Court judgment reported in (1987) 2 SCC 429 - P. Ananthakrishnan Nair and another V. Dr. G. Ramakrishnan and another was referred to, wherein it is held that the premises must be in the personal occupation of the tenant before he could exercise the right under Section 9 of the Act and actual physical possession of the demised premises of the tenant is sine qua non of an application under Section 9 of the Act. The Supreme Court in the case above cited having found that the tenant had discontinued its business in the suit premises and only a small portion thereof had been retained by them for keeping the accounts books, etc and further having found that the rest of the land and superstructure standing thereon had been in occupation of sub-tenants since long, held that it would be unreasonable to direct the landlord to sell the land to the tenants.

19. The learned counsel for the petitioner has at this juncture cited the Division Bench judgment of this court reported in 1976 (vol. 89 - Part 1) LW 1 - Haridas Girdhardas and others V. M. Varadaraja Pillai and another wherein the Division Bench is of the view that the requirement under Section 2(4)(ii)(a) or (6) of Amending Act 24 of 1973 as to continuance in actual possession of the land and building etc., has to be satisfied not only as on the date when the Amending Act 24 of 1973 came into force and on the date of the Application for sale, but also subsequently until and order is made under Section 9, and the same as well as the provisions of that

Section are fully worked out. Such a requirement is necessary. Though the observation is made in the context of tenant delivering actual physical possession, the same is also applicable to such cases wherein the main tenant was not in actual physical possession of the superstructure, on the date of section 9 application.

20.The Division Bench of our High Court in the judgment reported in 2003 (1) CTC 199 - B.S.Nagarajan V. K.B.Sivasankaran was of the view that the tenants who are in actual physical possession alone can claim protection under Tenants Protection Act and the tenant has not demarcated portion in his occupation and major area of superstructure is in possession of sub tenants and are not entitled to the protection under the Act.

21.The learned brother judge has in the judgment reported in 2000 MLJ (supp) 74 - J.Lease & Co and others V. M.S.A.Mohammed Farooq has from paragraph 11 onwards referred to catena of judgments of the Hon'ble Apex Court and our High Court for the legal principle that the right of a tenant to apply to the Court for an order directing the landlord to sell the land to him for a price to be fixed under Section 9 of the Principal Act is not a statutory right or a right to property conferred. But it is only a privilege conferred on him by the Act and the same could be exercised by adopting prescribed procedure under the Act. In paragraph 41 of the same judgment the observation of the then Chief Justice in T.R.P.Raja Sekara Bhoopathy V. Navaneethammal and other - 1992 LW 259 arising under the Tamil Nadu City Tenant's Protection Act is extracted. It is observed therein that the physical and actual possession of the land and building by a tenant is a sine quo non to project the benefits or statutory entitlement under the Act and the primordial requirement for a tenant to claim the benefit under the Act is that he should be in actual physical possession of such land and building.

22.The learned brother judge of this Court has in para 7 of his judgment reported in 2003 - 4 - LW 432 - Hindustan Petroleum Corporation Ltd., Rep by its Senior Regional Manager V. Spencer and Company Ltd., referred to the Supreme Court and Division Bench and single judge decisions of this Court for the same view that as Section 9 is not enforcing of right but only privilege given to the tenant and to claim such privilege he has to satisfy all the statutory conditions, one of which is that he should be in actual physical possession of the property of the superstructure. It is observed in para 9 by the learned single judge that what the law requires under the Act is to invoke the benefit and privilege, the petitioner must be in actual physical possession and legal or constructive possession of the property does not entitle the petitioner to claim the benefits.

23.If the facts of the present case, if viewed in the light of the legal premises as stated above, it would compel this court to hold that the tenant on his failure to be in actual possession of

entire land and superstructure and on his failure to show the extent of the land and building in his actual possession the tenant who is shown to be not in need of entire superstructure, is disentitled to seek the benefit under Section 9 for the beneficial enjoyment of the superstructure put up by the tenant.

24.The last aspect to be considered herein is the manner in which the lower appellate Court has dealt with and disposed of the appeal arising out of section 9 application. As already stated, the trial Court dismissed the petition on the ground that the tenant waived his right over the building and the tenant was not in actual possession of the entire building. Whereas, the lower appellate Court who is the next Court of fact, except narrating the respective contentions raised on both sides, failed to discuss the same on merits and to agree or disagree with the contention raised on the side of either of the parties for such reasons recorded in the judgment by the lower appellate Court. The lower appellate Court after narrating the respective contentions raised on both sides, concluded its judgment by saying that as per the unamended Act, the tenant is entitled to the benefit under the Act and the same warrants interference of the order passed by the trial Court. There is absolutely no discussion on merits on the issues involved and no specific finding rendered on the same. The lower appellate Court has not even held any enquiry into the minimum requirement. Such course adopted by the lower appellate Court for reversing the order of the trial Court and for upholding the claim of the tenant for the benefit under Section 9 of the Act is against the procedure under the Act and the well laid down legal principles and is hence legally perverse.

25.Further, as rightly argued by the learned counsel for the petitioner the lower appellate Court except stating the order passed by the trial Court is set aside not passed any effective order as contemplated under Section 9(1) (A) of the Act, under which no Court can pass a piecemeal order and the Court is required to pass composite order which will make reference to the right of the tenant to have the land sold to him, the extent of the land to be sold to him and also the price for which that is to be sold. It is held so by the learned judge of this Court as he then was in the authority reported in 1974 2 MLJ 172 - P.T.Srinivasan V. Sri Malleeswarar Devasthanam by Trustees and others, wherein the learned single judge, while holding the nature of the order to be passed is a composite order and there cannot be a multiplicity of orders, has further held that the order Under Section 9(1)(a)(i) cannot have a dual aspects i.e, one phase dealing with the right of the tenant to get a sale of the land over which he has put up the superstructure and other phase of it dealing with the price the tenant has to pay for the land made available to him by prior order of the court in his favour.

26.Thus for the detailed discussion held above, this court is of the considered view that Section 9 application filed by the first respondent/tenant is lacking in particulars and lacking in bonafide

and the tenant failed to satisfy the statutory requirement to be in need of occupation of entire superstructure and to be in the actual possession of the entire superstructure, before invoking Section 9 of the application and the manner of disposal of Section 9 application is also not in accordance with law and contrary to the legal principle laid down by the Supreme Court and our High Court. As such, the first respondent/tenant is disentitled to maintain Section 9 application and disentitled to get any order in his favour in the same. Whereas the impugned order passed by the lower appellate Court without duly considering and appreciating the relevant material factors that too in the light of well laid down legal proposition suffers from irregularity and infirmity and the same is hence liable to be set aside.

27.The order impugned in CRP.No.4771 of 2013 is one rejecting the petition filed by the plaintiff club for amending the plaint by introducing additional paragraph before the cause of action paragraph. The additional paragraph sought to be included is incorporated in para 10 of the affidavit filed in support of amendment application in IA.No.965 of 2012. The averments contained in the proposed additional paragraph are about the various changes, the first defendant/tenant partnership firm M/s.Woodlands Tiffin Room had undergone after the lease agreement on 28.06.1975 and about the non continuance of the same partners in the partnership firm and induction of new partners and change of partnership firm into proprietorship concern having one Krishnamoorthy who represented the tenant herein as its sole proprietor and induction of new partners and about how the changes effected with regard to the constitution of the original firm amounts to subletting or assignment of the tenancy without the consent of the landlord in writing at any point of time and how the same amounts to unauthorised subletting in violation of sub letting etc., The affidavit filed by the present Secretary of the Club explained the circumstances under which the plaintiff club came to be aware of the details through the additional documents filed in CRP.No.1601 of 2008 in the course of enquiry in the same and how the averments contained in the additional paragraph are essential and relevant to decide the main controversy in issue.

28.As already stated, the proposed amendment was seriously opposed by the respondent/tenant. The trial Court dismissed the petition not on merits, but on the ground that any order passed in the amendment application is likely to affect the determination of the issue involved in CRP.No.1601 of 2008. In my considered view, the disposal of IA in such short cut method cannot be treated as proper and effective disposal of the same in the manner required under law. It is relevant to mention at this juncture that the respondent/tenant has not in the counter filed in the application denied the correctness of the averments raised in the proposed additional paragraph as not true. The application for amendment is only sought to be opposed on the ground that the subletting is with the consent of the landlord and the averments raised in the proposed

additional paragraph are only an after thought and on the ground that the application for amendment filed after commencement of the trial i.e., after enquiry in Section 9 application is not maintainable. The learned counsel for the respondents has also cited the judgment reported in AIR 2009 SC 1433 - Vidyabai and others V. Padmalatha and another in support of such contention.

29. In my considered view, the question dealt with in the judgment of the Apex Court is not relating to the suit for ejectment and Section 9 application. In the case decided by the Supreme Court, the suit filed was one for the specific performance of an agreement of sale and the petition seeking amendment of the written statement was filed on 08.11.2006 much after framing of the issues and after the parties filed their respective affidavits for the evidence and the dates have been fixed for cross examination. The Supreme Court by virtue of proviso to Order VI Rule 17 CPC Amendment Act 2002, was ultimately of the view, that the proviso restricts the power of the Court. It puts an embargo on exercise of its jurisdiction to entertain any application for amendment. Only on satisfactory fulfillment of the condition such an amendment is necessary to decide the real dispute between the parties and otherwise the court will have no jurisdiction at all to allow the amendment etc., the same is not applicable to the facts of the present case, wherein the trial in the main suit was not admittedly commenced. The nature of the enquiry held is preliminary in nature regarding the right of the tenant to get the sale of the land under Section 9 of the Act and subject to the outcome of the final disposal of the same, the suit may have to be proceeded with for deciding the suit relief in respect of remaining portion, if any. As such, the objection raised on the side of the respondent/tenant is legally untenable herein.

30. Regarding the nature of the averments raised in the proposed additional paragraph is concerned, the same is sought to be supported by partnership deed dated 03.06.1977 and deed of retirement dated 04.01.1978 and deed of partnership dated 25.02.1988. In the lease deed dated 28.06.1975 M/s. Woodlands Tiffin Room is represented by its Managing Partner by name Gopal Rao. The reading of Partnership deed dated 03.06.1977 would reveal that Partnership Deed consisting of Srinivasa Rao and Gopal Rao was formed on 17.11.1974 for carrying on business under the name and style of Woodlands Tiffin Rooms and under Partnership Deed dated 03.06.1977, the third partner by name Srinivasa Achar was inducted as third partner, subject to the terms and conditions contained therein.

31. The next document to be looked into is deed of retirement from the Partnership Firm dated 04.01.1978, in and under which, two partners by name Srinivasa Rao and Gopal Rao retired from the Partnership Firm and the partnership firm by name Woodlands Tiffin Rooms became the sole Proprietorship concern having Srinivasa Achar as its sole Proprietor. Next document made available herein is the deed of Partnership Deed dated 25.02.1988 between Krishnamoorthy,

Suresh Rao, Vasudeva Rao, Ramesh Rao and Sathish Rao. While the name of the firm continue as Woodlands Tiffin Rooms, the name of the restaurant was changed as Aishwarya Restaurant. What was the period at which the constitution of M/s.Woodlands Tiffin Rooms was changed into partnership and how Krishnamoorthy became its partner and what was his authority to induct new partners etc., is not explained by the tenant.

32.According to the learned counsel for the petitioner, various changes as above mentioned was brought into the constitution of the Partnership Firm in systematic and calculated manner, so as to remove the original partners and to induct totally new partners and the original partners lost control over the property and the property come to be in the occupation of new set of persons under the guise of changing the constitution of the business firm and the same amounts to an act of assignment or subletting which without the consent of the lessor in writing is against the terms of the lease.

33.As rightly argued by the learned counsel for the plaintiff, when the relief sought for in the main suit for recovery of possession is on the ground of subletting and when according to the plaintiff, the changes brought into the firm also amount to either assignment or subletting, which is without the written consent of the landlord is unauthorised one under the terms of the lease deed, it is but necessary to allow the plaintiff to introduce necessary pleadings in support of the plaintiff's claim for recovery of vacant possession of the property in question. As rightly argued by the learned counsel for the plaintiff, the amendment is not likely to change the character of the suit, which will continue to remain as one for recovery of possession on the ground of subletting. The introduction of the proposed additional paragraph by way of amendment is also not likely to prejudice the right if any of the first respondent/defendant. In the event of the amendment being allowed the first respondent/defendant has the right to file additional written statement containing necessary pleading denying the plaintiff's case of subletting and the merits and demerits of the respective contentions raised on both sides are the matter for appreciation of evidence during trial.

34.That being so, this court while setting aside the impugned order passed by the trial court, is inclined to allow the application for amendment, with liberty given to the respondents to file additional written statement with direction issued to the trial Court to decide the merits and demerits of the same at the appropriate trial stage.

35.With such liberty and direction, CRP.No.4771 of 2013 is allowed by setting aside the order of the trial court and by ordering the amendment application IA.No.965 of 2012 as prayed for.

36.In the result, CRP.No.1601 of 2008 is allowed by setting aside the order of the lower appellate Court and by restoring the order of the trial court. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

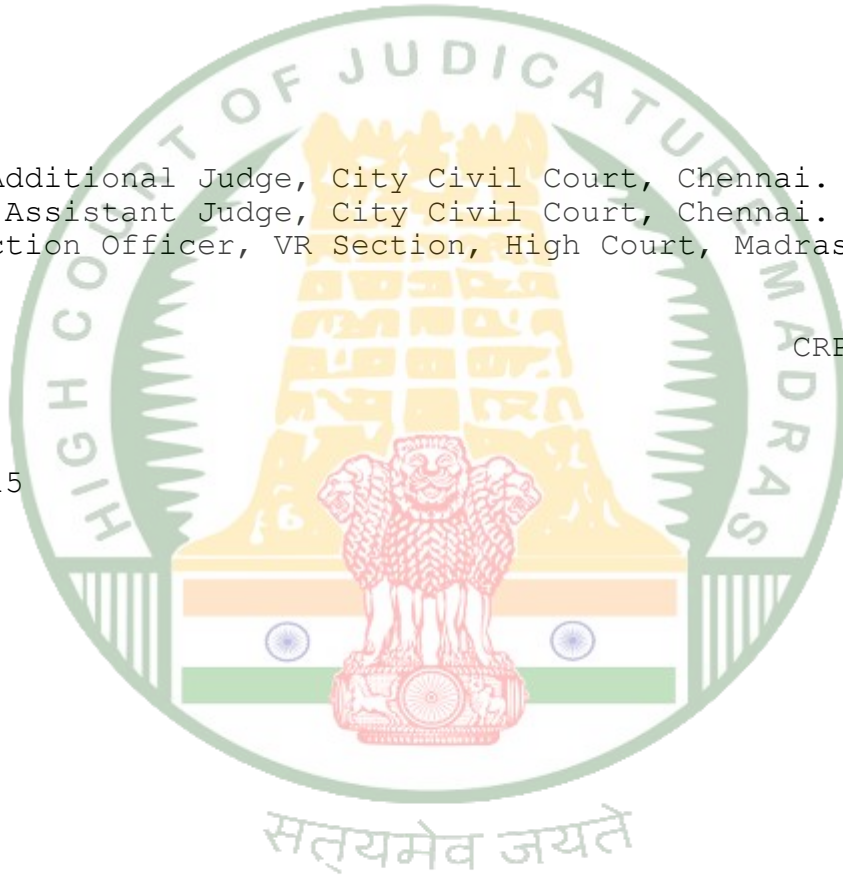
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To

1. The I Additional Judge, City Civil Court, Chennai.
2. The XI Assistant Judge, City Civil Court, Chennai.
3. The Section Officer, VR Section, High Court, Madras.

CRP.No.1601 of 2008
and 4771 of 2013

SKV(CO)
Eu 08.10.15



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