

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON:06.07.2015 AND DELIVERED ON : 31.7.2015

CORAM:

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN
AND
THE HON'BLE MR.JUSTICE T.MATHIVANAN

Appeal Suit No.883 of 2012
and C.M.P.No.1 of 2014

M.A.Muthu ... Appellant/Plaintiff

Versus

Murugabharathy ... Respondent/Defendant

Appeal Suit filed under Section 96 of Civil Procedure Code against the Judgment and decree dated 12.03.2012 made in O.S.No.10170 of 2010 by the IV Fast Track Court, Chennai.

For Appellant .. Mr.PL.Narayanan
For Respondent .. Mr.P.R.Raman

JUDGMENT

(V.RAMASUBRAMANIAN, J)

This appeal arises out of the dismissal of a suit for recovery of money.

2. Heard Mr.PL.Narayanan, learned counsel for the appellant and Mr.P.R.Raman, learned counsel for the respondent.

3. The appellant herein filed a suit in C.S.No.284 of 2010 on the file of this Court, praying for recovery of a sum of Rs.16,10,873/-, together with monthly rent and maintenance charges for the future period until the handing over of possession. The suit was transferred, after the change of pecuniary jurisdiction of the City Civil Courts, to the IV Fast Track Court at Chennai and got renumbered as O.S.No.10170 of 2010.

4. The case of the appellant/plaintiff in his plaint was that he is the absolute owner of the building and premises of shops F-114, F-116 and F-117 in the first floor of Phase-II, of Spencer Plaza, Anna Salai, Chennai-600 002; that the above premises were let out to the defendant with effect from 1.1.2005 on a monthly rent of Rs.25,000/- vide Lease Agreement dated 30.12.2004 executed by the plaintiff and defendant; that the defendant failed to pay the monthly rents

regularly and committed willful default; that the plaintiff filed R.C.O.P.No.176 of 2006 under Sections 10(20(i) and 10(3)(a)(iii) of the Tamil Nadu Buildings (Lease & Rent Control) Act, 1960, before the Rent Controller, the XIV Small Causes Judge; that the learned Rent Controller ordered the eviction of the defendant by a Judgment and Decree dated 16.8.2007; that by mistake the fittings and fixtures described in Schedule-B of the petition were not included in the decree and hence a petition to amend the decree has been filed; that the defendant did not hand over the vacant possession of the suit premises as ordered by the Rent Controller; that the arrears of rent payable by the defendant to the plaintiff works out to about Rs.12,50,000/- being the monthly rent for 50 months @ Rs.25,000/- per month from 1.12.2005 to 31.1.2010; that the plaintiff is now claiming the rental arrears of Rs.9,00,000/- being the monthly rent for 36 months from February, 2007 to January 2010; that in addition to the above, the defendant as tenant also committed default in the payment of monthly maintenance charges to the maintenance company, Plaza Maintenance and Services Limited to the tune of Rs.6,93,566/- up to 31.12.2009; that the plaintiff now claims that the maintenance charges due only for the 36 months from February 2007 to January 2010 amounting to Rs.7,10,873/-; that the defendant is due and payable to the plaintiff a total sum of Rs.16,10,873/- including maintenance charges for the suit premises for the period February 2007 to January 2010.

5. The respondent/defendant filed a written statement contending interalia that it was true that he took the three shop portions on lease with effect from 1.1.2005 onwards; that due to a financial crunch, he requested the plaintiff to adjust the advance amount paid at the time of inception of the tenancy towards rental arrears; that the plaintiff did not accede to the request and rushed to the Rent Controller and obtained an order on 16.8.2007; that as per the order of the Rent Controller, he became obliged to pay a sum of Rs.4,75,000/- towards rental arrears; that this defendant approached the plaintiff on 01.10.2007 negotiated with him and paid the above said amount by cash and handed over the keys and physical possession of the premises to him; that after receipt of the above said amount by cash and after taking physical possession and keys of the premises from this defendant, the plaintiff kept quiet for a long time of nearly three years and now come up with false, frivolous allegations that the defendant has committed willful default in payment of monthly rents from 01.12.2005 to 31.01.2010 for 50 months working out to Rs.12,50,000/-; that there is no explanation as to why the plaintiff did not initiate any proceedings for recovery of money at an early stage; that it is unbelievable that a person could waive 14 months rent; that the plaintiff appears to have incurred heavy loss in his business and in order to evade his creditors he had filed a vexatious suit; that it is false to say that the defendant committed default in payment of monthly maintenance charges to the tune of Rs.6,93,566/- up to 31.12.2009; and that on and from 1.10.2007, there was no cause of action for the plaintiff.

6. On the above pleadings, the trial Court framed three issues, which are as follows:-

1. Whether the plaintiff is entitled for a sum of Rs.16,10,873/- towards the arrears of rent and maintenance charges for the period from February 2007 to January 2010?

2. Whether the plaintiff is entitled for the relief of payment of monthly rent and the maintenance charges from February 2010 upto the time of vacant possession of the suit property?

3. To what relief the plaintiff is entitled to?

7. The appellant/plaintiff examined himself as P.W.1 and filed 13 documents as Exhibits. The Lease Agreement dated 30.12.2004 was marked as Ex.A1. The copy of the Petition in R.C.O.P.No.176 of 2006, the Copy of the counter filed therein and the copy of the Fair and Decretal order in R.C.O.P.No.176 of 2006 were respectively filed as Exs.A3 to A6. The Lawyer's notice and reply notice were filed as Exs.A7 and A10. The statement of accounts and the statement of account for maintenance charges were filed as Exs. A8 and A9.

8. The respondent/defendant examined himself as D.W.1. But no documents were filed on the side of the respondent/defendant.

9. After analysing the oral and documentary evidence, the trial Court came to the conclusion that the respondent/defendant had vacated the premises on 1.10.2007 and that therefore, there was no relationship of landlord and tenant after 1.10.2007, for the plaintiff to come up with a suit for recovery of arrears of rent. Consequently, the trial Court answered all the three issues against the plaintiff and dismissed the suit. Therefore, the plaintiff has come up with the above regular appeal.

10. Mr.PL.Narayanan, learned counsel appearing for the appellant/plaintiff contended that the judgment and decree of the Court below are contrary to law, weight of evidence and the probabilities of the case; that when it is pleaded by the defendant that he had paid the rental arrears and also handed over possession on 1.10.2007, the burden to prove the same rested on the defendant; that the defendant could not discharge the burden of proof cast on him to show that he paid the rental arrears of Rs.4,75,000/- and also handed over the keys on 1.10.2007; that for the purpose of recovering the rental arrears, a landlord need not establish the continuation of the relationship of landlord and tenant; that till it is proved that the actual possession of the shops were handed over to the plaintiff either by the executing Court or by the defendant himself, the relationship of landlord and tenant would not come to an end; that it was unbelievable that a person who paid the monthly rental of Rs.25,000/- only by way of cheques, paid the rental arrears of Rs.4,75,000/- in cash; that the oral evidence adduced by the

defendant was completely unbelievable; that the reasoning given by the trial Court that the appellant waived his claim for arrears of rent from 1.12.2005 to 1.1.2007 was wrong; that there was no question of waiver, when the rental arrears for the said period constituted a claim before the Rent Controller; that as per the additional evidence now filed, the plaintiff took actual possession of the shops only through the Executing Court of the Rent Controller, by breaking open the lock on 4.8.2012; that as it is well established that actual physical possession was taken only after the institution of the suit, the liability of the defendant to pay the maintenance charges also continued; that the Court below failed to consider Exhibits A6, A8, A9, A11 and A13, which were very vital to decide the question of arrears of maintenance; and that therefore the dismissal of the suit in total was completely contrary to law and unjustified.

11. In response, it is contended by Mr.P.R.Raman, learned counsel for the respondent/defendant that the respondent handed over possession of the property on 1.10.2007 and also paid the arrears of rent up to that date; that this is why the appellant/plaintiff kept quiet for more than three years; that the trial court, which is always in a better position to appreciate the demeanour of the witnesses, chose to believe oral evidence of D.W.1; that once the trial court believes the oral evidence of a witness, an appellate court cannot take a different view; that the normal reaction of a person who had secured an order of eviction would be to file an execution petition immediately in the absence of an appeal; that in this case the appellant/plaintiff, without even choosing to file an execution petition, filed the above suit in the year 2010 for recovery of rent and chose to file an execution petition only after two more years, in the year 2012; that the very fact that a person who obtained a decree for eviction in the year 2007 chose to file a suit for recovery of arrears of rent in 2010 and thereafter filed an execution petition for taking possession in the year 2012 would probablise the case of the respondent that possession was already handed over and that therefore, the judgment and decree of the court below were unassailable.

12. We have carefully considered the above submissions.

13. Before we take up the issues arising for consideration in the above appeal, we must bring on record one more fact namely a miscellaneous petition in M.P.No.1/2014 filed by the appellant under Order 41 Rule 27 of CPC. The appellant seeks through this miscellaneous petition, to file two documents by way of additional evidence in the appeal. They are: (1) the report of the bailiff in E.P.No.297 of 2007 in R.C.O.P.No.176 of 2006 dated 14.8.2012 for breaking open the lock and (2) the report of the bailiff dated 16.8.2012 and 24.8.2012 recording delivery.

14. The appellant seeks to file the above documents, for the purpose of establishing that he took possession of the property only on 16.8.2012 through the Rent Control Executing Court and that therefore the contention of the respondent that he had handed over actual physical possession on 1.10.2007 could not be true. In the light of the rival contentions, and the miscellaneous petition for filing additional documents, we are of the considered view that the following points arise for determination in this appeal.

(1) Whether the trial court was right in coming to the conclusion that the possession of the property was delivered by the respondent to the appellant on 1.10.2007?

(2) Whether the trial court was right in coming to the conclusion that the respondent had paid rental arrears of Rs.4,75,000/- on 1.10.2007?

(3) Whether the trial court was right in holding that the relationship of landlord and tenant severed on 1.10.2007, disentitling the appellant to claim any rental arrears after 1.10.2007?

(4) Whether the trial court was right in rejecting the claim of the appellant for maintenance charges for the shops in question? and

(5) Whether the appellant is entitled to any relief?

POINT NOS.1 & 2

15. The first point arising for determination is as to whether the trial court was right in coming to the conclusion that the possession of the property was delivered by the respondent to the appellant on 1.10.2007. The second point is as to whether the trial court was right in coming to the conclusion that the respondent had paid rental arrears of Rs.4,75,000/- on 1.10.2007. Since both these issues are intertwined and they are nothing but two sides of the same coin, they cannot be dealt with separately. Therefore, they are taken up together for consideration.

16. The specific case of the plaintiff is that the defendant who had taken three shop portions with effect from 1.1.2005 on a monthly rent of Rs.25,000/- under a Lease Agreement dated 30.12.2004, committed default in making payment of the rent from 1.12.2005 to 31.1.2010. In other words, the case of the appellant/plaintiff was that the respondent committed default in paying monthly rent for 50 months. However, the plaintiff restricted his claim only to Rs.9,00,000/-, being the monthly rent for 36 months from February 2007 to January 2010.

17. The specific case of the respondent/defendant was that on 1.10.2007, he paid the rental arrears of Rs.4,75,000/-, as fixed by the Rent Controller namely XIV Judge of the Court of Small Causes, Chennai in R.C.O.P.No.176 of 2006, by an order dated 16.8.2007.

According to the written statement filed by the respondent, he approached the plaintiff on 1.10.2007, negotiated with him and paid the above amount in cash and handed over keys and physical possession of the premises to him.

18. Therefore, this is a case where the allegation of non payment of rental arrears at least up to 1.10.2007 is specifically admitted in the written statement. Not only did the respondent admitted his liability, but also admitted the quantum of liability.

19. As admitted in the written statement and as admitted by the defendant in his deposition as D.W.1 and as seen from Exs. A3 to A5, the rental arrears payable by the defendant was Rs.4,75,000/- at least up to 1.10.2007.

20. Once it is found that as on 1.10.2007 the defendant was obliged to pay Rs.4,75,000/- to the plaintiff and once it is claimed by the defendant that he had paid the money by way of cash on 1.10.2007 to the plaintiff, then the burden of proof got cast on him to prove that he had discharged the liability. A person who admits liability but claims to have discharged it, should prove the discharge.

21. To prove that he had discharged the liability, the respondent/defendant had no evidence other than his own oral testimony. Let us therefore see whether the oral testimony of the respondent/defendant was sufficient to hold that he had discharged the liability.

22. In the affidavit filed by the respondent/defendant in lieu of chief examination, he stated in para 2 as follows:-

" 2. I submit that the shops F-14, F-16 and F-17 in the first floor of phase II of Spencer Plaza, Anna Salai, Chennai-600 002 was leased out to me from 01.01.2005 onwards. Due to some financial crunch I have asked the plaintiff to adjust the advance amount paid at the time of inception of tenancy for monthly rent, but the plaintiff without doing so filed R.C.O.P.No.176 of 2006 before the Hon'ble XIV Judge, Small Causes Court at Chennai and obtained an order on 16.08.2007. In the said order I was directed to pay a sum of Rs.4,75,000/- towards arrears of monthly rent to the plaintiff. Accordingly I have approached the plaintiff on 01.10.2007 negotiated with him and paid the above said amount by cash and handover the keys and physical possession of the premises to him."

23. During the cross-examination, the respondent/defendant claimed that he paid the cash to the plaintiff. However, he admitted that he used to let out his properties on monthly rental or weekly

rental basis and that he used to issue receipts. He also admitted that for all the three shops that was taken by him on monthly rental basis from the plaintiff, he used to pay rent only in the form of cheques and not by way of cash. A specific question was put to him as to whether the payment of Rs.4,75,000/- as per the order of the Rent Controller was reflected in his Income tax Returns. He replied that he could answer the question only after checking up with his auditor. The respondent/defendant also admitted that he did not obtain any acknowledgment from the plaintiff for having handed over the keys of the premises. A suggestion was also put to him that he never paid the money as claimed by him on 1.10.2007.

24. From the oral evidence let in by the respondent/defendant, it is clear that he had always paid the monthly rental only by way of cheques. It is unbelievable that a person who always paid the monthly rental amount of Rs.25,000/- by way of cheques, suddenly made payment of a huge amount of Rs.4,75,000/- by way of cash on 1.10.2007. Assuming that such a payment had in fact been made even by way of cash, the same should have been reflected in the books of accounts of the respondent/defendant and in the Income tax Returns. But the defendant failed to produce either his bank statement to show the availability of so much of money as on 1.10.2007 or the Income tax Returns to show such a payment. Even after a specific question being put to him in cross-examination, the respondent/defendant did not care to produce the Income tax Returns. Therefore, the plea of discharge, could not have been believed by the trial court. Once the plea of discharge goes, it follows naturally that the claim of the plaintiff for payment of rental arrears cannot be rejected in total.

25. If the story of the defendant that on 1.10.2007 he approached the plaintiff and paid an amount of Rs.4,75,000/- by way of cash cannot be believed, then the other part of the story namely that the defendant handed over the keys of the buildings to the plaintiff cannot also be believed. It is true that the plaintiff did not choose to file an Execution Petition for five years from 16.8.2007 until 2012, for executing the decree of eviction passed by the Rent Controller. But that can at the most indicate the failure of the plaintiff to mitigate the loss. It cannot be taken to be an indicator that possession was handed over on 1.10.2007.

26. From the additional documents that the appellant/plaintiff has filed along with M.P.No.1 of 2014 under Order 41 Rule 27 of C.P.C. it is seen that on 14.8.2012, the Senior Bailiff attached to the Court of Small Causes went to the shop portions. After finding that the shops were locked, the Bailiff broke open the locks. Inside the shop portions, no materials were found. The two additional documents sought to be filed in the appeal show that the respondent was not in actual physical possession of the shops.

27. Therefore, it appears that the respondent vacated the shop portions and disappeared without actually paying the rental arrears and without actually handing over vacant possession of the premises to the landlord. But unfortunately, the trial court recorded a finding as though the defendant had handed over vacant possession and also paid the rental arrears of Rs.4,75,000/-, on 1.10.2007, only by inference. As a matter of fact it is not even possible to term the finding of the trial court in this regard as an inference, borne out of circumstances. What the trial court drew was actually a presumption. This presumption was also only on the basis of a conjecture that the plaintiff would not have kept quiet without taking any action for nearly three years and that even in this suit, he claimed the rental arrears only from February 2007.

28. The fact that the plaintiff came to court after three years may deprive him of something else, but it cannot necessarily prove the defendant's case that he had handed over possession as well as the rental arrears. The fact that the plaintiff claimed rent only from February 2007 in this suit, would not also not prove the defence of the defendant, since the plaintiff appears to have gone on a legally wrong presumption that the rental arrears for the period prior to February 2007 might be barred by time. This presumption was legally wrong in view of the fact that the liability of the defendant to pay the rental arrears of Rs.4,75,000/- actually crystallised only by an order of the Rent Controller dated 16.8.2007. Therefore, though the period of limitation from the date of the original cause of action namely, the failure of the defendant to pay the rent every month might have expired, the right of the plaintiff to claim Rs.4,75,000/- towards rental arrears arose out of the order of the Rent Controller dated 16.08.2007. Hence, the finding of the trial court that rental arrears was paid on 1.10.2007 and possession was handed over on 1.10.2007, based upon mere conjectures, cannot be sustained. The trial court has completely overlooked the fact that the person who pleads discharge of a liability, was duty bound to establish the same through evidence. In this case, the defendant pleaded discharge by contending that he vacated the premises and handed over vacant possession along with cash of Rs.4,75,000/- on 1.10.2007. But he was not able to establish the same by his own evidence. The trial court has omitted to see that the defendant was a person who paid even the monthly rent of Rs.25,000/- only by way of cheque and hence his plea that he paid a huge amount of Rs.4,75,000/- by way of cash without even taking a receipt and without even producing the books of accounts or the bank account to prove the same, was not acceptable.

29. Therefore, on points 1 and 2, we hold that the trial court was not right in coming to the conclusion that the possession of the property was delivered by the respondent to the appellant and that the respondent also paid rental arrears of Rs.4,75,000/- by way of cash on 1.10.2007.

POINT - 3:

30. The third point arising for consideration is as to whether the trial court was right in holding that the relationship of landlord and tenant severed on 1.10.2007, disentitling the appellant to claim any rental arrears after 1.10.2007.

31. The trial court came to the conclusion that there was no landlord-tenant relationship between the plaintiff and the defendant and that consequently there was no cause of action for the plaintiff to come up with the above suit. This conclusion of the trial court was based upon two things namely (a) that the original rental agreement dated 30.12.2004 between the plaintiff and the defendant was only for a period of three years, expiring on 30.12.2007 and (b) that the defendant had vacated and handed over keys of the premises on 1.10.2007.

32. But the above finding of the trial court is completely perverse. On 16.8.2007, when the Rent Controller passed an order under Section 11(4) of the Tamil Nadu Buildings (Lease and Rent Control) Act, directing the defendant to vacate and hand over possession due to non payment of rental arrears, as ordered by the Rent Controller, the tenancy subsisted very much. As a consequence, the liability to pay rent would continue till the tenant vacated and handed over possession to the landlord. The cause of action for the plaintiff, did not depend upon the period of tenancy fixed in the agreement. His cause of action continued till the defendant actually vacated and handed over possession and till he paid the rental arrears.

33. The trial court has failed to see that the cause of action for a plaintiff in a suit for recovery of arrears of rent, is the continued occupation of the tenant and not the date of expiry of the period of lease. If the logic of the trial court is accepted, a tenant can continue to hold over to the property, even after the expiry of the period of lease or its early termination and claim that there was no liability to pay rent. It is true that in cases of unlawful occupation, what is claimed by a landlord is actually damages for use and occupation and not rental arrears. But the right of the plaintiff cannot be defeated, merely because of a wrong label. So long as the defendant failed to hand over vacant possession, his liability to pay rent, whether it is termed as rent or as damages for use and occupation, continued. As long as this liability continued, the cause of action for the plaintiff continued to survive.

34. Therefore, we hold on point No.3 that the trial court was wrong in coming to the conclusion that the relationship of landlord and tenant got severed on the expiry of the period of lease and that therefore, there was no cause of action for the plaintiff to sue the defendant. We have already found, in our discussion on points 1 and 2 that the defendant had not proved to have handed over vacant

possession on 1.10.2007 and that he had also not proved the payment of Rs.4,75,000/- on 1.10.2007. Therefore, it is clear that the plaintiff was entitled to claim rent or damages for use and occupation, up to the date of taking actual physical possession by lawful means.

POINT NO-4:

35. The fourth point for determination is as to whether the trial court was right in rejecting the claim of the appellant for maintenance charges for the shops in question.

36. Admittedly, the defendant took on lease, three shop portions bearing Nos. F-114, F-116 and F-117 in the first floor of the IInd Phase of Spencer Plaza in Mount Road, Chennai-2, from the plaintiff, under an agreement dated 30.12.2004 marked as Ex.A-1. The agreement stipulated a monthly rent of Rs.25,000/- under clause-1. In addition, the defendant was also made liable to pay the maintenance charges to the Association of Shop Owners, under clause-5 of the agreement. The electricity, water and telephone charges are also liable to be paid by the defendant either to the concerned authorities or to the maintenance department of the Plaza, under clause-6. Clauses-5 and 6 read as follows:-

"5. Maintenance

Any new rules and regulation laid down by the Plaza Maintenance department and/ or the shop owners Welfare Association of spencer Plaza shall be complied by the Lessee. The monthly maintenance charges (electricity inside the premises, common electricity charges including A.C. charges, contribution towards expenses, belated payment surcharge and any other charges) levied by the Plaza Maintenance Department shall be paid by the tenant. Any liabilities upto 31st December 2004 shall be borne by the LESSOR.

6. Electricity, Water and Telephone Charges

The Lessee shall pay directly to the concerned authorities/ Plaza Maintenance Department the Electricity, Water and Telephone charges utilized for his own use as per the actual meter reading and bills submitted during the period of Lease. Any increase in electricity and water charges shall be paid by the Lessee. "

37. Therefore, the fact that the defendant was liable to pay maintenance charges, so long as he continued to be in occupation, is clearly borne out. In para 4 of the plaint, the plaintiff has claimed maintenance charges to the tune of Rs.7,10,873/- for the period from February 2007 to January 2010.

38. In para 2 of the written statement, the defendant has stated the following, in response to the claim for arrears of maintenance charges:

"It is utterly false to state that this defendant has committed default in the payment of monthly maintenance charges to the maintenance company, Plaza Maintenance and Services Limited to the tune of Rs.6,93,566/- up to 31.12.2009. If it is true, why the Plaza Maintenance and Services Limited had not sent any demand so far. "

39. After having taken such a plea in para 2, the defendant took another plea in para 4 of his written statement, which reads as follows:

"Further it is the bounden duty of the Plaza Maintenance and Services Limited to claim maintenance and arrears of maintenance if any. The Plaintiff has no right, title or interest to claim maintenance from this defendant that too in this Hon'ble High Court on behalf of Plaza Maintenance and Services Limited. It is pertinent to point out that Plaza Maintenance and Services Limited has not given any power or authority to the plaintiff to act as Agent and recover the maintenance charges on behalf of them. In the absence of contra evidence the plaintiff would not claim any amount towards maintenance on behalf of Plaza Maintenance Services Limited on the ground alone the suit may be dismissed."

40. From the stand taken in the written statement, it is clear that the defendant did not dispute either his primary liability to pay the maintenance charges or even the quantum of liability. His defence was two fold namely (a) that there was no default on his part in this regard and (b) that the plaintiff had no locus standi to claim this amount.

41. But both the above defences, could not have been sustained by the trial court. The first defence that there was no default, is something that the defendant was obliged to prove. But he did not produce even a single scrap of paper to show that these charges had been paid. After all, the payment was to be made to a Limited Company established for the purpose of maintenance of the entire Plaza. Therefore, the payments should have been made against receipts. Since the defendant did not produce any receipt to show payment, his first defence that there was no default, was not established. The contention that the Company did not make a demand, is no defence, since the primary liability was on the owner. Tenants constitute a floating population in huge plazas and malls and hence the companies entrusted with the task of maintenance, raise a claim primarily on the owners.

42. The second defence that the plaintiff has no locus standi to claim the maintenance charges, has no legal basis. As we have pointed in the previous paragraphs, the companies entrusted with the task of maintenance, make a demand on the owners and it is up to the owners to seek payment or divert payment from the tenants. Therefore, the defence taken by the defendant in respect of this claim, was unsustainable and also remained unproved.

43. Now, let us see whether the plaintiff proved his claim for Rs.7,10,873/- in this regard, irrespective of the fact that the quantum of the claim was not disputed by the defendant.

44. The plaintiff marked as Ex.P-6, a debit note raised by Plaza Maintenance and Services Limited to the tune of Rs.6,93,566/-, for the period up to 31.12.2009. In addition, the plaintiff also filed as Ex.A-11 series, a set of debit notes raised by the Maintenance Company in respect of the three shops. The plaintiff was made to pay the amount claimed under these debit notes. He did so on 25.10.2010, as seen from the receipt filed as Ex.A-12. The plaintiff also filed as Ex.A-13, the audited statement of accounts, to prove that he made payment to the Maintenance Company.

45. Interestingly, there was no cross-examination of the plaintiff, who was examined as P.W.1, on these exhibits. Not even a single question was put to P.W.1, questioning either the truth or validity of the contents of Exx.A-6, A-11 series, A-12 and A-13. Therefore, it is clear that the defendant was obliged to make payment of these maintenance charges.

46. But unfortunately, the trial Court rejected this claim, on account of the fact that it recorded a finding as though the defendant handed over vacant possession on 1.10.2007 and that thereafter, there was no liability. However, the trial court failed to see that even if the defendant had handed over possession on 1.10.2007, his liability to pay maintenance charges at least up to 30.9.2007 could not have been rejected. Therefore, we hold on point No.4 arising for our determination that the plaintiff had proved both the liability as well as the quantum of liability of the defendant to pay maintenance charges.

POINT NO-5:

47. Our conclusions on points 1 to 4 would now take us to the last point arising for our consideration namely as to what relief the plaintiff is entitled to.

48. We have found on point Nos. 1 and 2 that the defendant has not proved either to have handed over vacant possession of the tenanted premises on 1.10.2007 or to have made payment of the arrears of Rs.4,75,000/- on 1.10.2007. Once the plea of the defendant that he paid the rental arrears and handed over possession on 1.10.2007 is

rejected, it follows as a consequence that he is liable (i) to pay the rental arrears of Rs.4,75,000/- as determined by the Rent Controller in his order dated 16.08.2007, for the period from December 2005 up to June 2007 and (ii) to pay the rents for the period from July 2007 up to January 2010, at the agreed rate of Rs.25,000/- per month, as claimed in para 8 (a) of the plaint. Under normal circumstances, the defendant may also be liable to pay the future rent from February 2010 onwards up to the date of handing over possession, in view of our finding that the defendant never handed over vacant possession either on 1.10.2007 or on any subsequent date.

49. But in a written statement filed on 7.12.2010, the defendant took a stand that he handed over possession on 1.10.2007. It was only thereafter that the plaintiff filed an Execution Petition in E.P.No.297 of 2012 before the Rent Controller and got an order for delivery of possession on 14.6.2012.

50. But in cases of this nature, the landlord is not entitled to wait perennially for filing an execution petition and taking possession through court. It is true that so long as possession is not handed over to the landlord, the liability to pay rent continues. But merely because the liability to pay rent continues up to the date of handing over possession, no landlord can indefinitely wait, especially when he had a decree for eviction in his hands. What the appellant did in 2012 by filing the Execution Petition E.P.No.297 of 2012 could have been done by him much earlier.

51. The Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 prescribes a period of limitation of 15 days under Section 23 to file an appeal against the order of the Rent Controller. In this case, the Rent Controller passed an order of eviction on 16.08.2007. The respondent did not file an appeal under Section 23 of the Act. Therefore, at the earliest, the appellant could have filed an Execution Petition in October 2007. This is in view of the fact that the order of the Rent Controller dated 16.8.2007 filed as Ex.A-5 gave one month time for the defendant to vacate. But he filed the Execution Petition only in 2012 after five years of the order of eviction.

52. The delay in filing the Execution Petition is sought to be explained by the appellant, by claiming that there was some mistake or discrepancy in the drafting of the decree of the Rent Controller. But the averment to this effect was completely vague.

53. In para 3 of the plaint, the appellant has stated as follows:-

"The Honourable Court was pleased to order the eviction of the defendant by a judgment and decree dated 16.08.2007. However, by mistake, the fittings and fixtures described in Schedule B of the petition were not included in the decree and hence a petition to amend the decree has been filed. After amendment of the decree the same will be executed."

54. But the above stand taken by the appellant in his plaint for not filing an Execution Petition, is quite strange. Admittedly, the appellant/plaintiff issued a lawyer's notice under Ex.A7 dated 22.1.2010, claiming rental arrears, on the ground that the defendant had not vacated the premises. But the defendant issued a reply notice under Ex.A10 dated 30.1.2010 taking a stand that possession was already handed over. In the light of such a stand, the appellant could have at least taken possession on that date namely 30.1.2010, so that there was no further liability for the respondent and there was no further loss for the plaintiff himself.

55. During cross-examination, the appellant admitted that he did not take any action for executing the decree of eviction from 2007 to 2010 and that the property was under lock and key. Therefore, we are of the considered view that the failure of the appellant to take immediate steps to take possession of the property that was kept under lock and key, would deprive him of the right to claim monthly rental from January 2010 up to the date of the Bailiff handing over possession namely 14.8.2012. In other words, the relief claimed by the plaintiff for the future period from February 2010 onwards, in para 8(b) of the plaint is liable to be rejected outright.

56. The relief claimed in para 8(a) of the plaint is for payment of the monthly rent as well as maintenance charges for the period from February 2007 to January 2010, amounting to Rs.16,10,873/-. The rent component of this amount is Rs.9,00,000/- and the maintenance charges component is Rs.7,10,873/-.

57. Even from the additional documents filed by the appellant in this appeal, it is clear that the premises was under lock and key and that no articles belonging to the defendant were available. Since both the additional documents sought to be filed by the appellant, in a way support the case of the respondent/defendant that he was not in occupation of the tenanted premises, he cannot have any objection to these documents being taken as additional evidence. Therefore, M.P.No.1 of 2014 is allowed and the reports of the Bailiff dated 14.8.2012 and 16.8.2012 are marked as Exx.A-14 and A-15.

58. The additional documents show that the defendant was not in possession of the shops as on 14.8.2012. The reply notice dated 30.1.2010 issued by the defendant in response to the suit notice and marked as Ex.A-10 had a categorical assertion that the defendant had ceased to occupy the tenanted premises. Therefore, if the plaintiff had initiated execution proceedings promptly, he could have at least taken possession in early 2008 or so. Just as the tenant has the duty not only to vacate but also to hand over possession, to avoid future liability towards rent, the landlord also has the duty to initiate execution proceedings at the earliest, to mitigate the loss.

59. Therefore, we are of the considered view that granting a decree for payment of monthly rent alone for the period from February 2007 up to January 2010, but rejecting the claim for maintenance charges for this period, would put both parties in their proper places. While directing the defendant to pay the monthly rent of Rs.25,000/-, for the period from February 2007 up to January 2010 (36 months) would be appropriate, as he failed to hand over vacant possession to the plaintiff, rejecting the claim of the plaintiff for maintenance charges would be appropriate, for his failure to initiate execution proceedings at the earliest to mitigate the loss.

60. The plaintiff as well as the defendant have brought upon themselves, the above consequences, by their own conduct. It appears that the defendant closed the shops and ceased to occupy them, after the order of the Rent Controller, but did not formally hand over vacant possession. Similarly it appears that the plaintiff was lulled in to a sense of false security as though he can wait perennially to execute the decree for eviction. While the liability of the tenant to pay the monthly rent would continue till the vacant possession of the tenanted premises is handed over to the landlord, his liability to pay maintenance charges would continue only during his actual physical occupation of the premises. Therefore, the grant of a decree only for the payment of monthly rent from February 2007 to January 2010 at the rate of Rs.25,000/- per month, would be the just and proper relief to which the plaintiff may be entitled.

61. In view of the above, the appeal is partly allowed and the judgment and decree of the trial court is set aside. The suit O.S.No.10170 of 2010 filed by the appellant/plaintiff on the file of the Additional District Judge, Fast Track Court No.IV, Chennai is decreed partly, directing the defendant to pay to the plaintiff, a sum of Rs.9,00,000/-, representing the arrears of rent for a period of 36 months, from February 2007 up to January 2010 at the rate of Rs.25,000/- per month. The appellant/plaintiff is entitled to proportionate costs throughout, both in the suit and in this appeal. The other reliefs claimed in the suit are negatived. The defendant is given 3 months time to make payment of this decretal amount of

Rs.9,00,000/- together with proportionate costs. Upon his failure to make payment, the defendant will become liable to pay interest on the said amount at the rate of 6% per annum.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

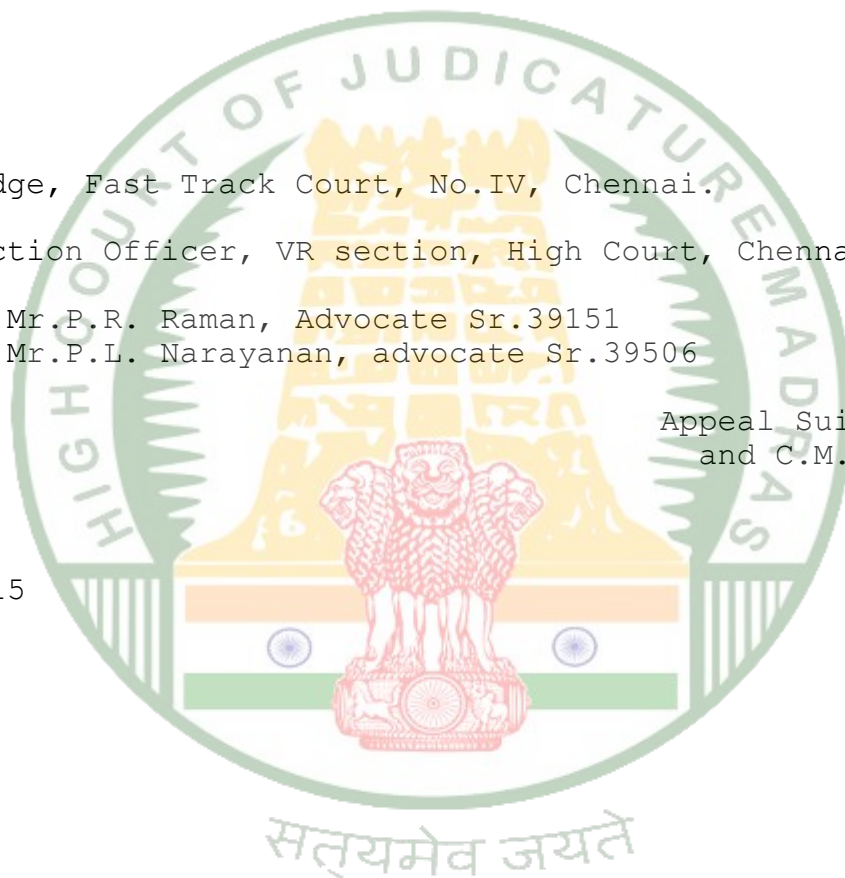
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TO

1. The Judge, Fast Track Court, No.IV, Chennai.
 2. The Section Officer, VR section, High Court, Chennai.
- + 1 cc to Mr.P.R. Raman, Advocate Sr.39151
+ 1 cc to Mr.P.L. Narayanan, advocate Sr.39506

Appeal Suit No.883 of 2012
and C.M.P.No.1 of 2014

TEJ(CO)
EU 16.10.15



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