

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On:15.12.2016
Pronounced On:23.12.2016

Coram

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

Second Appeal No.1074 of 2010
and
M.P.No.1 of 2010

B.Muralidharan .. Appellant/Plaintiff

/vs/

1.The Chairman,
Tamil Nadu Housing Board,
Anna Salai, Nandanam,
Chennai 600 035.

2.The Superintending Engineer,
Tamil Nadu Housing Board,
Chennai Circle, Anna Nagar,
Chennai 600 040.

3.The Executive Engineer,
Mogapair Division,
TNHB Mogapair,
Chennai 600 040.

4.Allottee-Service Manager,
Mogapair Division,
Tamil Nadu Housing Board,
Chennai 600 050.

5.M.Ramamurthy .. Respondents/Defendants

Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree of the learned Additional District Judge, Fast Track Court-V, Chennai made in A.S.No.31 of 2008 dated 18.11.2009, which was filed reversing the judgment and decree of the learned VI Assistant Judge, City Civil Court, Chennai made in O.S.No.6729 of 2000 dated 03.03.2006.

For Appellant :Mr.T.P.Kathiravan
For Respondents:Mr.R.Jayaselan for R1 to R4
No appearance for R5-

JUDGMENT

This appeal is directed against the judgment of the first appellate Court, which reversed by the trial Court judgment allowing the suit for declaration, mandatory injunction and for permanent injunction.

2. For the sake of convenience, the parties are described as per their status and ranking as shown in the plaint.

3. The plaintiff was allotted a Plot bearing No.2170 LIG -II, at Avadi by the Tamil Nadu Housing Board, the first defendant on 30.01.1993 vide Ex.A-4. The Lease-cum-Sale agreement was entered between the plaintiff and the third defendant vide Ex.B-10. The average tentative costs of the plot was fixed at Rs.39,483/- payable in 180 monthly installment of Rs.355/-p.m., after defraying the part sale consideration of Rs.9,871/-, the allotment was made. Thus, as per the terms of lease-cum-sale agreement, the plaintiff is expected to pay the monthly installment on or before 10th of every month commencing from 01.04.1993. As per Clause 3 of the terms of agreement [Ex.B-10], the lessee-purchaser is liable to pay interest at the rate of 12% on all monthly installment, which has fallen in arrears and which remains unpaid on the stipulated dates. As per Clause 5 of the agreement, in the event of default in payment of installments for two consecutive months, the lessor-vendor is entitled to forfeit the amount already paid by the lessee-purchaser and cancelled the allotment. The agreement under Clause 7 also prohibits the purchaser from keeping the plot vacant indefinitely. It mandates the purchaser to start construction within one year from the date of allotment and complete it within 3 years.

4. Admittedly the plaintiff was a chronic defaulter. He did not pay the monthly installments regularly. He was tendering the dues in lumpsum. Ex.B-3 reveals that the plaintiff was served with a show cause notice during the month of October 1995, why action should not be taken against him for the arrears of monthly installments Rs.5,680/- due up to October 1995. Since there was no explanation forthcoming from the plaintiff, notice for eviction within one month time has been served on the plaintiff. Thereafter, the plaintiff has made payment of Rs.3,500/- on 07.12.1995 vide, Ex.A-18 and Rs.2,535/- vide Ex.A-19 on 13.02.1996.

5. The 4th defendant has issued Ex.A-20 letter dated 15.02.1996 intimating the cancellation of allotment made in favour of the plaintiff citing arrears of Rs.2,890/-. In this order, the plaintiff was asked to pay the arrears along with cancellation charges of Rs.1000/- within 10 days from the date of receipt of this cancellation order, failing which, the cancellation order will be confirmed and the plot will be placed under vacancy list. In response to this cancellation order, the

plaintiff has written a letter dated 13.03.1996 [Ex.A-21] to the 4th defendant stating that two days prior to the cancellation order, he has paid Rs.2,535/-, therefore, the cancellation order may be revoked and cancellation charges of Rs.1000/- may be waived. The 4th defendant has not considered this request and cancelled the allotment on 21.07.1997 vide Ex.A-23. Thereafter, the plaintiff has paid a sum of Rs.5,635/- on 22.08.1997.

6. After cancelling the allotment, the plaintiff has made certain payments. However, the defendants have proceeded further by putting the plot in auction. One Mr.M.Ramamurthy, the successful bidder in the auction held on 20.10.2000 has remitted Rs.1,21,000/-, vide his letter marked as Ex.B-7 and he has requested the defendants to grant him time to pay the balance sale consideration of Rs.1,50,000/- in 120 monthly instalments. The said Ramamurthy has been impleaded as 5th defendant in the year 2004 along with amendment to the prayer by including the relief of mandatory injunction to remove the superstructure put up on the suit plot.

7. After contest, the trial Court has held in favour of the plaintiff. Whereas, on appeal, the first appellate Court has held against the plaintiff on the ground that, the plaintiff has failed to pay the installments as per the terms and conditions stipulated under the lease-cum-sale agreement. On the date of Ex.A-20 as well as on the date of Ex.A-23, there was arrears of installment exceeding two months. Further, before instituting the suit, the plaintiff ought to have issued notice under Section 138 of the Tamil Nadu Housing Board Act, 1961. Due to non-compliance of the statutory notice, the suit is liable to be dismissed.

8. Aggrieved by the judgment of the first appellate Court, the plaintiff has preferred this Second Appeal. At the time of admission, this Court has formulated the following Substantial Question of Law for consideration:-

"Whether the judgment of the the first appellate court is vitiated by non-appreciation of the payment made by the appellant to the Housing Board just two days prior to the cancellation notice and non application of correct principle of law ?"

9. The learned counsel for the appellant beside canvassing the Substantial Question of Law as formulated above also sought indulgence of the Court to re-look the finding of the first appellate Court regarding Section 138 of the Tamil Nadu Housing Board Act, 1961, which is in pari materia to Section 80 of the Civil Procedure Code.

10. Section 138 of the Tamil Nadu Housing Board Act, 1961 reads as follow:-

"Section 138-Notice of Suit Against Board etc.:- No suit shall be instituted against the Board, or any member, or any officer or servant of the Board, or any person acting under the direction of the Board, or of the Chairman or Managing Director of any officer or servant of the Board, in respect of any act done or intended to be done under this Act, or any rule or regulation made there under until the expiration of sixty days next after written notice has been delivered or left at the Board's office or the place of abode of such officer, servant or person, stating the causes of action, the name and place of abode of the intending plaintiff, and the relief which the claims, and the plaint must contain a statement that such notice has been so delivered or left".

11. Though the counsel for the appellate relying upon the Supreme Court Judgments rendered in respect of Section 80 of the Civil Procedure Code, a shuttle difference in these provisions has to be taken note. Both are not identical.

12. Further, the Division Bench of this Court in the judgment in The Tamil Nadu Housing Board rep. by its Managing Director and 2 others -vs- Nolambur Residents Welfare Association, rep by its President Mr.N.Gangadharan in O.S.A.No.252 of 2010, dated 10.12.2011, while has directly dealt with Section 138 of the Tamil Nadu Housing Board Act, 1961, has held in para 24 and 25, which reads as follows :-

"24.....The learned Senior Counsel would further submit that regarding the non-compliance of durational requirement of pre-suit notice under Section 138, no issue was framed and no finding was recorded and therefore, the appellant Board must be deemed to have waived that right.

25. The above contention does not merit acceptance. The issuance of notice under Section 138 is mandatory and in fact plaintiff Association was conscious about it by issuing Ex.P17 notice. As pointed out earlier, Ex.P-17 notice is captioned as "Notice u/s 138 of TNHB Act, 1961 (17 of 1961)" and having captioned it as "Notice under Section 138 of TNHB Act", the plaintiff Association ought to have complied with the statutory mandate of durational requirement. In our considered view, non-compliance of mandatory requirement of Section 138 is fatal to the plaintiff's case and this point is answered accordingly"

13. Regarding the Substantial Question of Law as framed, this Court finds that, On facts it is well established by the Housing Board that the plaintiff is a chronic defaulter. In spite of show cause notice Ex.B-3 and Ex.A-20, he did not clear the arrears in toto. On reading Ex.A-20 and the receipt Ex.A-19, it is an admitted fact that the plaintiff has paid only Rs.2,535/- as against the due of Rs.2,890/- and cancellation of charge of Rs.1,000/-. Thus, he has failed to clear the arrears in full on the date of cancellation order. Even his request to waive the cancellation charges of Rs.1,000/- did not emanate within 10 days from the date of cancellation notice as specified. While cancellation notice Ex.A-20 is dated 15.02.1996, the request for waiver that too without paying the entire arrears has been sent only on 13.03.1996, after lapse of 10 days. Therefore, even on equity, any part payment made subsequently will not enure the plaintiff the right of retaining the allotment in violation of the terms of agreement. The first appellate Court has properly appreciated these facts and found that the amount paid two days earlier to the cancellation notice is not the entire amount demanded under the cancellation notice dated 15.2.1996. Therefore, on proper application of Clauses 3 and 5 of the agreement Ex.B-10, the first appellate Court has arrived at the right conclusion, which requires no interference.

14. For the aforesaid reasons, the substantial question of law is answered against the plaintiff/appellant. In the result, the second appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

15. On perusal of records, this Court finds that the subsequent auction purchaser has been impleaded as 5th defendant, after 4 years from instituting the suit. The suit plot is shown as his address. Obviously, the notice is not served to him and he was set exparte. Pending second appeal, an interim order has been passed by this Court restraining the Housing Board from executing the sale deed in favour of the 5th defendant, the auction purchaser. From Ex.B-3 letter of the 5th defendant, it could be seen that out of total sale price of Rs.2,71,000/-, the auction purchaser has remitted Rs.1,21,000/-, immediately after the confirmation of sale. Therefore, it is imperative to make clear that in the light of the dismissal of the Second Appeal, the Housing Board and the 5th defendant can pursue their respective contractual obligation.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional District Judge(Fast Track Court-V),
Chennai.

2.The VI Assistant Judge,
City Civil Court, Chennai.

3. The Section Officer,
VR Section, High Court, Madras.

4. The Chairman, Tamil Nadu Housing Board,
Anna Salai, Nandanam.

5. The Superintendent Engineer,
Tamil order Housing Board, Chennai Circle,
Anna Nagar,
Chennai 600 040.

6. The Executive Engineer,
Mogapair Division,
Tamil Nadu Housing Board,
Chennai 600 040.

7. Allottee-Service Manager,
Mogapair Division,
Tamil Nadu Housing Board,
Chennai 600 050.

+ 1 cc to Mr.R. Jayaseelan, Advocate Sr.76205

+ 1 cc to Mr.T.P. Kathiraman, Advocate for 76113

S.A.No.1074 of 2010

SR(CO)
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