

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.10.2016

PRONOUNCED ON : 26.10.2016

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.174 of 2008 and
C.M.P.No.2663 of 2016

J.Shahjahan

...Appellant

..Vs..

M.H.Mohammed Mustafa

... Respondent

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree of the learned Principal Subordinate Judge, Coimbatore dated 06.10.2005 in A.S.No.73 of 2005 confirming the judgment and decree of the learned II Additional District Munsif's Court, Coimbatore dated 13.12.2004 in O.S.No.557 of 1998.

For Appellant	:	Mrs.A.Kundavai for Mr.C.R.Prasannan
For Respondent	:	Mr.D.Shivakumaran

JUDGMENT

This Second Appeal is directed against the concurrent findings of the Courts below, rejecting the plaintiff's suit for bare injunction restraining the respondents from interfering the alleged peaceful possession of the suit schedule property without resorting to due process of law.

2. The short point involved in this case is that, the appellant herein claims to be in enjoyment of the suit schedule property bearing Door No.741, later amended as Door No.741/A, Thiyagi Kumaran Market Corner, Rangey Gowder street, Coimbatore-1 and during the communal riot which took place in Coimbatore during the month of February 1998, the shop was burnt and ransacked. Taking advantage of that incident, the landlord who is the respondent herein trying to dispossess the plaintiff.

3. The case of the plaintiff contested by the defendant on the grounds that, the plaintiff is not in occupation of Door No.741/A. It is accepted by the defendant that the plaintiff was a tenant under him for nearly 30 years. The premises let out to the plaintiff was burnt in the riot and thereafter, the building has been renovated by the defendant spending a huge sum and it is in possession of the defendant. There is a default in payment of rent and on the date of written statement, a sum of Rs.58,000/- is due towards rent.

4. The Trial Court, considering the evidence let in by parties and based on the Commissioner's report has held that there is no premises bearing Door No.741/A at Thiyagi Kumaran Street as stated in the amended suit schedule. The plaintiff has not proved his possession of the suit schedule

property on the date of filing the suit and therefore, without any proof of possession the suit has been filed in respect of Door No.741/A which is not in existence, hence dismissed this suit.

5. The First Appellate Court concurring the view of the Trial Court has dismissed the appeal, confirming the judgment and decree of the Trial Court.

6. Aggrieved by the concurrent findings, the appellant has preferred this Second Appeal.

7. This Court has formulated the following substantial questions of law based on the memorandum of grounds of appeal raised by the appellant.

(i) Whether in law the Court below erred in overlooking that on the admission made in para 3 and 4 of the written statement claiming arrears of rent the tenancy in respect of the suit property was proved as also the possession of the appellant to the suit property?

(ii) Whether in law the Courts below are right in rejecting the documents which were relied upon by this Hon'ble Court in Civil Revision Petition in

C.R.P.No.1829/2003 in order to prove the door number of the suit property as 741/A?

(iii) Whether in law the Courts below erred in not placing any reliance on commissioners report coupled with the defendant's admission admitting the tenancy and destruction of the suit superstructure in fire?

8. The specific case of the appellant is that, the suit premises is in possession and enjoyed by the appellant as a tenant under the respondent and after the riot taking advantage of the incident, the respondent is trying to dispossess unlawfully.

9. To establish the landlord and tenant relationship, the appellant relied upon the admission made by the respondents in their written statement and further referring the Hon'ble Supreme Court judgement reported in 2003(5) SCC 150 in Lakshmipathi and others Vs.P.Nithyananda Reddy and others submitted that even after destruction of the premises during the riot, the landlord and tenant relationship subsists and the tenant cannot be thrown away unlawfully without following procedure established under law.

In Lakshmipathi and others Vs.P.Nithyananda Reddy and others cited supra, the Hon'ble Supreme Court has held that:-

"20.The tenancy cannot be said to have been determined by attracting applicability of the doctrine of frustration consequent upon demolishing of the tenancy premises. Doctrine of frustration belongs to the realm of law of contracts; it does not apply to a transaction where not only a privity of contract but privity of estate has also been created inasmuch as lease is the transfer of an interest in immovable property within the meaning of Section 5 of the Transfer of Property Act (wherein the phrase "the transfer of property" has been defined), read with Section 105, which defines a lease of immovable property as a transfer of a right to enjoy such property".

10. In the same judgment, it is further observed by the Hon'ble Supreme Court that :

"the rule of estoppel between landlord and tenant continues to operate so long as the tenancy continues and unless the tenant has surrendered possession to the

landlord. The estoppel would cease to operate only on the tenant openly restoring possession by surrender to the landlord. Neither respondents 2 and 3 nor their successors-in-interest or the persons claiming under them could have denied the title of respondent 1 during the continuance of the tenancy and even thereafter unless they had restored possession over the tenancy premises to respondent 1".

11. To the points, whether the plaintiff has properly described the property for which relief of injunction is sought for and whether the plaintiff was in actual possession of the suit property on the date of filing the plaint which is the relevant fact for granting relief of injunction, the Courts below have held that there is no evidence to show that Door No.471/A exist on the field and that the plaintiff was in possession of Door No.741/A on the date of filing the suit. The Advocate Commissioner appointed to find out the physical features of the suit property has specifically stated in his report that the plaintiff is not aware of the exact Door No. of the portion which he claims to be in his lawful possession and there is no evidence to show that their exists at property bearing Door No.741/A at Thyagi Kumaran Street.

12. Under these circumstances, both the Courts have rightly held that the plaintiffs have failed to prove both existence of property with description of Door No.741/A, Thiyaagi Kumaran street and the factum of possession of the said premises with the plaintiff/appellant.

13. Originally, the plaintiff has described the suit schedule property as Door No.741, later it was amended as 741/A after the intervention of the Hon'ble High Court in Civil Revision Petition. All throughout the plaintiff is not certain about the Door No. of the premises which he claims to be in his possession. The plaintiff has not controverted the allegation made in the written statement that there is an arrear of rent to tune of Rs.58,000/- and after the riot, the defendant has taken over the possession of the property and renovated the same.

14. Holding that Exhibits A1 to A11 relied by the appellant lends no support to the case of the appellant that he was in possession of the suit property at the time of filing the suit, both the Courts on facts has held that on the day of filing the suit the plaintiff is not in a possession of the suit property and therefore he is not entitled for injunction as prayed.

15. No doubt the Commissioner indicates in the rough plan a portion in violet colour. At the same time, the Commissioner in his report has categorically stated that the portion marked as violet colour does not bear any door number. The plaintiff also does not know the door number of that portion. It is an unambiguous observation of the Commissioner in his report, that there is no door no 741/A on the field. Therefore, the order of the High Court in C.R.P.No.1829 of 2003 allowing to appellant to amend the suit schedule property is not a conclusive proof regarding existence door No.741/A.

16. What is admitted in paragraph Nos.3 and 4 of the written statement is the of landlord-tenant relationship. Nowhere in the written statement the defendant has admitted the possession of the plaintiff. Neither plaintiff has proved his possession independently. Whereas it is the admitted case of the plaintiff that, on 14.02.1998, during the riot, the entire shop was burnt. Being so, without renovation of the building, revival of business is impossible. It is the specific case of the defendant that after the incident, the premises has been taken over by the defendant and restored at their cost. Unless the contrary is proved, there is no reason to disbelieve the case of the defendant. The person who pleads possession of the premises has to positively let in evidence to that effect. Both the Courts have held against the plaintiff's regarding his possession, which is purely a question of fact. Having lost both the

Courts on facts, this Court under Section 100 of Code of Civil Procedure has no scope to entertain this appeal.

17. It is well settled through catena of judgments that under Section 100 C.P.C, the scope of interfering with the finding of Courts below is very limited. As a rule, pure question of fact cannot be a matter for second appeal unless the finding of the subordinate Courts, on the facts, are contrary to the evidence on record and are perverse. This Court finds that the concurrent findings of the Courts below on the question of possession is neither perverse nor bereft of reasons. For the reasons stated above, the substantial questions of law formulated are held to be unsustainable.

18. In the result, this Second Appeal is dismissed. Consequently, the Civil Miscellaneous Petition in C.M.P.No.2663 of 2016 filed to fix an early date for hearing the Second Appeal is dismissed as infructuous. However, there shall be no order as to costs.

.10.2016

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Index: Yes/No

To

1.The Principal Subordinate Court, Coimbatore

2.The II Additional District Munsif Court, Coimbatore

Dr.G.JAYACHANDRAN.J.,

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**Judgment made in
Second Appeal No.174 of 2008**

26.10.2016