

HON'BLE SRI JUSTICE R.KANTHA RAO

Appeal Suit No.866 of 2013

Judgment:

This is a defendant's appeal. The Indian Oil Corporation Limited (IOCL) filed the appeal against the judgment and decree dated 03-6-2013 in O.S.No.43 of 2010 passed by the Judge, Family Court cum Additional District Judge, Rajahmundry, East Godavari district directing eviction of the defendant from the schedule property. For the sake of convenience, the parties will be referred to as the plaintiffs and the defendant.

2. The plaintiffs filed the suit for eviction of the defendant from the schedule property, for the arrears of the rent and also for future profits at the rate of Rs.50,000/- per month from the date of suit till the date of delivery. The plaintiffs, who are the owners of the property which is a vacant site, leased out the same to the defendant-IOCL on a monthly rent of Rs.4,000/- under a lease deed dated 17-9-2004 for a period of 20 years from 17-9-2004 to 16-9-2024. The monthly rent is payable on or before 05th of every succeeding month. It is stated that if the rent is not paid for a period of three months after it became due, the lessor has

a right to make re-entry into the property by giving

14 days' notice in writing. It is the version of the plaintiffs that the defendant was not paying the rent regularly and committed default. It made part payments by way of Demand Drafts now and then to a tune of Rs.20,500/-. It is the further case of the plaintiffs that the defendant without the knowledge of the plaintiffs entered into an agreement with its dealer by converting the property into "A" class site. In view of the conversion of the property into "A" class site, the plaintiffs' version is that they are entitled to claim the rental value in vogue at Rs.50,000/- per month which the defendant has to pay to the plaintiffs. Thus, the defendant has to pay the arrears of rent at Rs.18,00,000/-. Along with the ground of committing wilful default in payment of rent, the plaintiffs issued a quit notice dated 13-3-2009 terminating the tenancy and demanded the defendant to vacate the premises by 16-6-2009. The notice was issued under Section 106 of the Transfer of Property Act. The defendant received the notice but neither issued

a reply nor made any payment nor vacated the premises. However, the defendant sent a reply on 19-9-2009 through its Advocate on 11-11-2009

with all false allegations. It is submitted by the plaintiffs that they received the rent under protest without prejudice to their rights and contentions.

3. The suit claim is opposed by the defendant by filing a written statement with the following contentions:

The lease is admitted but according to the defendant, the rent is Rs.1,000/- per month but not Rs.4,000/-. There is a typographical error on account of which, the rent was mentioned as rupees four thousand in the lease deed in words. It is further contended that there was an agreement between the defendant and its dealer and according to the said agreement, the rent payable by the dealer to the defendant could be adjusted towards rent. The adjustment of rent was accepted by the plaintiffs. Therefore, according to the defendants, there is no default in payment of rent.

4. Basing on the above pleadings, the trial Court settled the following issues:

- (1) Whether the plaintiffs are entitled for the order of eviction of defendant from plaint schedule property?
- (2) Whether the plaintiff is entitled for recovery of rental arrears of Rs.18,00,000/- with interest at 12% p.a., from the date of suit till payment?

- (3) Whether the plaintiffs are entitled for future profits of Rs.50,000/- from the date of suit till delivery of plaint schedule property?
- (4) Whether the agreed rental is Rs.1,000/- or Rs.4,000/- as per lease deed dated 17-9-2004?
- (5) Whether the plaintiffs are entitled to revise the rental to Rs.50,000/- for plaint schedule property after it was converted into 'A' site?
- (6) Whether Dealership Agreement dated 13-10-2006 is applicable for the sites owned/leased by Corporation?
- (7) Whether the defendant committed default in payment of rentals as per lease deed by invoking the terms and conditions?
- (8) To what relief?

5. An additional issue - whether the quit notice dated 13-3-2009 is true and valid? was also framed subsequently by the trial Court.

6. Before the trial Court, on behalf of the plaintiffs, P.W.1 was examined and Exs.A-1 to A-30 were marked. On behalf of the defendant, D.Ws.1 and 2 were examined and Ex.B-1 was marked.

7. On appraisal of the oral and documentary evidence, the trial Court held that on the mere ground that the defendant entered into an agreement with its dealer without the consent of the plaintiffs, cannot claim arrears of Rs.18,00,000/- from the defendant. The trial Court also held that except the assertion made by the plaintiffs, there is no evidence whatsoever to show that the plaint schedule property fetches rent of

Rs.50,000/- per month. Ultimately, taking a view that the plaintiffs failed to establish the claim relating to arrears of rent at Rs.50,000/- per month, on the ground that the plaintiffs failed to establish the said claim, did not agree with the plaintiff, however, the fact remains that the subject matter of lease under Ex.A-3 is different from Ex.A-1. What is leased out under Ex.A-1 is a vacant site whereas under Ex.A-3, it is a Petrol Bunk along with its machinery that is leased out to the dealer. So the trial Court arrived at the conclusion that basing on Ex.A-3 lease deed between the defendant and the dealer, the plaintiffs are not entitled to claim revised rent. However, on the ground that the defendant committed wilful default in payment of rent, the trial Court passed a decree for eviction and directed the defendant to vacate the plaint schedule property and deliver vacant possession within two months from the date of judgment.

8. Feeling aggrieved, the defendant preferred the present appeal.

9. I have heard Sri Deepak Bhattacharjee, learned counsel appearing for the appellant-

defendant and

Sri Subba Rao Korrapati, learned counsel appearing for the respondents-plaintiffs.

10. At the end of the hearing of the appeal, the defendants filed a Memo under Section 114 of the Transfer of Property Act offering to pay the rent as decided by this Court after adjudication along with the costs of the suit for cancellation of the right of forfeiture of the appellant-defendant. It is prayed for in the Memo to accept the above offer of the appellant and permit the appellant to enjoy the lease of the plaint schedule property till 16-9-2024 (unexpired period) on payment of the entire rent and cost of the suit as determined by this Court, within a period of 15 days from the date of receipt of the copy of the order.

11. Having regard to the rival contentions and in view of the Memo filed by the defendant, the following points would arise for determination in the present appeal:

- (1) Whether the defendant is liable for eviction?
- (2) Whether the defendant can be granted the relief against forfeiture in view of the offer made by it?
- (3) In view of the arbitration clause in the

agreement that any dispute shall be referred to the Arbitrator, whether the suit is not maintainable?

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12. Point No.1:- There is no dispute about the execution of the lease deed between the parties and the duration of the lease. The contention of the plaintiffs is that the rent is at Rs.4,000/- per month, whereas it is the version of the defendant that it is only Rs.1,000/- per month. The issuance of quit notice is not denied by the defendants. After issuing the quit notice, the plaintiffs received the rent under protest. Mere receiving rents under protest by the plaintiffs, as rightly held by the trial Court, does not constitute waiver of eviction. In the lease deed, the monthly rent is mentioned at Rs.1,000/- in figures but it is mentioned as rupees four thousand in words.

13. The learned counsel appearing for the defendant argued that on account of the typographical error, the rent is mentioned as rupees four thousand in words but the actual rent agreed upon between the parties is only Rs.1,000/- per month. Reliance is placed upon by the defendant on Ex.B-1 a letter whereunder the defendant offered to pay rent at Rs.1,000/- per month. Ex.B-1 is dated 28-4-2004 which is much

prior to Ex.A-1 lease deed and the other documents Exs.A-2 and A-3. But in none of the documents, Ex.B-1 was referred to. D.Ws.1 and 2 through whom Ex.B-1 was marked admitted in their evidence that Ex.B-1 was not referred to in Exs.A-1 to A-3. Further, Ex.B-1 came to light only in the evidence of D.W.2. Further, the defendant did not mention about Ex.B-1 in its reply notice dated

11-11-2009 marked as Ex.A-27. Further, Ex.B-1 was not filed along with the written statement. The trial Court quoted Section 18 of the Negotiable Instruments Act which lays down that where the amount is stated differently in figures and words, then the amount stated in words shall be the amount undertaken or ordered to be paid. So the trial Court arrived at the conclusion that the amount mentioned in the words shall be taken into consideration but not the words mentioned in the figures.

14. The trial Court also took into consideration the evidence of D.W.1 who admitted in the cross-examination that the quantum of rent mentioned in Ex.A-1 reduced to writing is Rs.4,000/-. Another important factor which the trial Court took into consideration is that D.W.1

admitted that Ex.A-6 was issued from his office whereunder the defendant paid rent of Rs.4,000/- to the plaintiffs 1 and 2 i.e. Rs.2,000/- each for the month of December, 2008. From the said payment, it can be understood that since the rent is Rs.4,000/-, the defendant paid Rs.2,000/- twice for the month of December, 2008. Ex.A-6 shows that the defendant sent Demand Drafts for Rs.4,000/- for the month of December, 2008 to the plaintiffs 1 and 2. This lends assurance to the contention of the plaintiffs that the rent payable to the plaintiffs is Rs.4,000/- but not Rs.1,000/- as contended by the defendant.

15. As regards the theory put-forth by the defendant regarding the adjustment of rent in view of the agreement with the dealer, the trial Court rightly pointed out that the theory of adjustment does not find place anywhere in Exs.A-1 to A-3 or in any other document. The plaintiffs are obviously not parties to the agreement between the defendant and its dealer. Therefore, the plea taken by the defendant about the adjustment of the rent to the dealer as per the subsequent lease by the defendant in favour of the dealer has no force. Therefore, as rightly held by the trial Court, the rent is Rs.4,000/- and the defendant committed

wilful default in payment of rent, the quit notice issued by the plaintiff dated 13-3-2009 Ex.A-11 which was not replied to by the defendant is valid and therefore the defendant is liable for eviction.

16. Point No.2:- It is true that there is an arbitration clause in the agreement which enables the parties to refer any dispute to the arbitrator. The contention of the defendant is that when there is such a clause, the dispute has to be referred to the arbitrator but the civil suit is not maintainable. In support of his contention, the learned counsel appearing for the defendant relied on **HINDUSTAN PETROLEUM CORPN. LTD.**

v. PINKCITY MIDWAY PETROLEUMS ^[1] wherein it is held that where arbitration clause exists, the court has a mandatory duty to refer the dispute arising between the contracting parties to the arbitrator and civil court has no jurisdiction to continue with the suit once an application under Section 8 of the Arbitration and Conciliation Act, 1996 has been filed.

17. The learned counsel appearing for the defendant further relied on **SWISS TIMING LTD.**
v. COMMONWEALTH GAMES 2010
ORGANISING COMMITTEE ^[2] wherein the

Supreme Court held that it is mandatory for the courts to refer the disputes to arbitration, if agreement between the parties provides for reference to arbitration. In the said case, registering a criminal case in relation to the agreement concerned on grounds of fraud, corruption and collusion against certain members of both parties, held, is not an absolute bar to refer disputes to arbitration.

18. The situation in the present case is altogether different. When the plaintiffs issued quit notice under Ex.A-11 dated 13-3-2009 to the defendant stating that they would file a civil suit for eviction on the ground of committing default in payment of rents, the defendant did not reply. Even in the civil suit before the trial Court also, the defendant did not raise the contention that the suit is not maintainable in view of the existence of arbitration clause enabling the parties to refer the dispute to arbitration.

19. In this context, it would be relevant to refer to a judgment of the Division Bench of this Court in **Sri Krishna Sarma v. Ramesh Kumar**

Joshi^[3].

The Division Bench held as follows:

“16. A perusal of sub-section (1) of Section 8 of the Act makes it clear that in order to make an application under Section 8 of the Act, the subject matter of the suit shall also be the subject matter of arbitration.

In other words, only those disputes, which are specifically agreed to be arbitrated alone, can be the subject matter of the arbitration and upon satisfaction of the same, the Court can subject the parties to arbitration.

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19. the Court cannot, mechanically or for mere asking, merely because the arbitration agreement had been presented, refer the parties for arbitration. It implies that it is necessary for the Court or the Judicial authority to go into the facts of the case and arrive at a conclusion as to whether the parties can be referred to arbitration or not.”

20. In the instant case, for the first time at the hearing of the appeal, the defendant raised the contention that in view of the existence of arbitration clause the dispute shall be referred to the arbitrator and a civil suit is not maintainable.

21. In **VIKAS MOTORS LTD. v. DR P.K.**

JAIN^[4], the Supreme Court held as follows:

“Where ruling of District Forum regarding jurisdiction not challenged and party also participating in the proceedings, such party

is stopped from raising plea relating to jurisdiction at the SLP stage as he cannot be permitted to approbate and reprobate at the same time after submitting to the territorial jurisdiction of the District Forum.”

22. In the present case also, at no point of time the defendant challenged the jurisdiction of the trial Court till the pronouncement of judgment by the trial Court.

It did not object to the jurisdiction of the civil court in its reply notice nor did it challenge the jurisdiction of the trial Court in its written statement. Therefore, this was not at all an issue before the trial Court. At the hearing of the appeal, for the first time the defendant which subjected itself to the jurisdiction of the civil court challenged its jurisdiction after passing of the decree and contended that the dispute has to be referred to the arbitrator in view of the existence of arbitration clause in the agreement. Therefore, the contention put-forth by the defendant on the point of jurisdiction has no substance and is rejected. Thus, this point is also answered in favour of the plaintiffs and against the defendant.

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23. Point No.3:- The defendant filed a Memo at the conclusion of the hearing of the appeal offering to pay the rent as adjudicated by this Court to grant relief against forfeiture and permit

the defendant to enjoy the lease of the plaint schedule property till 16-9-2024 (unexpired period) on payment of the entire rent and costs of the suit as determined by this Court. In support of his contention, the learned counsel appearing for the defendant relied on **R.S. Lala Praduman Kumar v. Virendra Goyal**^[5] wherein the Supreme Court held that the appeal being a rehearing of the suit, in appropriate cases it is open to the appellate Court at the hearing of the appeal to relieve the tenant in default against forfeiture unless the tenant has by his conduct disentitled himself to the equitable reliefs the Courts can grant relief against forfeiture of tenancy on the tenant paying the rent due, interest thereon and costs of the suit. In the same judgment, the Supreme Court pointed out that the appellate Court, may, having regard to the conduct of the tenant decline to exercise its discretion to grant him the relief against forfeiture.

24. The question is not one of jurisdiction but of discretion. Therefore, it has to be seen whether having regard to the facts and circumstances of the present case, the defendant is entitled for the relief against forfeiture on the offer made by him. This is a case wherein the defendant taking

advantage of the difference between mentioning of rents in figures and words, committed default in payment of rent and took the stand that the rent is only Rs.1,000/- per month.

The defendant without the knowledge of the plaintiffs entered into an agreement with its dealer and sublet the premises for a higher rent. Though there is no evidence in support of the contention of the plaintiffs that the rent in the locality where the plaint schedule property is situate is at Rs.50,000/- per month, it has to be accepted that the schedule property is situate in a prime locality and fetches a higher rent. The defendant (IOCL) without paying the meagre amount which was undertaken in the lease agreement committed default in payment of rent and made the plaintiffs to file the suit for eviction. Having regard to the conduct exhibited by the defendant-IOCL, this Court is of the considered view that it is not appropriate to exercise its discretion granting relief to the defendant against forfeiture. Therefore, the offer made by the defendant is not acceptable and the same is rejected. Thus, this point is also answered against the defendant and in favour of the plaintiff.

25. For the foregoing reasons, the appeal fails

and the same is dismissed. The miscellaneous petitions,
if any, pending in this appeal shall stand closed.
No costs.

R.KANTHA RAO, J.

09th May, 2016.
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HON'BLE SRI JUSTICE R.KANTHA RAO

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09th May, 2016.
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[\[1\]](#) (2003) 6 SCC 503

[\[2\]](#) (2014) 6 SCC 677

[\[3\]](#) 2006 (2) ALT 724 (D.B.)

[\[4\]](#) (1999) 6 SCC 548

[\[5\]](#) AIR 1969 SC 1349