

IN THE HIGH COURT OF JUDICATURE AT MADRAS**RESERVED ON : 25.01.2017****PRONOUNCED ON : 02.02.2017****CORAM****THE HONOURABLE MR. JUSTICE T.RAVINDRAN****S. A.No.703 of 2011**

Arulmigu Vedaranyeswaraswamy
 Devasthanam,
 Rep.by its Executive Officer,
 Vedaranyam Town,
 Nagapattinam District.

...

Appellant

Vs.

A.Ibrahim Sahib

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 10.03.2011 passed in A.S.No.46 of 2010 on the file of the learned Subordinate Judge, Nagapattinam, reversing the judgment and decree dated 11.11.2009 passed in O.S.No.87 of 2008 on the file of the learned District Munsif-cum-Judicial Magistrate, Vedaranyam.

For Appellant : Mr.Kingston Jerold
 For Respondent : Mr.Vadivel Murugan

JUDGMENT

Challenge in this second appeal is made by plaintiff against the judgment and decree dated 10.03.2011 passed in A.S.No.46 of 2010 on the file of the Sub Court, Nagapattinam, reversing the judgment and decree dated 11.11.2009 passed in O.S.No.87 of 2008 on the file of the District Munsif cum Judicial Magistrate, Vedaranyam.

2. The second appeal has been admitted and the following substantial questions of law are formulated for consideration in this second appeal.

(a)Whether the lower Appellate court is right in holding that under Ex.A2 there is no valid termination of tenancy especially when the defendant did not object to the Ex.A2, Notice in the written statement and therefore deemed to have been waived?

(b)Whether the receiving rent after the issue of Ex.B12, with amount to waiver of termination of tenancy?

3. The suit has been laid by the plaintiff for arrears of rent and recovery of possession.

4. The defendant, inter alia, has raised various defences resisting the case of the plaintiff and according to the defendant, he is the Paguthidar of the ground site of the suit property and not in arrears of rent in respect of the suit property as put forth by the plaintiff and further, he is not liable to hand over the possession of the suit property to the plaintiff.

5. As regards the contention of the defendant that he is the paguthidar of the ground site of the suit property, the courts below have negated his plea. Similarly, as regards his claim that he is not in arrears of rent, the said defence has also been found against him by the Courts below. It is held that the defendant is only a tenant of the building in the suit property.

6. Before laying the suit, it appears that the plaintiff temple has issued a notice dated 25.10.2004 calling upon the defendant to hand over the possession of the suit property. The receipt of the same has not been disputed. Based upon the above said notice dated 25.10.2004 marked as Ex.A2, the trial Court has decreed the suit in entirety in favour of the plaintiff temple. The defendant preferred the first appeal. As adverted to earlier, the first appellate court has also concurred with the findings and conclusions of the trial court, as regards the contentions of the defendant with reference to his claim that he is only a paguthidar of the ground site of the suit property and also not in arrears of rent. However, considering the notice marked as Ex.A2, the first appellate Court found that under the said notice, the tenancy of the defendant has not been determined by the plaintiff temple in accordance with Sections 106 and 111 of the

Transfer of Property Act and in such view of the matter, held that the plaintiff's suit for recovery of possession of the suit property from the defendant/tenant is not maintainable as the plaintiff cannot seek the possession of the suit property from the defendant without due termination of the lease as contemplated under law and thereby, held that the plaintiff is not entitled to seek the relief of recovery of possession of the suit property from the defendant. Accordingly, set aside that portion of the judgment and decree of the trial court and concurred with the other portions of the judgment and decree of the trial court as regards the recover of arrears of rent etc.,

7. It is also found that during the pendency of the first appeal, a document i.e. notice sent by the plaintiff dated 26.01.2002 to the defendant has been marked as an additional evidence and Exhibited as Ex.B12. Ex.B12 has not been controverted by the plaintiff temple. It has been admitted that the said notice has been issued by the plaintiff temple to the defendant. Under Ex.B12, it is found that the plaintiff has determined the tenancy of the defendant and directed him to hand over the possession of the suit property. However, pursuant to Ex.B12, as rightly found by the first appellate court, the plaintiff had not laid any suit seeking recovery of possession of the suit property from the defendant. On the other hand, as rightly found

by the first appellate court, even after issuance of Ex.B12 notice, terminating the tenancy of the defendant, the plaintiff temple had been collecting the rents from the defendant and accordingly, as rightly found by the first appellate court, the plaintiff temple has waived the quit notice issued under Ex.B12 as per Section 113 of the Transfer of Property Act. Therefore, the first appellate Court has rightly found that the plaintiff temple cannot maintain the suit on the basis of Ex.B12 notice. Equally, the first appellate court has also found the failure of the plaintiff temple in not taking steps to recover the possession of the suit property from the defendant pursuant to Ex.B12 would not be a bar to the plaintiff temple to seek possession of the suit property from the defendant after issuing notice of termination of the tenancy in accordance with law. Accordingly, it had been contended by the plaintiff temple that Ex.A2 notice has been issued directing the defendant to hand over the possession of the suit property.

8. However, as rightly found by the first appellate court, it is noted that under Ex.A2 notice, the plaintiff temple has not determined the tenancy of the defendant in respect of the suit property in accordance with Sections 106 and 111 of the Transfer of Property Act. On the other hand, it is found that the notice only states

about the arrears of rent kept by the defendant over a period of time and called upon the defendant to pay the said arrears of rent, failing which, the plaintiff temple will be constrained to take appropriate steps to recover the same and also, to recover the possession of the suit property from the defendant. It is therefore obvious that under Ex.A2, as rightly found by the first appellate court, the tenancy of the defendant has not been duly determined by the plaintiff temple in accordance with law and in such view of the matter, the defendant being a tenant of the plaintiff temple in respect of the suit property, without determination of the defendant's tenancy in accordance with law, the plaintiff would not be entitled to maintain the suit for recovery of possession of the suit property from the defendant. Accordingly, it could be seen that the first appellate court has rightly found that the suit filed by the temple for eviction of the defendant from the suit property is not maintainable and the plaintiff's temple would be entitled to recover the possession of the suit property from the defendant only after the determination of his tenancy duly in accordance with law. In such view of the matter, the findings and conclusions of the first appellate court for rejecting the relief of recovery of possession of the suit property from the defendant sought for by the plaintiff temple do no call for any interference.

9. The plaintiff's counsel contended that Ex.A2 notice has not been seriously controverted by the defendant in the written statement and therefore, the Court should hold that he has waived the same and accordingly, grant the relief of possession sought for by the plaintiff. However, the above contention does not merit acceptance. Under Ex.A2, it is found that the plaintiff temple has not determined the tenancy of the defendant as per the provisions of law, hence, it could be seen that the plaintiff's suit for eviction would not lie as per law. Therefore, there is no question of the defendant waving the same by not controverting the same specifically in the written statement. On the other hand, a perusal of the pleas made in the written statement would go to show that the defendant has been fighting the plaintiff's case tooth and nail on various grounds and also contended that he is not liable to be evicted from the suit property. In such view of the matter, the findings of the first appellate court that no valid termination of the tenancy has been made by the plaintiff temple under Ex.A2 is found to be in order. Equally, the findings of the first appellate court that the plaintiff temple has waived the issuance of quit notice under Ex.B12 notice as contemplated under Section 113 of the Transfer of Property Act also is found to be in order. Accordingly, the substantial questions of law formulated in this second appeal are answered against the plaintiff temple and in favour of the defendant.

10. In the light of the above discussions, the decision relied upon by the plaintiff counsel reported in **AIR 2006 KARNATAKA 57 (B.S.Sadananda V. K.S.Chinnappa)** as rightly argued by the defendant's counsel, is not applicable to the facts and circumstances of the case at hand.

In conclusion, the second appeal fails and accordingly, the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

02.02.2017

Index : Yes/No
Internet: Yes/No
sms

To
1. The Sub Court, Nagapattinam.
2. The District Munsif-cum-
Judicial Magistrate, Vedaranyam.

T.RAVINDRAN,J.

sms

Pre-delivery Judgment in
S. A.No.703 of 2011

02.02.2017

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