

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 10.02.2017

Judgment Pronounced on : 03.11.2017

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

C.M.A.No.987 of 2009 & CRP (PD) No.873 of 2009
and MP.No.1 of 2009, M.P.No.1 of 2015 in CMA.No.987 of 2009
and MP.No.1 of 2009 in CRP.(PD).No.873 of 2009

1.Hindustan Petroleum Corporation Ltd.,
Registered Office at
No.17, Jamshedji Tata Road,
Mumbai - 400 020.
Regional Office at :
IV Floor, Thalamuthu Natarajan Building,
No.8, Gandhi Irwin Road,
Egmore, Chennai - 600 008.

2.Hindustan Petroleum Corporation Ltd.,
Retail Regional Office at H.P.House
1/3, Big Bazaar Street,
Coimbatore - 641 001.

... Appellants in CMA.No.987 of 2009/
Petitioners/Defendant

... Petitioners in CRP (PD).No.873 of 2009/
Respondents/Defendants

-Vs-

1.M/s.L.G.Balakrishnan and Brothers
Represented by its Partner
M/s.L.G. Equipments Limited
India House, Trichy Road,
Coimbatore - 641 018.

2.M/s.L.G.Equipments Limited
Trichy Road, Singanallur,
Coimbatore - 641 005.

3.M/s.L.G.Ultra Industries Limited
Trichy Road,
Coimbatore - 641 018.

... Respondents in Plaintiffs CRP/
Petitioners

Prayer in CMA.No.987 of 2009:- Civil Miscellaneous Appeal under Section Order 43 Rule 1 CPC read with Section 9A of Tamil Nadu City Tenants Protection Act 1921 (as amended by Act 2 of 1980) praying to call for the records and to set aside the order dated 10.12.2008 made in I.A.No.49 of 2006 in O.S.No.302 of 2005 on the file of the Additional District and Sessions (Fast Track Court-I) Court, Coimbatore.

Prayer in CRP (PD) No.873 of 2009:- Civil Revision Petition filed under Article 227 of Constitution of India, to revise the order dated 10.12.2008 made in I.A.No.280 of 2008 in O.S.No.302/2005 passed by the Additional District and Sessions (Fast Track Court-I) Court, Coimbatore.

In both CMA & CRP :

For Appellants : Mr.O.R.Santhanakrishnan

For Respondents : Mr.Madan Babu
1 & 2 in CMA for Mr.R.Parthasarathy

For Respondents
in CRP : No Appearance

COMMON JUDGMENT

The defendants in O.S. 302/2005 on the file of Additional District Court (FTC-I, now III Additional District Court), Coimbatore, has preferred a CMA, challenging a decretal order dismissing I.A.49/2006, filed by it under Sec.9 of the City Tenancy Protection Act. CRP 873/2009 is filed impugning an order allowing I.A.280/2008 filed by the plaintiff/respondent to hear on the maintainability of the earlier mentioned I.A.49/2006 filed under Sec.9 of the City Tenancy Protection Act.

2.The Facts:

The suit property has an extent of about 10 cents and it forms part of a larger extent of 3.32 acres. It abuts the Coimbatore-Trichy road. The entire property belonged to the plaintiff. In August, 1962, the suit property was leased out to M/s Esso Standard Eastern Inc. to install and run a retail-outlet for the sale of petrol and petroleum products. It was periodically renewed and it was to expire in July, 1982. In the meantime, under Esso (Acquisition of Undertakings in India) Act, 1974, the interest of Esso devolved on the appellant/defendant. On the expiry of the lease term in July, 1982, there was a statutory extension of lease term for another ten years. Accordingly, lease was extended from 01-08-1982 to 01-08-1992. The rent payable, which was originally fixed at Rs.75/- per month in 1962 and was increased to Rs.450/- per month by 1982 and as a result

of the statutory extension of the lease term as stated above, the same rent continued to be paid. On the expiry of the lease term, negotiations began between the parties for renewal of lease but no consensus could be arrived at on the material terms of intended renewal. In this backdrop, in February 2003, plaintiff made an offer to renew the lease for a period of three years, but on the condition that the lessee paid Rs.4,000/- as monthly rent. As there was no response to this offer, the plaintiff sent a reminder in May, 2003. Since this too was not responded to, and given the fact that the lease term had already expired, the plaintiff issued its first notice dated 24-01-2003 requiring the lessee to surrender possession of the suit property. The lessee yet again did not respond. The plaintiff did not give up its hope and issued its second notice dated 29-11-2004, demanding its lessee to surrender vacant possession by 01-03-2004, and also claimed damages for over staying in its property. This time, the appellant considered it appropriate to respond. In its reply dated 27-12-2004, it denied plaintiff's contention and raised untenable contentions. Plaintiff issued its rejoinder to it. Left with no option, the plaintiff has laid the suit for recovery of property with mesne profits/damages valued at Rs.14,40,000/- and also future mesne profits.

3. The defendant filed its written statement. What however, is of greater significance is that the defendant filed I.A.49/2006 under Sec.9 of the City Tenancy Protection Act. It would aver in the affidavit filed by its Chief Regional Manager that its predecessor-in-interest ESSO has constructed an Officer room, canopy, toilets, other superstructures, compound wall, fencing besides, underground petrol and diesel tanks, dispensing pumps, compressors and other equipments and hence the defendant is entitled to the protection of Sec.9 of the T.N. City Tenancy Protection Act which requires that the lessor/plaintiff executes a sale deed for whole or part of the property at a price to be fixed by the Court.

4. This was resisted by the plaintiff. In its counter it raised two objections:

(a) That the structures referred to in the affidavit of the defendant are put up several years ago and are easily removable.

(b) The defendant/lessee is not in possession of the suit property. The actual physical possession of the property is with a partnership firm that runs the outlet. In order a lessee could invoke Sec.9 of the T.N.City Tenancy Protection Act, the lessee must be in actual physical possession of the property.

It also briefly highlighted the unfairness in the stands of the defendant/lessee despite it being a multi-crore turnover company.

5. While I.A.49/2006 filed under Sec.9 of the City Tenancy Protection Act was pending thus, the plaintiff filed I.A.280/2008 to take up the maintainability of the same. The ground on which it was founded on its contention that the defendant/lessee was not in actual physical possession of the suit property. In its counter to this application, the defendant/lessee has contended that it has appointed a dealer as a licensee only for a limited purpose of carrying on its business. Actual physical possession is with it and that the dealer is neither in possession nor has a right to possess.

6. The learned District Judge appeared to have taken up together both I.A.49/2006 as well as I.A.280/2008 filed to test the former's maintainability together. What the learned District Judge ended up doing was that he passed an order whose cause-title bears I.A.280/2008 in I.A.49/2006, and allowed I.A.280/2008 and on its strength it dismissed I.A.49/2006. To state it differently, the Court did not appear to have passed a separate order in I.A.49/2006, but all the same has drafted a decretal order for it. This has now generated two proceedings: (a) An appeal in CMA 987/2009 against the Order in I.A.49/2006 filed under Sec.9 of the City Tenancy Protection Act, and (b) C.R.P.873/2009 against the order in I.A.280/2008 under Article 227 of the Constitution of India.

7. In its elaborately written speaking order in I.A.280/2008, the District Court has considered the moot point affecting the maintainability of I.A.49/2006, namely if the petitioner/lessee/defendant has been in actual physical possession of the suit property to claim right under Sec.9 of the City Tenancy Protection Act. Negativizing it, the Court below has reasoned: The lessee itself has admitted that only its dealer has been in physical possession. Besides, the learned District Judge has also drawn sustenance for his conclusion so arrived from the ratio in the authorities in Malini Parthasarathy Vs Hindustan Petroleum Corporation Ltd., [(2007) 2 MLJ 416] Hindustan Petroleum Corporation Ltd., Vs Spencer and Company, Ltd., Annasalai [2003-4-LW 432] wherein this Court has relied on the dictum in Radhakrishnan S.R. Vs Neelamegam [2003 (3) CTC 488 (SC) : 2003-4- LW 426]. The learned District Judge, has also considered the arguments of the defendant/lessee and the authority in S.K.Rohini and 4 others Vs Hindustan Petroleum Corporation Ltd., [1997 (II) CTC 481] cited by it, before rejecting them.

8. The learned counsel for the lessee (the appellant in the CMA

and petitioner in the CRP) took a strong exception to the approach of the Court below. What it intended to, or supposed to decide was I.A.280/2008, whose scope is limited to deciding if the Court should take the issue of maintainability of I.A.49/2006 filed under Sec.9 of the City Tenancy Protection Act. There is an apparent merit in this submission, for as indicated in paragraph 5 above, the cause title of the impugned order says it was passed in I.A.280/2008. This was also stated in the decretal order in I.A. 49/2006 which appeared to have been prepared without an order backing it.

9. The learned counsel for the appellant relied on the decisions in (i) Smt.Swaran Latha Ghosh Vs. H.K.Banerjee & Others [1969 (1) SCC 709] (ii) Bharat Petroleum Corporation Ltd., and Anr. Vs. N.R.Vairamani and Anr., [MANU/SC/0850/2004 = (2004) 8 SCC 579] (iii) Saroja & Others Vs. The Divisional manager, New India Assurance Company Limited [2013-3-L.W.820]; (iv) Samuthirapandi Vs. Ramakrishna & Others [2015-5-L.W.741]; (v) P.S.Jaganath Babu Vs. K.Santhanam [2008 (6) CTC 104 (Mad)] (vi) Thankayyan Vs. Edwin Shaji [2008 (2) CTC 291] (vii) M.Arasan Chettiar and Ors. Vs. S.P.Narasimhalu Naidu's Estate Trust, Coimbatore & Ors. [MANU/TN/0257/1980 = (180) 2 MLJ 303] and (viii) Hindustan Petroleum Corp. Ltd., Vs. Nalini Parthasarathy [2007 2 MLJ 416].

10. The learned counsel for the respondents relied on the decisions in Ahmed Saheb (Dead), Rep by Lrs. Vs. Sayed Ismail [(2012) 8 SCC 516] and Hari Ram Maurya Vs. Union of India and Others [(2006) 9 SCC 167].

11. But this Court intends to look at the larger aspect of the controversy. The matter in controversy is whether lessee is entitled to the protection under Sec.9 of the T.N.City Tenancy Protection Act on the ground that it is not in physical possession of the suit property, especially when the defendant has conceded that it operates a petroleum outlet unit in the suit property only through its dealer. If the order of the trial court is perused, it gives an impression that parties have gone prepared to argue this issue and have cited authorities to sustain their respective contentions. This would indicate that neither side is prejudiced on the ground that an opportunity of fair hearing is not accorded. It also indicates that the Court has decided to take up the issue of maintainability of I.A.49/2006 first. However, while preparing the order, the Court appears to have been drifted into an apparent error, in that it has delivered an order containing all its reasoning in I.A.280/2008 when it ought to have stated them in I.A.49/2008.

12. Now there are two options open to this Court: To set aside both the orders and direct the trial court to re-hear I.A.49/2006. But for what purpose should this be resorted to

except to correct a procedural flaw in delivering the order? As stated above, the order rejecting the prayer to invoke Sec.9 of the T.N.City Tenancy Protection Act is a reasoned one, and even if the matter is remanded back, the same argument alone is going to be advanced, probably with the aid of authorities that might have been pronounced since then. This argument has already been advanced before this Court in the CMA 987/2009. This Court therefore, considers that to remand the matter is a profitless direction for duplicating the efforts already expended by both sides.

13. Newer situation bringing with it newer challenges in handling procedures. In the context of the present set of cases, it is no fault of any of the parties that a situation such as the one has visited them. Plainly, it is the fault of the Court in ignoring to go through the cause title of the order that led to the situation such as this. If actus curie nevinum gravabit shall reign as one of the fundamental principles guiding the courts in administration of justice, then it shall not let to prejudice the parties especially when they have done what they are required to do. Secondly, if procedure is a mere hand maid of justice, then error in procedure shall not be granted an undue prominence unless the nature of such error affects the substantial right of the parties to a litigation. Procedural parity is all about fairness in granting either side to a litigation just opportunity to participate in the decision making process of the Court on equal terms. As one peruses the impugned orders, it does disclose that this opportunity has already been granted. Hence, an error in the cause of title of an order, a creation of the Court in that, cannot be let to halt the proceedings to move to the next stage. A resort to Sec. 153 CPC will put to rest many a confusion that the trial court has created by its sheer carelessness in preparing the cause title of the order. See 153 CPC. reads:

"General Power to amend - The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit; and all necessary amendments shall be made for the purpose of determining the real questions or issue raised by or depending on such proceedings."

14. Accordingly, this Court, corrects and amends the cause title of the impugned order and deletes there from 'I.A.280/2008 in'. This would mean that the order passed would be treated as one passed in I.A.49/2006. By resorting to this method, neither side is prejudiced in the matter of their right to participate in the proceedings nor have they deemed to have lost it on any score.

Once this is done, then I.A.280/2009 filed to test the maintainability of I.A.49/2006 superfluous, since the same has already been considered. Necessarily, I.A.280/2009 has to be dismissed and accordingly CRP 987/2009 is dismissed. As a consequence, the decretal order prepared by the Court below and styled as one prepared in I.A.280/2008 too is amended as one prepared under I.A.49/2006.

15. This leaves only CMA987/2009 alone for consideration. In deciding it this Court has a convenient basic premise in that the appellant itself has admitted that on its behalf its dealer is running the retail outlet. Will this amount to actual physical possession by the defendant of the suit property within the meaning of Sec.9 of the Tamil Nadu City Tenancy Protection Act? It must be stated to the credit of the learned District Judge, that he has purveyed substantial number of case law on the subject before rejecting appellant's claim of right under Sec.9.

16. The character of the right conferred under Sec.9 of the CTP Act has passed judicial scrutiny and consideration a few times and has elicited its views. In Swami Motor Transports (P) Ltd., and another Vs.Sri Sankaraswamigal Mutt and another [AIR 1963 SCC 864], Supreme Court has held:

"30. The law of India does not recognize equitable estates. No authority has been cited in support of the contention that a statutory right to purchase land is, or confers, an interest or a right in property. The fact that the right is created not by contract but by a statute cannot make a difference in content or the accidents of the right: that depends upon the nature and the scope of the right conferred. The right conferred is a right to purchase land. If such a right conferred under a contract is not a right of property, the fact that such a right stems from a statute cannot obviously expand its content or make it any the less a non-proprietary right. In our view, a statutory right to apply for the purchase of land is not a right of property. It is settled law that a contract to purchase a property does not create an interest in immovable property."

17. After relying on the above, in P. Anantha Krishnan Nair Vs Ramakrishnan [(1987) 2 SCC 429], the Supreme Court has held that the right created under Sec. 9 CTP Act is an absolute right, as the court has discretion to grant or refuse the releif for the purchase of the land. This is reiterated in Bharat Petroleum Corporation Ltd., Vs N.R.Vairamani [2004(5) CTC 74 (SC)] and

other decisions.

18. A privilege generally act in personem. It is hence, the Court has insisted that the tenant who seeks to enforce a privilege that Sec.9 has conferred on him, must be in actual physical possession. Radhakrishnan S.R. Vs Neelamegam [2003 (3) CTC (SC) 488], Hindustan Petroleum Corporation Ltd., Vs Spencer & Company [2003-4-LW 432], Hindustan Petroleum Corporation Ltd., Vs Keyram Hotels (P) Ltd., [2002-2-LW 620] : 2002 - 2CTC 21], Malini Parthasarathy Vs Hindustan Petroleum [(2007) 2 MLJ 416], It may be mentioned that last three authorities referred to above relate to cases of Petroleum Companies who were similarly placed as the appellant here in is, and have pleaded identical facts as the present appellant that their licensee was in possession, but have lost them.

19. The rationale behind is not difficult to comprehend for ultimately the right granted under Sec.9 to the tenant is only in the nature of a privilege, without any interest in the property demised. A right to enforce the privilege therefore may have to be equated to an equitable remedy. It is hence like equity acts in personem, a privilege also acts in personem.

20. Having stated it, it is emphasised that no tenant has a right to misuse that right which equity has granted him, though through a statutory provision, and blackmail his lessor or be allowed to profit to the detriment of the right of the lessor, to whom, the land belongs. Wherever equity intervenes, it operates evenly in aid of both the parties to the dispute and not one in preference to the other. If so read enforcing an equitable right under Sec.9 CTP Act must be approached with the same decree of seriousness with which enforcing contractual rights for seeking equitable remedies under Specific Relief Act are approached.

21. The learned counsel for the appellant submitted that in Bharat Petroleum Vs R. Ravikrishnan & another [2011(5) CTC 437], a Division Bench of this Court, upon remand by the Supreme Court, has held that the appellant was in legal possession but not in physical possession to entail the benefit of of Sec.9 of the CTP Act and therefore not entitled to any remedy flowing out of the said provision. He added that this is challenged by the appellant before the Supreme Court and has been tagged to a batch of cases pending before it. He therefore, required this Court to defer a decision till the Supreme Court decided the issue.

22. This, in the considered view of this Court is unacceptable. The law on the point on which the appellant rests its contention is yet to be settled, and as per the law that now prevails, the

appellant is not entitled to invoke the benefit that Sec.9 of the CTP Act grants to the lessee.

23. In the end, both the appeal and the revision petition are dismissed and order made in I.A.No.49 of 2006 in O.S.No.302 of 2005 and I.A.No.280 of 2008 in O.S.No.302/2005 on the file of the Additional District and Sessions (Fast Track Court-I) Court, Coimbatore are hereby confirmed. The trial Court is directed to dispose of the suit within six months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS IV)

//True copy//

Sub Assistant Registrar

ds

To:

- 1.The Additional District and Sessions Juddge
(Fast Track Court-I)
Coimbatore.
 - 2.The Section Officer(To Send back records forthwith)
VR Section
High Court, Madras
- +2cc to Mr.O.R.Santhanakrishnan, Advocate SR.No.78417

C.M.A.No.987 of 2009 &
CRP (PD) No.873 of 2009

VGI (CO)
GN(21/03/2018)

WEB COPY