

Reserved on : 15.12.2016
Delivered on : 10.01.2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

THE HON'BLE MR.JUSTICE K.K.SASIDHARAN
AND
THE HON'BLE MR.JUSTICE V.PARTHIBAN

Original Side Appeal No.369 of 2009

V.X.Joseph

...Appellant

vs.

1.M.Saraswathi
2.Manoharan
3.K.Subramani

...Respondents

Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules r/w Clause 15 of Letters Patent, against the judgment and decree passed in C.S.No.543 of 1997 dated 23.06.2009 on the file of this Court.

For Appellant : Mr.S.Elambharathi for
Mr.K.J.Rebello

For Respondents: Mr.T.S.Baskaran for R3
R1 and R2 given up

J U D G M E N T

(delivered by K.K. SASIDHARAN, J.)

This intra court appeal is directed against the judgment and decree dated 23 June 2009 in C.S.No.543 of 1997, dismissing the suit against the third respondent and rendering a finding that he is the owner of the superstructure, entitled to the provisions of the Madras City Tenants' Protection Act, 1921 (for short "the Act")

The facts

2. The appellant filed a civil suit in C.S.No.543 of 1997 against the respondents 1 and 2 for delivery of vacant possession of the property shown in the Schedule I of the plaint and to direct the 3rd respondent to deliver vacant possession of the property shown in the Schedule II of the plaint.

3. Before the learned single Judge, the appellant contended that he entered into a Sale Agreement with Dr.Pasupathy, the erstwhile owner of the property. Since the agreement was not honoured, the appellant filed the Original Suit in O.S.No.1689 of 1981 before the City Civil Court, Madras, for specific performance. The suit was dismissed by the Trial Court. However, in the connected appeal in A.S.No.349 of 1983, this Court was pleased to decree the suit. Thereafter, he took possession of the property by initiating Execution Petition in E.P.No.400 of 1994. The appellant further contended that his vendor put up a construction in 1982 and it was given on rent to Thiru.Gerard. Subsequently, Thiru.Gerard vacated the property and it was given on lease to the third respondent. It was his further contention that the respondents 1 and 2 are in possession of the property shown in Schedule I and the Shed in Schedule II is in the possession and enjoyment of the third respondent.

4. The suit was resisted by the third respondent. The third respondent contended that Dr.Pasupathy granted a lease of 250 Sq.ft of land in Schedule II to him on 06.08.1974, subject to payment of a sum of Rs.25/- as monthly rent. Thereafter, he constructed a building for business purpose. According to the third respondent, he is entitled to purchase the vacant land invoking Section 9 of the Act.

5. The learned single Judge after framing as many as 7 issues decreed the suit against the respondents 1 and 2. The learned Single Judge opined that the third respondent is a tenant entitled to protection under the Act. The suit against the third respondent was therefore dismissed. Feeling aggrieved, the appellant has come up with this intra court appeal.

6. We have heard the learned counsel for the appellant and the learned counsel for the third respondent.
Points for consideration

7.i) Whether the appellant is entitled to a decree of declaration of possession in respect of the property shown in Schedule II?

ii) Whether the learned single Judge was correct in the finding that the third respondent is the owner of the superstructure and as such, he is entitled to protection under the Act?

Resolution of Point No.(i)

8. The appellant laid the suit against the third respondent on the ground that the superstructure put up by his vendor was given on lease originally to Thiru.Gerard and thereafter to the third respondent. In order to prove that he is entitled to a decree of possession against the third respondent, the appellant marked Ex.P2 - Sale Deed executed on 23.11.1995 (Document

No.74/1996). The lawyer notice issued to the third respondent was marked as Ex.P5.

9. The learned single Judge found that there was no mention in Ex.P2 with regard to the superstructure put up in the property shown in Schedule II of the Plaint. There were only two buildings referred to in the document marked as Ex.P2. The learned Judge was therefore correct in giving a finding that the building in the possession of the third respondent was not the subject matter of sale.

9a. The learned Judge on the basis of the admissions made by the appellant as P.W.1 arrived at a conclusion that the superstructure found in Schedule II was not put in the year 1992 and it existed even before 1976. The reasoning given by the learned single Judge to negative the plea of eviction of the third respondent was on the basis of evidence on record. The appellant miserably failed to plead and prove that the superstructure found in Schedule II was also the subject matter of the suit in O.S.No.1689 of 1981 and it was included in Ex.P2. Therefore, it cannot be said that the learned single Judge erred in dismissing the suit against the third respondent. We therefore answer Point No.(i) against the appellant.

Resolution of Point No.(ii)

10. The learned single Judge observed that the superstructure in question was constructed by the third respondent and as such, he is entitled to the benefits of the Act. There was no evidence produced by the third respondent to prove that the superstructure was actually put up by him. Before instituting the suit in C.S.No.543 of 1997, the appellant issued a lawyer notice to the the third respondent, as per Ex.P5. The receipt of the said notice was clearly admitted by the third respondent in his written statement. However, when he was examined as D.W.1, the third respondent denied the receipt of notice.

11. The learned single Judge in Paragraph 11 of the judgment clearly observed that the third respondent has not filed any document in support of his claim that the superstructure was put up by him. Merely because, there was no mention in Ex.P2 with regard to the superstructure found in Schedule II, it cannot be said that it was constructed only by the third respondent. There was no evidence, much less, acceptable evidence before the Trial Court to arrive at a finding that the superstructure was constructed by the third respondent and as such, he is entitled to the benefits of the Act.

11a. The learned single Judge made an observation that the appellant has not issued notice under Section 11 of the Act,

calling upon the third respondent to vacate and hand over physical possession of the superstructure on payment. According to the learned single Judge, the suit is bad for want of notice under Section 11 of the Act. The question of issuing a notice under Section 11 of the Act would arise, only in case, the tenant has established that the superstructure was put up by him and that he is entitled to purchase the land by invoking the provisions of the Act. In short, there was no evidence produced by the third respondent before the Trial Court to prove that he is the owner of the superstructure and as such, entitled to purchase the land on payment of compensation. We are therefore of the view that the learned single Judge was not correct in arriving at a finding with regard to the construction of superstructure and the right of the third respondent to invoke the provisions of the Act. We therefore answer the second point in favour of the appellant and against the third respondent.

Conclusion

12. In view of the aforesaid reasons, we confirm the judgment and decree, dismissing the suit against the third respondent. The finding recorded by the learned single Judge that the third respondent is the owner of the superstructure and that he is entitled to the benefits of the Act is set aside.

13. The intra court appeal is allowed in part as indicated above. No costs.

Sd/-

Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

svki

To

The Sub Assistant Registrar
Original Side
High Court, Madras

1 cc to Mr.K.J. Rebello, Advocate Sr. 2352
2 cc to Mr.T.S. Baskar, Advocate, Sr. 2539

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SVI (CO)
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