

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 28.02.2017

Judgment pronounced on : 03.03.2017

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.344 of 2001
& C.R.P. (NPD) 253 of 2006

1. Maliq John
2. Kallell John .. Appellants / Petitioners
(In both cases) (Tenants)
(Defendants)

Versus

Rukija Beevi
Rep. By her Power of Attorney Agent
Mohamed Yusuf .. Respondent/Respondent/
Plaintiff(In both cases) (Land lord)

Prayer in Second Appeal: Petition filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 04.12.2000 made in A.S.No.133 of 2000 on the file of the Principal District Judge, Nagapattinam, reversing the judgment and decree dated 31.07.2000 and made in O.S.No.136 of 1992 on the file of Additional Subordinate Judge, Nagapattinam.

Prayer in Civil Revision Petition: The petition filed under Sec.25, Tamil Nadu Building, Rent & Lease Control Act, against the fair and decreetal order dated 11.11.2015 in R.C.A.No.1 of 2005 on the file of Rent Control Appellate Authority confirming the fair and decreetal order dated 02.12.2004 in RCOP No.3 of 2001 on the file of Rent Controller, District Munsif, Nagapattinam.

For Appellants : Mr.T.R.Rajaraman (In both cases)
For Respondent : Mr.G.R.Swaminathan (In both cases)

COMMON JUDGMENT

The defendants are the appellants before this Court, in the suit for recovery of possession and mesne profit, which was dismissed by the Trial Court and confirmed by the First Appellate Court.

2. Aggrieved by the observation made in respect of Exhibit B5, the present appeal is filed. The plaintiff sought for recovery of possession and mesne profit on the ground that he purchased the said property on 19.02.1992 from one John Syed Thaha Sahib. The first defendant Sahib John, who died pending suit was tenant under his vendor and he attorned the tenancy infavour of the plaintiff after he purchased the property. Latter the plaintiff issued notice to the first defendant and demanded arrears and also asked him whether he is willing to be tenant under him. The first defendant issued a reply notice dated 17.06.2012, wherein the first defendant, declined the ownership of the plaintiff. Hence, the suit for recovery of possession and mesne profit was filed. Pending the suit, the first defendant died, hence the legal representatives were impleaded as 2nd and 3rd defendants.

3. The case of the defendant is that he entered into agreement with landlord one J.S.Syed Mohideen Sahib on 11.07.1977. He spent Rs.22.640/- to repair the shop and got a deed of preemption from the land owner J.S.Syed Mohideen Sahib. The alleged sale of suit property in favour of the plaintiff by the owner J.S.Syed Mohideen Sahib is just to devoid the preemptive right of the defendant. The vendor of the defendant have no right to dispose the property. Hence, the suit is not maintainable. It was further contended by the defendant that if the plaintiff is of the opinion that the defendant is tenant under him, he should resort to the Tamil Nadu Buildings (Lease and Rent Control) Act and should have filed the petition before the Rent Controller. The said allegation of possession is therefore not maintainable.

4. The Trial Court framed issues and examining PW1 and PW2 on behalf of the plaintiff and DW1 on behalf of the defendant marked 5 Exhibits on behalf of the plaintiff and 6 Exhibits on behalf of the defendants. Court Exhibits X1 to X5 were admitted in evidence. The Trial Court after appreciating these evidence dismissed the suit, holding that the plaintiff landlord, ought to have filed petition before the Rent Control Tribunal for eviction and not a suit for recovery of possession.

5. Aggrieved by that, the plaintiff preferred First Appeal. The parties canvassed their respective cases before the appellate court which re-appreciated the evidence and held that the respondent has denied the title of the plaintiff / landlord, so the plaintiff ought to have filed the suit for declaration of his title, but has filed suit only for recovery of possession and mesne profit. Citing the decision of the Hon'ble Supreme Court reported in AIR 1991 Supreme Court 1094, dismissed the

appeal as not maintainable. The lower appellate Court has further observed that the plaintiff has to approach the Rent Controller and get a finding whether the denial of tile by the tenant is bonafide or not and thereafter, based on the decision of the Rent Controller, the plaintiff has to take necessary decision about the Forum in which he should agitate his case.

6. In view of the judgment of the first appellate court, the landlord has approached the Rent Controller filed petition for eviction of the tenant on the ground of willful default and owners occupation. The said RCOP 3 of 2001 on the file of Rent Controller, Nagapattinam was allowed. On appeal by tenant, the appellate authority confirmed the eviction order, wherein it is held that the respondent tenant has willfully defaulted in paying the rent since 1992 in spite of direction to deposit the rent in the Court. Against which the Civil Revision Petition 253/2006 has been filed.

7. While the landlord took up his cause to Rent Controller as directed by the lower appellate court, the tenant aggrieved by the finding of the first appellate court regarding Exhibit B5, the preemption deed dated 15.07.1977, preferred the second appeal.

8. Both the Revision Petition and the Second Appeal has been taken together, in view of the commonness in the dispute and parties.

9. At the time of admitting the Second Appeal this Court has formulated the following question of law:

1. Is the learned Principal District Judge right in holding that without the cross objection, being filed at the instance of the defendant the truth and genuineness of Exhibit B5 preemption can be gone into, in view of the rules laid down in SHRI RAVINDER KUMAR SHARMA V. STATE OF ASSAM & ORS. Reported in 1999 (8) Supreme 62?
2. Is the learned Principal District Judge having held that he cannot go into the truth and validity of Exhibit B5 is right in giving a finding that Exhibit B5 is invalid and unenforceable?

10. The grievances of the appellants in the Second Appeal is that, though the suit was dismissed in their favour, the observation of the Courts below regarding Exhibit B5 affects his right of preemptive purchase, therefore it has to be set aside. When this was pointed out before the lower appellate court, the lower appellate court declined to entertain the plea on the ground that without preferring appeal, the appellant cannot canvass the adverse finding of the court below.

11. Exhibit B5 is a preemption deed alleged to have been executed by the J.S. Syed Mohideen Sahib. This document is dated 15.07.1977. The trial court has held that the defendant who relied on the said document has failed to prove the execution of the same. No witness was examined by the defendant to prove the execution of Exhibit B5. So, the trial court held that the Exhibit B5 not duly proved. Though ultimately, the trial court dismissed the suit for recovery of possession and mesne profit on maintainability, observing the plaintiff has to resort Tamil Nadu Buildings (Lease and Rent Control) Act for vacating the tenant, the unsuccessful plaintiff, preferred appeal. Though the defendant claims that they are aggrieved by the observation made by the trial court regarding Exhibit B5. He has not filed any cross appeal. Precisely, that was the reason the lower appellate court has not entertained the respondent to question the legality of the adverse observation made against the Exhibit B5.

12. This Court is bound to look into the appeal and the revision petition filed by the tenant cumulatively. It is recorded by the Rent Control Appellate Authority that after preferring the second appeal, the tenant has requested, the appellate authority to stay further proceedings in the rent control appeal till the disposal of the second appeal. He has also refused to deposit the rent in the court, in spite of direction issued to him to deposit the rent, pursuant to the order passed under Section 11(4) of the Tamil Nadu Buildings (Lease and Rent Control) Act. The lower appellate court rightly rejected the plea of the appellant regarding the observation made by the trial court upon Exhibit B5, referring Order 41 Rule 22. It has held that any person aggrieved by the finding of the court can prefer cross appeal. But without cross appeal, the adverse findings cannot be canvassed. The Hon'ble Supreme Court in a case reported in 1999 (8) Supreme 62 (Shri Ravinder Kumar Sharma vs. State of Assam & others) has observed as follows:

....We hold that the respondent-defendant in an appeal can, without filing cross-objections attack an adverse finding upon which a decree in part has been passed against the respondent, for the purpose of sustaining the decree to the extent decree to the extent the lower court had dismissed the suit against the defendants-respondents. The filing of cross-objection, after the 1976 Amendment is purely optional and not mandatory. In other words, the law as stated in Venkata Rao's case by the Madras Full Bench and Chandre Prabhuji's case by this Court is merely clarified by the 1976 Amendment and there is no change in the law after the Amendment.....

13. The fact of the case cited above is entirely different from the facts of the case in hand. In the case in hand, no decree in part was passed against the respondent. In fact, the suit was dismissed in favour of the defendant and the plaintiff was the appellant. Facts of the judgment cited in which the suit was partly allowed, under such circumstances, the respondent was permitted to defend the allowed portion and without cross appeal to sustain the decree to the extent lower court had dismissed the suit against the defendant / respondent. Therefore, the lower appellate court did not permit the respondent to raise the plea of Exhibit B5 validity without cross objections.

14. This Court find no reason to interfere with the judgment of the first appellate court. The question raised by the appellant is answered accordingly. In the result, Second Appeal dismissed. No order as to Costs.

15. Insofar as the revision petition is concerned, as pointed out earlier it is the categorical finding of the courts below that the appellant has not paid the rent since 1992, in spite of direction by the Court. Therefore, the wilful default is well proved.

16. The learned counsel for the appellant submitted that though the petition for eviction was filed on two grounds, viz., wilful default and owners occupation, without any discussion regarding owners occupation, the trial court has held in favour of the landlord.

17. No doubt there is no sufficient discussion regarding the plea of owners occupation of the landlord. However, the plea of wilful default is overwhelmingly proved by the conduct of the petitioner who has refused to deposit the rent in the Court, even after the direction of the court to deposit the rent.

18. For the said reason, I see no merit in the Revision Petition. Hence, the petition is dismissed. Three months time is granted to the petitioner to handover the vacant premises to the respondent. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

pvs

To

1. The Principal District Judge,
Nagapattinam
2. The Additional Subordinate Judge,
Nagapattinam
3. The Rent Control Authority,
District Munsif,
Nagapattinam.
4. The Rent Control Appellate Authority,
Principal Subordinate Judge,
Nagapattinam.
5. The Section Officer,
V.R.Section,
High Court, Madras.

+2cc to Mr.T.R.Rajaraman, Advocate, S.R.No.14220,14221
+1cc to Mr.Swaminathan, Advocate, S.R.No.14010

NM(CO)
RS(23/03/2017)

JUDGMENT IN

S.A.No.344 of 2001
& CRP (NPD) 253 of 2006

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