

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.06.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.324 of 2018
and C.M.P.No.8984 of 2018

1.A.Shameem Begum
2.A.Ehtasham
3.A.Sameena Banu
4.Shanawaz Begum
5.S.Naveed
6.S.Nainab Fazeela Begum ... Appellants/Defendant

Vs.

I.M.Kuthurathullah ... Respondent/Plaintiff

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 31.01.2017 made in A.S.No.248 of 2016 on the file of the XV Additional City Civil Court, Chennai, reversing the judgment and decree dated 16.02.2016 made in O.S.No.6336 of 2013 on the file of the III Assistant City Civil Court, Chennai.

For Appellants : Mr.C.T.Mohan
For Respondent : Mr.T.Velumani

J U D G M E N T

Second Appeal is filed against the judgment and decree dated 31.01.2017 made in A.S.No.248 of 2016 on the file of the XV Additional Judge, City Civil Court, Chennai, reversing the judgment and decree dated 16.02.2016 made in O.S.No.6336 of 2013 on the file of the III Assistant City Civil Court, Chennai.

2.The appellants are defendants and respondent is the plaintiff in O.S.No.6336 of 2013 on the file of the III Assistant City Civil Court, Chennai. The respondent filed the said suit for permanent injunction restraining the appellants from interfering and disturbing the respondent's peaceful possession and enjoyment of the suit property, viz., land and building, except under due process of law.

3. According to the respondent, he has taken the suit property on usufructory mortgage under Othy Agreement dated 05.09.1996 from the original owners viz., M.A.B. Md.Ameenuddin

and M.A.B. Md.Sulthan Mohideen, for 15 years. As per Othy Agreement, the respondent paid an advance of Rs.2,00,000/- and has put up superstructure and also spent Rs.5,00,000/- for repair and maintenance of the suit property. The respondent obtained necessary permission from the Corporation of Chennai and other authorities for carrying on business in the suit property. The superstructure put up by him was assessed for the property tax and other statutory dues by other authorities. The appellants threatened the respondent to vacate the suit property. The respondent filed O.S.No.5510 of 2011 against the original mortgagors viz., M.A.B. Md.Ameenuddin and M.A.B. Md.Sulthan Mohideen, on the file of the XVII Assistant City Civil Court, Chennai, for permanent injunction. The respondent withdrew the said suit as original mortgagors, the defendants therein died and application filed for impleading the legal heirs of the original mortgagors was dismissed. The appellants issued notice dated 03.09.2012 through their advocate calling upon the respondent to receive the advance amount of Rs.2,00,000/- and vacate the suit building. The respondent sent reply dated 12.09.2012 calling upon the appellants to pay additional sum of Rs.10,00,000/- spent by him for putting up superstructure and for repair and maintenance of the suit property. On 09.11.2013, the second appellant came to the suit property and demanded the respondent to vacate the suit property and threatened him. Hence, the respondent has come out with the suit for the relief stated above.

4.The second appellant filed written statement and the same was adopted by appellants 1, 3 to 6. In the written statement, the appellants have accepted Othy Agreement and possession being handed over to the respondent and the respondent is in possession of the suit property. As per Clause-7 of Othy Agreement, the respondent must get consent or permission from the mortgagees to put up any construction and the respondent did not obtain any consent or permission from the mortgagees. The appellants denied that the respondent spent a sum of Rs.10,00,000/- for repair and maintenance of the building. The appellants never went to the suit property and threatened the respondent. The respondent is liable to vacate the suit property after receiving the sum of Rs.2,00,000/-.

5.Based on the pleadings, the learned Trial Judge framed necessary issues. Before the learned Trial Judge, the respondent examined himself as P.W.1 and marked five documents as Exs.A1 to A5. The second appellant examined himself as D.W.1 and marked four documents as Exs.B1 to B4.

6.The learned Trial Judge considering the pleadings, oral and documentary evidence, dismissed the suit. Against the said judgment and decree dated 16.02.2016 made in O.S.No.6336 of 2013, the respondent filed A.S.No.248 of 2016 on the file of the

XV Additional City Civil Court, Chennai.

7.The learned First Appellate Judge framed necessary points for consideration. The learned First Appellate Judge considering the materials on record and judgment of the trial Court, allowed the First Appeal decreeing the suit as prayed for.

8.Against the said judgment and decree dated 31.01.2017 made in A.S.No.248 of 2016, reversing the judgment and decree dated 16.02.2016 made in O.S.No.6336 of 2013, the appellants have come out with the present Second Appeal.

9.The learned counsel for the appellants contended that the learned First Appellate Judge ought to have decided first whether the possession of the respondent is lawful and legal. The First Appellate Court ought to have held that possession of the respondent is illegal and is unlawful after expiry of Othy agreement. The learned First Appellate Judge erred in not deciding the above aspect and is not correct in holding that respondent can be evicted only under due process of law. The First Appellate Court ought to have seen that the appellants have taken steps under due process of law by issuing notice dated 03.09.2012, which was marked as Ex.A4, calling upon the respondent to receive a sum of Rs.2,00,000/- and vacate the suit premises. The burden is upon the respondent to prove that he was in possession of the suit property, made out prima facie case, balance of convenience is in his favour and he will suffer irreparable injury, if the discretionary relief of injunction is not granted to the respondent. The appellants have categorically stated in the written statement and evidence that they never threatened the respondent and are not taking steps to evict the respondent by illegal means.

10.The learned counsel appearing for the caveator contended that the respondent is in possession of the suit property as mortgagee, he has spent Rs.10,00,000/- for putting up construction and maintenance of the suit property. Only when the appellants threatened and tried to evict the respondent, the respondent has filed suit for permanent injunction. The appellants have admitted the possession of the respondent and in such circumstances, the appellants have not made out any case and prayed for dismissal of the Second Appeal.

11.Heard the learned counsel for the appellants and respondent and perused the materials available on record.

12. The respondent is in possession of the suit property based on the usufructory mortgage and he took land of the suit property on usufructory mortgage. He has put up superstructure to carry on his business. The appellants disputed that the respondent has spent a sum of Rs.10,00,000/- for construction

and maintenance. In view of the admission of the appellants that the respondent is in possession of the suit property and that they are not trying to evict the respondent by illegal means, the contention of the learned counsel for the appellants that whether the possession of the respondent is illegal or unlawful has to be decided at first, is without merits. The learned First Appellate Judge referred and relied on the judgment of the Hon'ble Apex Court reported in Rama Gowda (Dead) by Lrs. Vs. M.Varadappa Naidu (Dead) by Lrs. and another, 2004 (1) SCC 769 and held that even a trespasser can be evicted only by due process of law.

13.From the materials on record, it is seen that the dispute between the appellants and respondent is as to whether the respondent must vacate the suit property by receiving a sum of Rs.2,00,000/- or whether the appellants have to pay a sum of Rs.12,00,000/- to the respondent for vacating the suit property. This issue can be decided only by a suit for recovery and cannot be decided in a suit for injunction. There is no error of law warranting interference by this Court with the judgment and decree of the First Appellate Court. No question of law much less than the substantial question of law has arisen in this Second Appeal.

14.In the result, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

LPP/kj

To

- 1.The XV Additional Judge, City Civil Court, Chennai.
- 2.The III Assistant Judge, City Civil Court, Chennai.

copy to

The Section officer
VR Section, High Court, Madras 104.

+2 CCS to Mr.C.T.Mohan, Advocate sr 37800.

S.A.No.324 of 2018
and C.M.P.No.8984 of 2018

SR(CO)
SP(19/07/2018)