

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 6Th DAY OF APRIL 2018

THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

A.No.84 & 85 of 2018

in

C.S.No.757 of 2014

C.S.No.757 of 2014

- 1.Mrs.A.Sethukarasi,
W/o.late Sp.Annamalai Chettiar,
Door No.1,State Bank Colony Road,
Thanjavur-613 004.
- 2.A.Kamala Selvam,
W/o.Selvam Alagappan,
No.17/15,Bharathi Nagar 2nd Street
T.Nagar,Chennai-600 017.
- 3.Mr.A.Subramaniam,
Flat No.4C,Poonam Apartments,
No.80,Nungambakkam High Road,
Nungambakkam,Chennai-600 034.

:Plaintiffs

-Vs-

- 1.Mr.SP.Valliappan,
S/o.late A.Subramaniam Chettiar,
Door No.8,Selvam Nagar,
Medical College Road,
Thanjavur-613 007.
- 2.M/s.Adithya Birla Nuvo Ltd.
(Madura Garments Division)
Lakshmi Towers,Old Door No.27,
New Door No.45,Dr.Radhakrishnan Salai,
Mylapore,Chennai-600 004.
- 3.M/s.Marvel Wedding Cards Pvt.Ltd.,
Lakshmi Towers,Old Door No.27,
New Door No.45,Dr.Radhakrishnan Salai,
Mylapore,Chennai-600 004.

:Defendants

A. No.84&85 of 2018

S.P.Valliappan
S/o.Late A.Subramaniam Chettiar,
Door No.8,Selvam Nagar,
Medical College Road,
Thanjavur-613007.

...Applicant

-VS-

- 1.A.Sethukarasi
W/o.Late S.P.Annamalai Chettiar,
Door No.1,State Bank Colony Road
Thanjavur-613 004.
- 2.A.Kamala Selvam,
W/o.Selvam Alagappan
No.17/15, Bharathi Nagar 2nd Street
T.Nagar,Chennai-600 017.
- 3.A.Subramaniam
Flat No.4C,Poonam Apartments
No.80,Nungambakkam High Road,
Nungambakkam,Chennai-600 034.
- 4.M/s.Adhithya Birla Nuvo Ltd.
(Madura Garments Division)
Lakshmi Towers,Old Door No.27
New Door No.45,Dr.Radhakrishnan Salai
Mylapore,Chennai-600 004.
- 5.M/s.Marvel Wedding Cards Pvt.Ltd
Lakshmi Towers,Old Door No.27,
New Door No.45,Dr.Radhakrishnan Salai,
Mylapore, Chennai-600 00

: Respondents/Defendants

A.No.84 of 2018

Application praying that this Hon'ble Court be pleased to direct the tenants 4 and 5 to pay 50% of rents due and payable by them to this applicant.

A.No.85 of 2018

Application praying that this Hon'ble Court be pleased to direct the Respondents 1 to 3 to return the sum of Rs.1,06,68,287/-

This Application coming on this day before this court for hearing the court made the following order:

The above said two applications have been filed by the 1st defendant in the suit, seeking a direction to the 4th and 5th defendants, who are tenants, to pay 50% of the rents due and payable by them to the applicant and also a direction against the 1st, 2nd and 3rd defendants to return a sum of Rs.1,06,68,287/-.

2. The suit in C.S.No.757 of 2014 has been filed by three plaintiffs, namely, A.Sethukarasi, A.Kamala Selvam and A.Subramaniam against three defendants, namely, the applicant herein Mr.S.P.Valliappan, against M/s.Adhithya Birla Nuvo Ltd. and M/s.Marvel Wedding Cards Pvt. Ltd.

3. The Suit had been filed seeking a judgment and decree, for specific performance, directing the first defendant to execute the registered release deed/relinquishment deed in favour of the plaintiffs, releasing/relinquishing his 50% share in the Suit schedule 'A', 'B' and 'C' mentioned properties as agreed in March 2012 or in the alternative, direction to pay the plaintiffs a sum of Rs.3,48,83,791/- together with interest at the rate of 18% per annum with monthly rests from the date of the plaint till the date of realization and directing the 1st defendant to pay the plaintiffs a sum of Rs.60,00,000/- towards damages together with interest at the rate of 18% p.a. from the date of Plaint till the date of actual payment and for costs.

4. According to the plaintiffs, the 1st plaintiff's husband S.P.Annamalai Chettiar and the 1st defendant S.P.Valliappan are brothers and sons of late.Subramanian Chettiar. S.P.Annamalai Chettiar is the elder brother. Late. S.P.Annamalai Chettiar and the 1st defendant had executed a lease deed in favour of the 3rd defendant, namely, M/s.Marvel Wedding Cards Pvt. Ltd. in respect of the 'C' schedule property on 20.10.1999. The 'C' schedule property is 1380

sq.ft in North East corner portion in the total built up area of 4094 sq.ft in land and building in Door Nos.106, 107/1, 107/2, Venkatachala Mudali Street, Old No.25/2, Dr.Radhakrishnan Salai, Mylapore, Chennai-4. Similarly, late S.P.Annamalai Chettiar and the 1st defendant had entered into a lease deed with respect to 'A' and 'B' Schedule properties on 17.07.2009 in favour of the 2nd and 3rd defendants. The 'A' and 'B' Schedule are 2715 sq.ft of super built up area and 2970 sq.ft of super built up area in the ground and mezzanine floor and also in the basement in the same property at Door Nos.106, 107/1, 107/2, Venkatachala Mudali Street, Old No.25/2, Dr.Radhakrishnan Salai, Mylapore, Chennai-4.

5. According to the plaintiffs, the 2nd defendant had to pay a sum of Rs.3,57,650/- per month for the first three years, Rs.4,11,298/- per month for the next three years and Rs.4,72,993/- for the final three years. The lease was for a period of nine years. The 3rd defendant had to pay a sum of Rs.71,200/- per month for the first thirty three months and Rs.94,696/- per month for the next thirty three months. The lease was for a period of five years and six months. It had been stated that the defendants 2 and 3 were paying the monthly rent to late S.P.Annamalai Chettiar and the 1st defendant in equal shares.

6. Late S.P.Annamalai Chettiar died on 01.09.2009 and the plaintiffs are his legal heirs. Since the other Co-owner KR. A.Mangalam Achi had executed a release deed with respect to the property on 14.02.2014, the plaintiffs on the one hand and the 1st defendant on the other had become entitled to undivided 50% share in the said properties and consequently in the rental income also. The 1st defendant agreed to release his 50% right in the properties and the plaintiffs agreed to pay a sum of Rs.4,00,00,000/- as consideration. The plaintiff agreed to pay an advance of Rs.3,00,00,000/- initially. They

approached the City Union Bank, Medical College Road Branch, for a loan of Rs.3,00,00,000/- on 24.03.2012. The 1st defendant also wrote a letter dated 31.03.2012 to the City Union Bank, confirming that he is relinquishing his share. The City Union Bank also sanctioned a loan of Rs.3,00,00,000/- to the 1st plaintiff and the 1st defendant stood guarantor of the loan. The bank paid the said sum directly to the 1st defendant by Demand Draft No.6405563, dated 31.03.2012.

7. The plaintiffs also paid a further sum of Rs.12,00,000/- on 19.04.2012, vide RTGS and a further sum of Rs.36,83,791/- on 22.04.2012, vide RTGS to the Savings Bank Account of the 1st defendant with State Bank of India, Thanjavur Branch in A/c. No.10857545898. The 1st defendant also wrote a letter on 16.07.2012 to the 2nd and 3rd defendants that he would releasing his rights in the property and he further stated that the rent which was paid to him till 30.06.2012 shall be settled by him to the plaintiffs. He also stated that he would forward a copy of the release deed when it was released from the Registrar Office. From that date, the 2nd and 3rd defendants had been remitting the entire rent to the 1st plaintiff. The 1st plaintiff also settled the loan availed from the City Union Bank. At that juncture, the 1st plaintiff received a letter on 23.10.2013 from the 2nd defendant stating that they were withholding 50% of the rent under instructions received from the Advocate on behalf of the 1st defendant. The 1st plaintiff issued a reply dated 20.11.2013, stating that the rents should be paid to the 1st plaintiff alone. At the time of institution of the Suit, the 2nd defendant was withholding 50% of the rent payable in respect of the 'A' and 'B' Schedule properties under the lease agreement dated 17.07.2009. The 3rd defendant was in arrears of rent from 01.09.2013. It was

claimed in the plaint that the 1st defendant has no right to call upon the 2nd and 3rd defendants to pay 50% of the rents to him. It is under these circumstances claiming the balance of rent, that the suit had been filed, seeking specific performance or in the alternate way to pay a sum of Rs.3,48,83,791/- which was the amount paid to the 1st defendant and a sum of Rs.60,00,000/- towards damages together with interest.

8. During the hearing of the suit, this court in A.No.7387 of 2014 by order dated 13.06.2016 had passed orders directing the tenants to pay the entire rent in respect of the property to the plaintiffs. As against that order, the 1st defendant herein had filed O.S.A. No.178 of 2016 and the appeal was also dismissed on 29.08.2016 as withdrawn. Subsequently the 1st defendant had filed these two applications for the reliefs as stated above.

9. In the affidavit filed in support of the said two applications, the 1st defendant had stated that the circumstances have changed after the order was passed by this court. A written statement had also been filed by the 1st defendant. A letter has also been given to the tenants to pay 50% of the rent to the 1st plaintiff. It had been stated that if the present application is not considered, it would amount to the suit being decreed without a trial. It had been stated that the total rent due for the years 2009 - 2017 was Rs.4,05,84,050/- and that the 1st defendant was entitled to Rs.2,02,92,025/-. It had been stated that the balance is due and payable by the 1st, 2nd and 3rd respondents. An annexure has also been given to the Judges Summons with respect to the same.

10. I have heard the arguments advanced by Mr.A.K.Mylsamy, learned counsel for the applicant/1st defendant and Mr.A.R.L.Sundaresan, learned senior counsel for the 1st

respondent/plaintiff. The parties shall be referred to as the plaintiffs and defendants.

11. There are three plaintiffs in the suit. They are legal representatives of late S.P.Annamalai Chettiar. S.P.Annamalai Chettiar was the brother of the 1st defendant, S.P.Valliappan. Both S.P.Annamalai Chettiar and the 1st defendant S.P.Valliappan had entered into a lease deed with the 2nd and 3rd defendants with respect to A, B & C schedule properties. A & B schedule properties were leased out to the 2nd defendant and the C schedule property was leased out to the 3rd defendant.

12. According to the terms of the lease, the 2nd defendant was to pay a sum of Rs.3,57,650/- for the first three years and a sum of Rs.4,11,298/- for the next three years and Rs.4,72,993/- for the final three years. The lease was for a period of nine years and was dated 17.07.2009 and registered as document no.1903 of 2009 in the office of the Sub-Registrar, Mylapore. The 3rd defendant was liable to pay a rent of Rs.71,200/- per month for the first thirty three months and Rs.94,696/- per month for the next thirty three years in accordance with the lease deed dated 20.10.1999, which was for a period of five years and six months. The lease amount was to be divided into two equal parts between S.P.Annamalai Chettiar and the 1st defendant. Unfortunately S.P.Annamalai Chettiar died on 01.09.2009. Thereafter the 1st defendant agreed to relinquish his 50% share in the suit property for a consideration of Rs.4,00,00,000/-.

13. The plaintiff had also approached the City Union Bank, Medical College Road branch, for a loan of Rs.3,00,00,000/-. The loan was also sanctioned and it was paid directly by the Bank to the 1st defendant by a Demand Draft No.6405563, dated 31.03.2012. Subsequently, the 1st defendant had also paid a sum of Rs.12,00,000/- by RTGS on 19.04.2012

and a further sum of Rs.36,83,791/- by RTGS on 22.04.2012 to the account of the 1st defendant in State Bank of India, Thanjavur Branch, in Savings Bank A/c No.10857545898.

14. Pending the suit, since the defendants, namely, the tenants did not come forward to pay the rental balance, this court, in A.No.7387 of 2014, by order dated 13.06.2016, had directed the tenants to pay the entire rental amount to the 1st plaintiff. As against the said order, the 1st defendant had filed O.S.A. No.178 of 2016. The said Original Side Appeal was dismissed as withdrawn on 29.08.2016.

15. It has been urged by Mr.A.K.Mylsamy, learned counsel appearing for the 1st defendant/applicant that the circumstances had subsequently changed and consequently, this court can re-visit the directions issued in these applications seeking direction to defendants to return a sum of Rs.1,06,68,287/- in A.No.85 of 2018 and for a direction to the tenants to pay 50% of the rents to the 1st defendant in A.No.84 of 2018

16. This court had raised serious doubts regarding the maintainability of the application, particularly when the order in A.No.7387 of 2014, dated 13.07.2016 had been challenged in O.S.A. No.178 of 2016 and it had been thought fit that the said appeal could be withdrawn from consideration of the appellate court. The withdrawal of the appeal would effectively mean that the order of this court in A.No.7387 of 2014 dated 13.07.2016 is recognised as being in force. This court wanted the grounds of the appeal to be given and a copy of the memorandum of grounds of appeal was also forwarded. In the said grounds of appeal, after extracting the facts of the case, it was not stated that the order of the learned Judge who passed the order in A.No.7387 of 2014 should be reversed.

17. According to Mr.A.K.Mylsamy, the learned counsel for the defendant, even though the appeal had been withdrawn, this court has power to re-examine the order passed in

A.No.7387 of 2014, since the order was passed ex-parte. The learned counsel also relied on (Arjun Singh Vs. Mohindra Kumar and others) reported in AIR 1964 SCC 993, wherein the Hon'ble Supreme Court had examined tests of "good cause" and "sufficient cause". The Court also examined the issue of adjourning the hearing of the suit ex-parte. It had been stated that where the court had adjourned the hearing, there is to be a hearing on the next date. However, when the entirety of the hearing had been completed and the suit had been posted for pronouncing judgment under Order 20 Rule 1 CPC, then there is nothing more to be heard in the suit.

18. In such a case, Order 9 Rule 7 of CPC have no application. The matter had to be taken up under Order 9 Rule 6 of CPC by passing an ex-parte decree. Order 9 Rule 13 is the only provision applicable. In this case, we have not detailed an ex-parte decree and order has been passed by this court in an application. The matter had been taken up in appeal. The 1st defendant had consciously taken a decision to withdraw the appeal and it only means that he is not agitating the vires of the order under appeal. He has submitted himself to the correctness of the said order, he has submitted himself to abide with the said order and he has further accepted that he has no grievance against the said order. He has withdrawn his appeal. The order is taken as final and he has not chosen to set aside the order on the ground that it was passed ex-parte at the earliest instance. The only changed circumstance urged now is that a written statement has been filed. When a written statement has been filed, the suit has to move to the next stage of 'framing issues' and inviting the parties to lead in oral and documentary evidence. The parties cannot be forced to be stagnated at the same stage and the suit should move forward.

19. The learned counsel for the applicant also relied on the judgment of the learned Single Judge of the Delhi High

Court in Kiran Girhotra and Ors. Vs. Raj Kumar and Ors. (I.A. No.11196/2009 in CS(OS) No.75/2004), reported in MANU/DE/3128/2009, with respect to changed circumstances and stated that Order 39 Rule 4 of the CPC would entitle re-visiting the order once again. I am not able to agree myself to the said order. In the present case, there had been an appeal filed and it was withdrawn. That gives a finality to the order passed by this court in A.No.7387 of 2014 dated 13.06.2016.

20. Mr.AR.L.Sundaresan, learned Senior Counsel for the plaintiff relied on (Bhanu Kumar Jain Vs. Archana Kumar and Another) reported in (2005) 1 SCC 787, wherein the Hon'ble Supreme Court had held that there are two alternatives available if an order is sought to have been passed ex-parte, namely an appeal under Section 96 and also an application to set aside an ex-parte order. In the present case the appeal had been filed and had been withdrawn. Consequently the subsequent application cannot be maintained by the present applicant.

21. The learned Senior Counsel also relied on (Vinod Kapoor Vs. State of Goa and Ors) reported in AIR 2012 SCC 3722, wherein the Hon'ble Supreme Court had also held that when a special leave petition had been dismissed as withdrawn for the purpose of filing a review petition, a fresh petition is not maintainable. The learned Senior Counsel also relied on (Sandhya Educational Society and another Vs. Union of India and others) reported in (2014) 7 SCC 701, wherein also the Hon'ble Supreme Court had held that where a petition is dismissed as withdrawn without obtaining leave to file a separate or a fresh petition, the second petition is not maintainable.

22. I am not examining the facts of the case, since the trial has to be conducted. However, I held that these applications cannot be considered by me, particularly because

the appeal had been withdrawn and the Order in A.No.7387 of 2014, dated 13.06.2016 has attained finality. Consequently, I am not able to convince myself to grant any reliefs to the applicants. The only changed circumstance is that a written statement has been filed. If written statement has been filed then the answer is to take the matters forward to trial and it would be highly inappropriate, if the parties are sent to navigate around the same decision. They must move forward and re-opening an order already passed is not the answer. Consequently, these applications are dismissed. No Costs.

Sd./- C.V.K.J

06.04.2018

//Certified to be true copy//

Dated at Madras this the th day of 2018.

COURT OFFICER (O.S.)

kyl/06.04.2018

From 6th Day of APRIL 2018 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.