

THE HON'BLE DR JUSTICE SHAMEEM AKTHER

SECOND APPEAL No. 764 of 2005

JUDGMENT:

1. The Second Appeal is filed by the appellant/defendant against the judgment and decree dated 28.03.2005 in Appeal Suit No.75 of 2002 on the file of the VIII Additional District Judge (Fast Track Court), Visakhapatnam.

2. The appellant herein is the defendant, and the respondent herein is the plaintiff, in the suit. For better appreciation of facts, the parties are hereinafter referred to, as they are arrayed in the trial court.

3. The Second Appeal was admitted on the following substantial questions of law.

“a) Whether the acceptance of the rent by the landlord, after filing of the suit for ejectment, amounts to waiver of the termination of the tenancy ?

b) Whether keeping the advance amount (free of interest) by the landlord after issuing quit notice amounts to creating a new tenancy ?

4. To adjudicate the *lis*, it is necessary to refer to admitted and disputed facts.

(a) The plaintiff filed the suit for vacant possession of the suit schedule property by evicting the defendant therefrom and for recovery of arrears of rent from July, 1997 to August, 1998 for Rs.9,100/- and for future damages @ Rs.1,300/- per month, stating that plaintiff leased out the suit schedule

property viz. stair case shop in 'Arcade Sri Venkat' situated in plot No.15 & 16 in Prakasaraopeta, Visakhapatnam, in the year 1994 on a monthly rent of Rs.500/- payable on or before 10th of every succeeding month; the defendant paid interest free advance amount of Rs.25,000/- at the time of taking the premises with an understanding that the same had to be returned at the time of vacating the premises by the defendant; that the defendant was irregular in paying rents and failed to pay rents from July, 1997 onwards; that the plaintiff got issued a notice dated 10.7.1998 under Section 106 of the Transfer of Property Act, 1882 (for short, 'the Act, 1882') terminating tenancy by the end of August, 1998 and calling upon the defendant to deliver vacant possession of the premises by 1.9.1998; that from the date of default, the defendant is liable to pay damages for use and occupation of the premises @ Rs.1,300/- per month from September, 1998; that though defendant received the notice, he did not vacate the suit premises. Hence the suit.

(b) The defendant filed written statement denying plaint averments and contending that the plaintiff was paid rents from December, 1995 till June, 1997 but she did not issue receipts; that some times, her family members used to pass receipts to defendant; that the plaintiff did not issue quit notice; that the defendant is not admitting the agreement in the year 1991 in which year the shopping complex was constructed and for the purpose of income tax and property

tax, the receipts were issued in the name of amenities, but the plaintiff did not provide amenities; that though the defendant paid rents every month as per the agreement, plaintiff did not issue receipts; that there is no default clause in the lease agreement but it is an oral lease agreement for a period of 25 years and the deposit amount is still with the plaintiff. Hence, it is prayed to dismiss the suit.

5. Basing on the above pleadings, the trial Court settled the following issues for trial.

- 1) Whether the plaintiff is entitled for eviction of the defendant from the plaint schedule property and for vacant possession of the same ?
- 2) Whether the plaintiff is entitled for recovery of arrears of arrears of rent ?
- 3) Whether the plaintiff is entitled for future damages as prayed for ?
- 4) Whether the oral lease agreement for a period of 25 years is valid and binding on the defendant ?
- 5) To what relief?

6. During trial, on behalf of the plaintiff, P.W.1 was examined and Exs.A1 to A47 were got marked, and on behalf of defendant, D.Ws.1 and 2 were examined and Exs.B1 to B80 were got marked.

7. The trial Court, upon appreciation of the evidence on record, decreed the suit with costs granting two months' time to the defendant to vacate the suit schedule premises and hand over vacant possession of the same to the plaintiff;

directing the defendant to pay a sum of Rs.9,100/- towards arrears of rent to the plaintiff from July, 1997 to August, 1998; and directing the defendant to pay future damages @ Rs.650/- per month from the date of filing of the suit till the date of handing over vacant possession of the plaint schedule premises to the plaintiff. Challenging the judgment and decree of the trial Court, the defendant preferred A.S. No.75 of 2002 on the file of the VIII Additional District Judge (Fast Track Court), Visakhapatnam. Vide the impugned judgment and decree, the first appellate court allowed the appeal in part confirming the judgment and decree of the trial Court as regards eviction; setting aside the judgment and decree of the trial Court granting arrears of rent of Rs.9,100/- from July, 1997 to August, 1998, and awarding the damages from the month of November, 2018 @ Rs.650/- per month. Challenging the same, the present Second Appeal has been preferred by the defendant.

8. Heard both sides and perused the record.

9. It is the main contention of the learned counsel for the appellant/defendant that acceptance of rent by the landlady after filing of the suit for ejectment would amount to waiver of termination of tenancy and that non-returning of interest free advance amount by the landlord (plaintiff) after issuing quit notice amounts to creating a new tenancy, and that both the courts below have not appreciated the evidence on record in

proper perspective and arrived at, perverse findings, and ultimately, it is prayed to allow the Second Appeal.

10. On the other hand, learned counsel for the respondent/ plaintiff would contend that there was no waiver of notice of eviction; that receipt of rents by the plaintiff after filing of the suit would not amount to waiver of termination of tenancy; that there are no grounds to interfere with the concurrent findings of both the courts below; the substantial questions of law relate to factual aspects and hence there are no grounds to interfere with the findings of the courts below.

11. There cannot be any dispute that, under the amended Section 100 C.P.C., a party aggrieved by the decree passed by the first appellate court has no absolute right of appeal. He can neither challenge the decree on a question of fact nor on a question of law. The second appeal lies only where the High Court is satisfied that the case involves a substantial question of law. The word 'substantial' as qualifying 'question of law', means and conveys of having substance, essential, real, of sound worth, important, considerable, fairly arguable. A substantial question of law should directly and substantially affect the rights of the parties. A question of law can be said to be substantial between the parties if the decision in appeal turns one way or the other on the particular view of law. But, if the question does not affect the decision, it cannot be said to be substantial question between the parties. Recording a

finding without any evidence on record; disregard or non-consideration of relevant or admissible evidence; taking into consideration irrelevant or inadmissible evidence; perverse finding- are some of the questions, which involve substantial questions of law.

12. As per the record placed before the Court, the plaintiff filed the original suit for eviction of the defendant from the suit schedule property and for *mesne profits*. The defendant admitted *jural* relationship with the appellant-plaintiff and that there was oral lease between them. Originally, the rent was Rs.500/- per month and thereafter, it was enhanced to Rs.650/- per month. The defence set up by the defendant is that Ex.A3-notice issued under Section 106 of the Act, 1882, is invalid and defective and the plaintiff is not entitled to eviction and damages. According to the plaintiff, the defendant paid amount of Rs.25,000/- as interest free advance at the time of taking the premises with an understanding that the same had to be returned at the time of vacating the premises by the defendant.

13. As regards the first substantial question of law, it is the contention of the defendant that the conduct of the plaintiff in accepting the rents tendered by the defendant for the period subsequent to the filing of the suit without any reservations clearly leads to the inference that she was treating the lease as subsisting and she waived the notice. On this aspect, it is

pertinent to refer to the decisions of the Hon'ble Supreme Court in **Shanti Prasad Devi and another Vs. Shankar Mahto and others**¹ and **Sarup Singh Gupta Vs. S.Jagdish Singh and others**², wherein it is held that the mere acceptance of rent by lessor on expiry of period of lease would not amount "assent" for continuance of lease and the order of ejectment of lease was not interfered by the Hon'ble Supreme Court.

It is also pertinent to refer to a decision of this Court in **Purohit Lakshmanchandji Vs. Vetcha Venkata Sree Ramachandra Murty**³, wherein it is held as follows:

"The question whether the mere acceptance of rent after a notice to quit and in particular acceptance of rent even after the suit is filed would operate as a waiver has been the subject of several decisions and divergent views have been expressed. The preponderance of authority appears to be in favour of the view which I have taken, viz., that the acceptance of rent subsequent to the filing of the suit will not operate as a waiver in the usual course. All the authorities expressing the different views have been considered and dealt with in an elaborate judgment by the Madras High Court in Saleh Bros. v. K. Rajendran. AIR 1970 Mad. 165. After considering all the decisions as also the law in England, it was held that acceptance of rent after the suit in ejectment is not regarded as a waiver, because, once the matter has come to court, the election has become irrevocable. The plain language of Section 113 of the Transfer of Property Act indicates that the act of the lessor must be such as to constitute a clear evidence of his intention to treat the lease as subsisting and the illustration (a) must be understood and applied in consonance with the principle underlying the action with due reference to the intention of the lessor. There is no warrant for the view that mere receipt of rent, whatever may be the intention of the lessor, should of its own force, divorced

¹ AIR 2005 SC 2905

² AIR 2006 SC 1734

³ AIR 1976 AP 428

from the circumstances of the case, be regarded as amounting to a waiver."

14. The ratio in the aforesaid decisions and the language of Section 113 of the Act, 1882, indicate that the acts or intention of the lessor must be very clear with regard to extension of lease. It is also held in the aforementioned decisions that mere acceptance of rents after expiry of lease would not amount to waiver of quit notice. In view of the language envisaged in Section 113 of the Act, 1882, notice of waiver should be with express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting. In the case on hand, there is no such express or implied consent on the part of the landlady with regard to waiver. Receipt of rent after filing of the suit does not amount to waiver of the quit notice. Further, the suit was promptly instituted for eviction and possession.

15. The second substantial question of law relates to keeping interest free advance paid by the defendant (tenant) with the landlady (plaintiff) after issue of quit notice. As per the oral lease between the parties, the interest free advance amount has to be returned to the tenant at the time of his vacating the schedule premises. That stage has not come in this case. Both the substantial questions raised herein are answered in favour of the plaintiff accordingly.

16. As far as the contention of perversity of the findings of the both the courts below is concerned, both the courts below having analysed the oral and documentary evidence, including Ex.A3 quit notice giving 15 days time to the defendant to vacate the schedule premises, and held that Ex.A3-quit notice was valid. Further, there is no reply to the notice by the defendant. The only contention of the defendant is that the suit schedule premises were let out for 25 years. There is no registered lease agreement as required under Section 106 of the Act, 1882 to hold that duration of the lease was 25 years. Both the courts elaborately dealt with all the contentions raised by the defendant and held that there is valid quit notice. There is no waiver of the quit notice. Both the Courts below analysed the entire evidence on record and gave concurrent findings with regard to eviction of the defendant. None of the findings is shown to be perverse. The findings are based on record and there is no infirmity. There are no grounds to take a different view. Therefore, there are no merits in the Second Appeal and the same is liable to be dismissed.

17. A request is made on behalf of the appellant/defendant that some time may be given to the appellant/defendant to vacate the schedule premises and deliver its vacant possession to the respondent/plaintiff. In view of the submission, this court deems it appropriate to grant 3

months' time from today to the appellant/defendant to vacate the suit schedule premises and hand over its vacant possession to the respondent/plaintiff.

18. In the result, the Second Appeal is dismissed. No costs. The appellant/defendant shall vacate the suit schedule premises and hand over its vacant possession to the respondent/plaintiff on or before 05.12.2018.

Miscellaneous Petitions pending, if any, in the Second Appeal shall stand closed.

05.09.2018
DRK



(Dr.SA, J.)

THE HON'BLE DR JUSTICE SHAMEEM AKTHER



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