

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25..03..2019

CORAM

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

Second Appeal No.441 of 2019

K.G.Kothari & Co
Proprietor Ship Entity,
Mr.Navarattan Ghisalal Kothari,
Rep. by its Power Agent,
Mr.Deepak Karan Sanchetti
S/o Mr.Karan Sanchetti

... Appellant /Appellant/Plaintiff

-Versus-

1.Prabhakar Rao

2.N.C.Vignesh Kumar ... Respondents /Respondents/Defendants

This second appeal is filed against the judgement and decree dated 16.11.2018 made in A.S.No.59 of 2018 by the learned XVII Additional Judge, City Civil Court, Chennai, dismissing the appeal and confirming the judgement and decree dated 09.10.2017 made in O.S.No.2671 of 2012 by the learned XV Assistant Judge, City Civil Court, Chennai, dismissing the suit.

For Appellant : Mr.Kalyan Jhabakh G for
M/s.Surana and Surana

For Respondents : A.C.Kumaragurubaran for R1
Mr.A.Babu for R2

JUDGMENT

The plaintiff who has lost the case successively before the trial court and the first appellate court is the appellant. The defendants in the suit are respondents herein. The suit in O.S.No.2671 of 2012 was filed for decree for (i) declaration declaring that the plaintiff is the tenant in respect of A-schedule property; (ii) permanent injunction restraining the defendants from taking possession of any portion of A-Schedule property except under due process of law; (iii) declaration declaring that B-schedule property is in the illegal occupation of the 1st defendant; (iv) permanent injunction restraining the 1st defendant or his nominees or agent or any persons claiming

through or under him from delivering possession of the front room of the suit A- schedule property and mentioned in the B-schedule property, which is in the illegal occupation of the 1st defendant, to the 2nd defendant or his agents or nominees or any person or persons claiming through or under him; and (v) possession directing the defendants to deliver the vacant possession of the front room along with the open to sky terrace of the suit property more fully described in the B-schedule property; and also for costs of the suit.

2. According to the plaintiff, suit A-schedule property belonged to the 1st defendant. On 23.08.1958, A-Schedule property was leased out to the plaintiff by the father of the 1st defendant for a monthly rent of Rs.100/-. During the course of tenancy in June 2013, the 1st defendant for conducting ceremonies relating to the marriage of his son, requested a portion of the premises which is more fully described in the plaint as B-Schedule in the plaint which in the occupation of the plaintiff and it was handed over to the 1st defendant (land lord) for temporary use. Whereas after the purpose was over, the land lord did not hand over the possession of the property to the plaintiff. Later on, the plaintiff was shocked to know that the 1st defendant sold away the entire third floor of the premises to the 2nd defendant by way of sale deed dated 18.02.2011. The 1st defendant called upon the plaintiff to get his tenancy adorned in favour of the 2nd defendant. The 2nd defendant by his letter dated 14.10.2011 informed about the purchase of the suit A-schedule property. In the letter of the 2nd defendant, it has been wrongly stated that the plaintiff was in occupation of only in respect of 915 square feet. In the meantime, the plaintiff had initiated proceedings under Section 8(5) of The Tamil Nadu Buildings (Lease and Rent Control) Act in R.C.O.P.No.1559 of 2007 for deposit of payment of rent wherein the plaintiff has categorically described the tenanted premises as entire third floor of the building which fact was not disputed by the 1st defendant. After purchase of suit B-schedule property, the 2nd defendant has been in possession of the same. In the above circumstances, this suit for declaration and permanent injunction as stated above.

3. The 1st defendant filed written statement contending that the suit A-schedule property was leased out to the plaintiff on 23.08.1958 by the father of the 1st defendant for rent at Rs.100/- per month and the lease period was only for six years which got expired on 31.08.1964 itself. Thereafter, the lease was not renewed. The plaintiff initiated a proceedings under the Tamil Nadu Buildings (Lease and Rent Control) Act for deposit of rent and the 1st defendant also filed a petition for eviction on the ground of additional accommodation and another petition for fixation of fair rent as against the plaintiff. Thereafter, the

1st defendant filed a suit in O.S.No.7524 of 2008 for permanent injunction restraining the plaintiff herein from altering or making additions of the tenanted premises being the rear portion of the suit A-schedule property measuring about 915 square feet. The said suit was subsequently decreed based on the undertaking given by the plaintiff herein. Thereafter, due to necessity, the suit A-schedule property was given to the 2nd defendant for valuable consideration on 18.02.2011 and that possession of front portion of suit A-schedule property being the B-schedule property and also symbolic possession of the rear portion of the suit A-schedule property were handed over to the 2nd defendant. The 1st defendant also requested the plaintiff to adorn the tenancy in respect of the rear portion of the suit A-schedule property being 915 square feet in favour of the 2nd defendant. All the rent control proceedings were related to only in respect of the rear portion of the suit A-schedule property measuring to an extent of 915 square feet. So far as possession of B-schedule property is concerned, it was handed over to the 1st defendant for carrying out his travel agency and it was not handed over for temporary occupation as alleged by the plaintiff. If the contention of the plaintiff is true, then, he would have taken steps immediately for recovery of possession. The suit has been filed with malafide intention only after the sale of the suit A-schedule property to the 2nd defendant. After having surrendered the possession of B-schedule property, it is not now open to the plaintiff to seek for a decree for declaration declaring that he is the tenant in respect of the suit B-schedule property and for recovery of possession of the same.

4. The 2nd defendant filed a written statement denying the averments made in the plaint. He contended that he is the bonafide purchaser of the suit A-schedule property for valid consideration and ever since the date of purchase he has been in possession and enjoyment of the B-schedule property which forms part of A-schedule property. The plaintiff is not entitled for any relief as prayed for in the plaint.

5. Based on the above pleadings of either parties, the following issues were framed before the trial court for trial:-

- (1) Whether the suit is barred by limitation?
- (2) Whether the plaintiff is entitled to relief of declaration in respect of A-Schedule property?
- (3) Whether the plaintiff is entitled to the relief of permanent injunction in respect of A-schedule property?

(4) Whether the plaintiff is entitled to the relief of declaration in respect of the third floor?

(5) Whether the plaintiff is entitled to recovery of possession in respect of the B- schedule property?

(6) Whether the plaintiff is entitled to the relief of delivery of possession in respect of B-schedule property?

(7) To what other relief, the plaintiff is entitled to?

6. During trial, on the side of the plaintiff, he himself was examined as P.W.1 and Ex.A.1 to A.10 were marked and on the side of the defendants, 1st defendant was examined himself as D.W.1 and one Mr.A.G.Suryanarayanan, the Power of Attorney Agent of the 2nd defendant , was examined as D.W.2 and Ex.B.1 to B.14 were marked.

7. After having considered the available evidences, both oral and documentary, the trial court had come to a conclusion that the plaintiff had voluntarily surrendered the possession of the suit B-schedule property measuring an extent of 543 square feet in the year 2003 and thereafter, he remained to be in possession as tenant only in respect of the rear portion of the suit A-schedule property measuring to an extent of 915 square feet. The trial court had further held that the plaintiff as P.W.1 in his evidence had categorically stated that he had handed over possession of the property in the year 2003 to the 1st defendant and till 2012 he had not taken any steps to recover the possession and the 1st defendant has been running his travel agency business in the suit B-schedule property. Having held so, the trial court had concluded that after having voluntarily surrendered the possession of the property, the plaintiff could not seek declaration and recovery of possession and dismissed the suit. Aggrieved over the same, the plaintiff preferred an appeal and the first appellate court concurring with the findings of the trial court has dismissed the appeal suit. Hence, the unsuccessful plaintiff is before this court with the instant second appeal raising the following substantial questions of law:-

1. Whether the courts below substantially erred in law in not placing the burden of proof on the 1st respondent to show that the appellant surrendered possession of B-schedule portion of A-schedule property in the context of the specific plea in the written statement that appellant surrendered possession of B-schedule portion of A-schedule property to the 1st respondent?

2. Whether the first Appellate court substantially erred in law in rendering the finding only on the assumption that failure on the part of the appellant to initiate action soon after the marriage indicates that appellant intended to surrender tenancy right with respect to B-schedule portion of A-schedule property?

3. Whether the finding given by both the courts below that appellant surrendered possession of B-schedule portion of the A-schedule property without evidence as to the intention on the part of the appellant not to continue the tenancy in respect of B-schedule property is perverse?

4. Whether the finding given by the courts below that appellant surrendered possession of B-schedule portion of A-schedule property by overlooking the evidence that even after the 1st respondent's occupation of the B-schedule portion, appellant paid the same rent fixed for the entire A-schedule property is perverse?

5. Whether the courts below substantially erred in law in not following the principle of preponderance of probabilities and in not drawing adverse inference against the 1st respondent in his not refuting the contents of Ex.A.4 till the date of suit?

6. Whether the first Appellate Court substantially erred in law in misdirecting itself in answering whether the appellant's permission given to the 1st respondent to occupy B-schedule portion of A-schedule property was a voluntary act instead of answering whether the nature of possession given to the 1st respondent was to put an end to the tenancy in respect of B-schedule property?

8. Today, this second appeal has come up before this court for admission. I have heard the learned counsel for the appellant, the learned counsel for the 1st respondent and the learned counsel for the 2nd respondent and also perused the records carefully.

9. The learned counsel for the appellant would submit that the appellant did not surrender the possession of the B-schedule property voluntarily and it was handed over only for a temporary purpose for conducting ceremonies relating to the marriage of the 1st defendant's son. When the possession was not voluntarily

surrendered and it was handed over only for a temporary purpose of the land lord and at any rate, it would not amount to surrendering of possession .

10. The learned counsel for the appellant further submitted that in the subsequent proceedings initiated by both the parties also, the entire A schedule property was in dispute and that the appellant has been paying rent in respect of the entire A-schedule property. However, both the case below without considering the materials have erroneously held against the appellant and thereby dismissed his claim.

11. The learned counsel for the 1st respondent would contend that in the year 2003 B-schedule property was voluntarily surrendered by the appellant to the 1st respondent for running his travel agency and thereafter, it is the 1st respondent, who has been in possession and carrying on his business with the knowledge of the appellant who has been in occupation of the remaining rear portion of the A-schedule property and the appellant had not taken any steps for recovering possession of the disputed portion. Only after the property had been sold to the 2nd defendant, the present suit came to be filed with a malafide intention. In the subsequent proceedings initiated by the respective parties also only an extent of 915 square feet which is the remaining rear portion of the A-schedule property was in dispute and in so far as the B- schedule property is concerned, the same was treated being the property of the 1st respondent and after have purchased the property, the 2nd defendant has been in possession of the same as absolute owner. The findings recorded by the courts below are based on facts and there is no question of law is involved for admission of the second appeal and therefore, he prayed to dismiss the second appeal in limine.

12. I have considered the rival submissions carefully.

13. The total extent of the A-schedule property is 1458 square feet. Admittedly, it was leased out to the father of the appellant in the year 1958 for a period of six years and in the month of August, 1964, the leased got expired and thereafter, it was not renewed. However, the father of the appellant was in possession of the property as a tenant and after his death, the appellant was continued to be in possession.

14. Admittedly, in the year 2003, an extent of 553 square feet being portion of A-schedule property was handed over to the 1st respondent. It is the case of the plaintiff that, at request, the possession of the same was handed over to the 1st respondent for a temporary purpose for conducting ceremonies in connection with the marriage of his son and he never surrendered

the possession voluntarily and he continued to pay rent for the entire extent of A-schedule property. The appellant continued the statutory tenant in respect of the entire A-schedule property. Since possession was handed over for temporary purpose, the appellant is entitled to seek for recovery of possession.

15. But, the contention of the 1st respondent is that the suit B-schedule property was voluntarily surrendered to the 1st respondent in the year 2003 for the purpose of running a travel agency by the 1st respondent in the B-schedule property and right from the year 2003, till the property was sold out in the year 2011, he was in possession of the property and carrying on business to the knowledge of the appellant. For nearly 9 years, the appellant had not taken any steps to recover the possession, if it had been handed over for temporary purpose, he would have taken steps for recovery of possession of the same. Only after the property was sold out to the 2nd respondent, the suit came to be filed with a malafide intention. Further, according to the 1st respondent, in the earlier rent control proceedings also the dispute was only in respect of the rear portion measuring to an extent of 915 square feet in the A-schedule property and the possession in respect of B-schedule property was never disputed by the appellant.

16. Now, the only question that arises for consideration is whether handing over possession by the plaintiff to the 1st respondent was voluntary or for temporary occupation of the 1st respondent. It is an admitted case that in the year 2003, the possession of the suit B-schedule property was handed over by the appellant to the 1st respondent. The appellant in his evidence had admitted that he was in possession of an extent of 915 square feet in A-schedule property and in the year 2003, he had handed over the possession to the 1st respondent and since the 1st respondent had not sold the property to him, he filed the present suit. The relevant portion of the evidence of the appellant (P.W.1) reads thus:-

“நான் தற்போது தாவா பி அட்டவணை சொத்தை தவிர குறைந்தபட்சம் 915 சதுர அடியில் நான் உள்ளேன். மேற்குறிப்பிட்ட 915 அடி சதுர இடத்தில் 2003ம் வருடத்திலிருந்து நான் இருந்து வருகிறேன். 2003ம் வருடத்தில் முதல் பிரதிவாதியிடம் அவருடைய மகனின் திருமணத்திற்காக அவர் கேட்டுக்கொண்டதால் நான் தற்காலிக உபயோகத்திற்காக அவரிடம் அட்டவணை பி சொத்தின் முன் பகுதியை காலி சுவாதீனம் கொடுத்தேன். நான் தற்சமயம் இந்த வழக்கை தாக்கல் செய்வதற்கு காரணம் என்னவென்றால் முதல் பிரதிவாதி எனக்கு சொத்தினை விற்பதாக கூறி அதனை விற்காததனால் எங்களை ஏமாற்றியதால் நான் இந்த வழக்கை தாக்கல் செய்துள்ளேன்,”

17. It is also admitted by the appellant (P.W.1) in his evidence that he is fully aware of the fact that the 1st

defendant was running his travel agency in the suit B-schedule property. That apart, even though the appellant had initiated a proceeding under the Rent Control Act for deposit of rent for the entire extent of the property, due to compromise reached between the parties, the RCOP came to be withdrawn by the appellant. In the subsequent suit filed by the 2nd defendant in O.S.No.7524 of 2008 for bare injunction the suit property was being described as 950 square feet and the suit was also decreed. From the year 2003 till 2012, admittedly, the appellant did not take any steps for taking possession. The appellant had admitted that he filed the suit only after the property was sold to the 2nd respondent. Had the portion of the B-schedule property was handed over to the 1st defendant (landlord) for temporary occupation as alleged in the plaint, after the 1st defendant having started running his travel agency in the disputed B- schedule property, the appellant would have objected to it and initiated proceedings immediately for recovery of possession, but, he had kept quiet till 2012. After having considered all these factual aspects, both the courts below have concurrently held that the appellant had voluntarily surrendered the possession of the B-schedule property to the 1st respondent in which this court does not find any perversity or infirmity warranting interference and there is no question of law involved in this second appeal much less the substantial question of law for admission of the second appeal. Thus, the second appeal deserves only to be dismissed.

18. In the result, this second appeal is dismissed and the judgement and decree of both the courts below are confirmed. No costs.

Sd/-
Assistant Registrar(CS III)

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Sub Assistant Registrar

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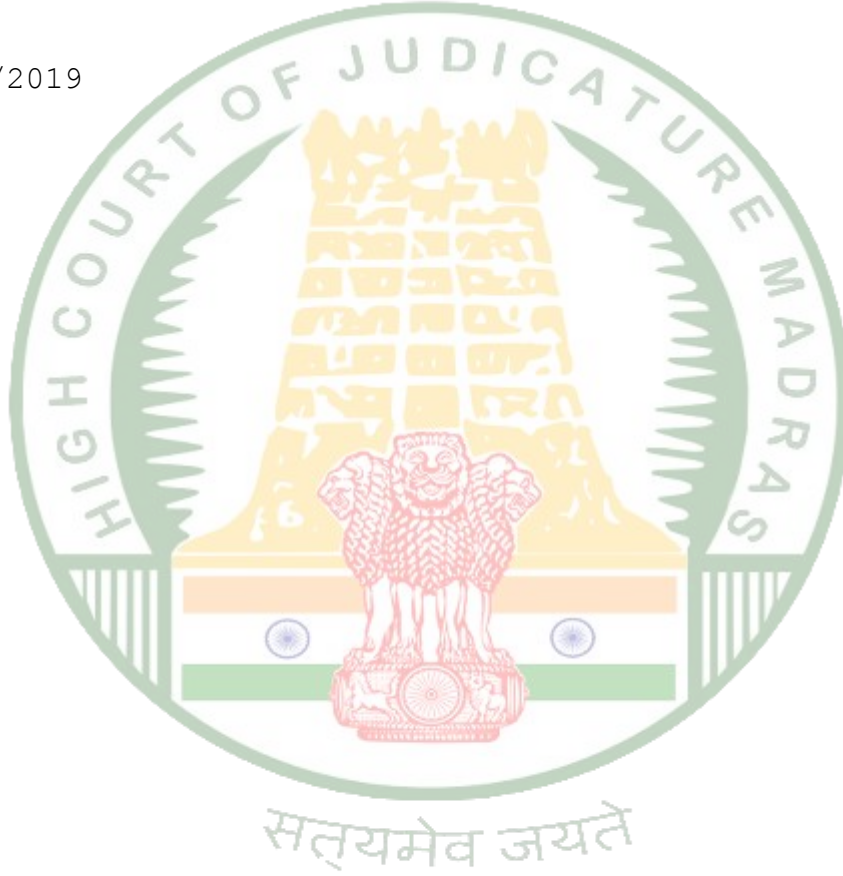
1.The Additional Judge,
City Civil Court,
Chennai.

2.The XV Assistant Judge,
City Civil Court, Chennai.

+1c cto Mr.A.Babu, Advocate Sr.28517
+1cc to Mr.A.C.Kumaragurubaran, Advocate Sr.28918
+1cc to M/S.Surana & Surana, Advocate Sr.28337

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