



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 22.03.2019

Delivered on:
23.05.2019

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THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.232 of 2013
and
M.P. Nos.1 & 2 of 2013

K.Mahalakshmi

... Appellant/Defendant

Vs.

B.Yamuna

... Respondent/Plaintiff

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 06.11.2012 in A.S.No.407 of 2010 on the file of the II Additional City Civil Court at Chennai, confirming the judgment and decree dated 12.04.2010 in O.S.No.2887 of 2003 passed by the learned XIV Assistant City Civil Judge, Madras.

For Appellant : Mr.I.C.Vasudevan

For Respondent : Mr.A.K.Raghavulu

JUDGMENT

This second appeal has been filed by the defendant against the judgment and decree passed by the II Additional Judge, City Civil Court, Chennai in A.S.No.407 of 2010 confirming the judgment and decree passed by the XIV Assistant Judge, City Civil Court, Chennai in O.S.No.2887 of 2003 dated 12.04.2010.

2. The respondent herein had filed a suit in O.S.No.2887 of 2003 on the file of the XIV Assistant Judge, City Civil Court, Chennai for permanent injunction restraining the defendant, her men, etc., from subletting or leasing out any portions of the suit property to any persons; for permanent injunction restraining the defendant, her men, etc., from collecting the rent from the tenants; for mandatory injunction directing the defendant to remove her things and vacate and deliver vacant possession of the schedule property; to direct the defendant to render accounts with regard to the collection of rent by her from the date of death of the plaintiff's father up to the date of delivery of vacant possession and pay the



plaintiff the said rental income as may be ascertained; and to direct the defendant to pay damages for use and occupation of the suit property at the rate of Rs.15000/- per month from the date of plaint till the date of delivery of vacant possession.

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3. The learned XIV Assistant Judge, by the judgment dated 12.04.2010 decreed the suit for as prayed with cost and directed the defendant to deliver vacant possession of the suit property within two months from the date of the judgment and order for separate enquiry with regard to quantum of damages. Aggrieved by the same, the defendant had filed an appeal in A.S.No.407 of 2010 on the file of the II Additional Judge, City Civil Court, Chennai. The learned II Additional Judge, by the judgment dated 06.11.2012 had dismissed the said appeal and confirmed the judgment and decree passed by the trial Court. Feeling aggrieved, the defendant has filed the present Second Appeal.

4. For the sake of convenience, the parties are referred to as described before the trial Court.

5. The averments made in the plaint are in brief as follows:-

The plaintiff is the absolute owner of the suit property by virtue of registered sale deed dated 23.03.1994. The plaintiff appointed the defendant as manager of the property. Initially, the defendant had collected rent from the tenants and sent to the plaintiff. Subsequently, the defendant without permission of the plaintiff had occupied some portions of the property and for which no rent is being paid. Though the defendant is collecting rent from other tenants she is paying only a part of the amount and the balance is retained by her. The defendant is owning her property adjacent to the suit property. Since the tenants are occupying the portion of the property and refused to pay rent and the defendant also after collecting rent from other tenants refused to pay, the plaintiff had issued a lawyer's notice dated 05.05.2003 revoking the permission given to the defendant and demanded for delivery of possession and also not to collect the rent from the tenants. In spite of the same, she collected the rent from the tenants. Further she is attempting to sublet the property to third persons. Hence, the plaintiff was constrained to file the above suit for the said relief.

6. The averments made in the written statement are in brief as follows:-

(a) The schedule property bearing Door.No.714, Poonamallee High Road, Chennai 29, originally belonged to one T.S.Mani, and the said property was purchased by the plaintiff and the



defendant (who are sisters) by way of two registered sale deeds dated 23.03.1994. The defendant was not appointed as the manager of the property as alleged for collecting the rents and sending the same to the plaintiff. On the contrary, after the purchase of the suit property the defendant invested her funds and also borrowed from various sources for putting up construction in the suit property which was completed in the year 1999. The plaintiff is well aware about the investments made by the defendant and had approved of the same by stating that she did not possess funds to contribute for the development of the suit property. As such, the averment that the defendant had occupied some portion of the property without permission and without payment of rent is not true.

(b) The defendant is living in the first floor of the suit property and she is carrying on business in two shops in the ground floor. The other two shops in the ground floor are lying vacant from 1998 when the construction was completed. The rents collected from the tenants occupying the second floor was used for purpose of maintaining the property and for payment of the taxes due on the property. Any balance amount less was paid to the plaintiff proportionately. This practice also followed by the defendant with the approval of the plaintiff from 1998 and it is now all of a sudden that the plaintiff has made wild allegations against the defendant as though the defendant has been collecting and usurping for herself all the money all these years. Further, the building put up in the suit property which is jointly owned by both the plaintiff and the defendant was constructed by the defendant and no demarcation of the building had been done marking out portions of each owner. As such the allegations of the plaintiff that the defendant is occupying other residential portions is not true. The records maintained by the Statutory Authorities like the Corporation, Electricity Board and Metro Water Authorities show that the plaintiff and defendant as the owners of the suit property. The defendant had caused a legal notice dated 02.05.2003 on the plaintiff calling upon the plaintiff to remove the lock illegally put up in a portion in the second floor of the suit property by her husband. The said notice was returned unserved. Coming to know that the defendant had caused the issue of the legal notice, the plaintiff through her counsel caused a legal notice dated 05.05.2003 alleging untrue facts against the defendant. The defendant had been in charge of the property collecting rents; paying the taxes and maintaining the property. As such the plaintiff cannot without any proof direct the defendant to stop collecting rents from tenants.

(c) The defendant is also owner of the property and the plaintiff is well aware that all these years the defendant had



been managing the property without any objection from the plaintiff. The suit for permanent injunction is not maintainable against co-owner. The plaintiff has not asked for the relief for recovery of arrears of rent. All the records would show that the plaintiff and the defendant are owners and there has been no division of the structure in the suit property by metes and bounds. As such the claim of the plaintiff cannot be looked into and the relief sought for cannot be granted. The plaintiff is not aware of even the physical structure of the building, the portions in the building and the tenants in occupation. The plaintiff has not come to the Court with true facts and as there is delay on her part in seeking relief, the suit filed by her is barred by limitation and therefore, the defendant prayed to dismiss the suit.

7. The averments made in the additional written statement are in brief as follows:-

As already stated in the written statement, the plaintiff and the defendant are co-owners of the property. The defendant had invested hugely for the construction of the property as agreed upon as it could be evinced from the documentary proof. Simply to distract the Court, the plaintiff had averred that the defendant was appointed as a manager and was permitted to live and she has gone to an extent to aver that the defendant was considered as a Trustee of the property which itself clearly proves the entire averments are farfetched and against the truth. Only to avoid the construction cost rendered by the defendant, the plaintiff had filed the above suit. As already stated the possession earmarked by the plaintiff is in her custody only. It is really astonishing why the plaintiff has sought for possessory rights to misguide the Court and as the defendant is the co-owner of the property she has got all vested rights equally as the plaintiff has got. Hence, the question of handing over of the suit property and rendition of accounts not at all arose. The suit for recovery of vacant possession is only to distract the Court as the possession is already in the enjoyment of the defendant and the plaintiff had never collected any rental income from the the tenants of the property. Therefore, the defendant prayed to dismiss the suit.

8. Based on the aforesaid pleadings, the learned Assistant Judge, had framed necessary issues, and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined her husband as PW1 and thereafter, she examined herself as PW2. She has marked Ex.A1 to Ex.A6 as exhibits. On the side of the defendant, the defendant examined herself as DW1 and also examined her husband as DW2. She had marked Ex.B1 to Ex.B5 as exhibits.



9. The learned XIV Assistant Judge, after considering the materials placed before him found that the defendant failed to prove that she had demolished the old house which was already in existence in the suit property and put up a new construction. He further found that since the defendant had admitted that she is in possession of the suit property, she is bound to deliver vacant possession of the suit property. Accordingly, he decreed the suit as prayed for with costs and directed the defendant to deliver of vacant possession within two months and with regard to the quantum of damages he ordered for separate enquiry. Aggrieved by the same, the defendant had filed an appeal in A.S.No.407 of 2010 on the file of the II Additional Judge, City Civil Court, Chennai. The II Additional Judge City Civil Court, Chennai had dismissed the said appeal and confirmed the judgment and decree passed by the trial Court. Feeling aggrieved, the defendant has filed the second appeal.

10. This Court, at the time of admitting the second appeal, has formulated the following substantial questions of law:-

"1. Whether the Courts below are correct in decreeing the suit when the plaintiff has not pleaded and proved that the plaintiff constructed the superstructure in the property?

2. Whether the suit is bad for non-joinder of tenants in the suit building who are ultimately the persons who are likely to be affected?

3. Whether the suit for bare injunction without the relief of declaration is maintainable when the title of plaintiff with regard to superstructure is disputed?"

11. Heard, Mr.I.C.Vasudevan, the learned counsel for the appellant and Mr.A.K.Raghavulu learned counsel for the respondent.

12. The Substantial questions of law 1 to 3:

The learned counsel for the appellant/defendant has submitted that the Courts below failed to see that the relief of delivery of possession cannot be granted in a suit for mandatory injunction. He further submitted that when the



defendant has proved by oral and documentary evidence that she has demolished the old building and constructed the new building, without seeking relief for declaration of title, the suit for delivery of possession is not maintainable. He further submitted that the Courts below failed to see that the tenants were not impleaded as parties, who are all entitled to the protection under the Rent Control Act. He further submitted that the Courts below failed to consider that the suit has not been properly valued for the purpose of the Court fee and jurisdiction.

13. He further submitted that the Courts below failed to see that the plaintiff has failed to prove that the defendant had undertaken to maintain or administer the property for and on behalf of the plaintiff and as such, the defendant is not bound to render any accounts. He further submitted that since the building has been constructed by the defendant, she is also a co-owner and as such no injunction can be granted against the co-owner. He further submitted that the Courts below failed to see that the plaintiff ought to have filed the suit for partition and without filing the suit for partition, the suit was merely filed for bare injunction is not maintainable. He further submitted that the suit property has not been demarcated and as such the relief of permanent injunction cannot be granted.

14. He further submitted that the Courts below failed to see that the defendant is entitled for the improvement made to the property as per the Section 41 of Transfer of Property Act. He further submitted that the Courts below failed to see that the 60 years old building in the suit property was demolished and new building was put up by the defendant and the same was not denied by the plaintiff. He further submitted that the plaintiff has examined her husband as PW1 without getting any permission from the Court as contemplated under Order 18 Rule 3 of CPC and thereafter examined herself as PW2 and as such, the evidence of PW1 has to be eschewed. He further submitted that PW1's evidence is eschewed that there is no oral evidence to prove the contention of the plaintiff's averments and hence, the Courts below ought to have dismissed the suit and therefore, he prayed to allow the Second Appeal and set aside the judgments and decrees passed by the Courts below and dismiss the suit.

15. The learned counsel for the appellant in support of the aforesaid contentions relied upon the following decisions:-

- 1) In Gnanasekaran Vs. Mani, 2005-4-L.W. 246.



2) In R.S.Muthuswami Gounder, Vs. A.Annamalai and others, AIR 1981 Mad 220.

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3) In Veerappa Gounder and others, Vs. Senniappan and others, CRP (PD).No.4215 of 2008 on the file of this Court dated 13.02.2009.

16. Per contra, the learned counsel for the respondent/plaintiff has submitted that the defendant is in possession of the suit property only as a licensee and the said license has been duly revoked by the plaintiff by giving notice and hence, the suit for mandatory injunction is maintainable. He further submitted that the defendant failed to prove that she had demolished the old building and constructed the new building. He further submitted that with regard to the Court fee, the defendant has not raised any objection in the written statement. He further submitted that as per Section 12 of the Tamil Nadu Court Fees and Suits Valuation Act, the defendant has to raise the objection with regard to the Court fees in the written statement itself and if any such defense is raised, the Court has to decide the said issue before deciding the suit on merit as a preliminary issue but in this case, the defendant has not raised any such plea in the written statement and hence, She is not entitled to raise the said question for the first time in the second appeal.

17. He further submitted that that the defendant has not raised any plea in the written statement with regard to non-joinder of tenants as parties and hence, she is not entitled to raise the said question for the first time in the second appeal. He further submitted that on the side of the plaintiff, her husband was examined as PW1 and thereafter, the plaintiff examined herself as PW2 and at the time of examining the plaintiff as PW2, the defendant has not raised the said point before the first Appellate Court also. Under the said circumstances, the defendant is not entitled to raise the said question for the first time in the second appeal. He further submitted that the trial Court after taking into consideration of the materials placed before it had rightly decreed the suit as prayed for and same has been confirmed by the first Appellate Court and in the said factual concurrent findings, this Court cannot interfere and therefore, he prayed to dismiss the second appeal.

18. The learned counsel for the respondent/plaintiff in support of the aforesaid contention, he relied upon the following decisions:



- 1) In Sant Lal Jain Vs. Avtar Singh, AIR 1985 SC 857.
- 2) In Chandrasekaran Vs. Thagattur Anna Chatram Vinayagar Mutt, Thaneerpandal Dharmam and others, 2017-2-LW 501.
- 3) In Aspinwall & Co., Ltd., Vs.Soudamini Amma, 1974 KHC 156.

19. It is an admitted fact that the defendant is the own sister of the plaintiff. It is also an admitted fact that on 23.03.1994 under the original of Ex.A3, the defendant had purchased 575 sq.ft., of land with building on the north of the plaintiff's property from one T.S.Mani @ T.Subramani. On the same day, the plaintiff under the original Ex.A1 sale deed, had purchased 575 sq.ft., land with building thereon from the same T.S.Mani @ T.Subramani and the said property is situated on the south of the defendant's property.

20. According to the plaintiff, after the said purchase, her father was looking after her property and he was collecting the rent from the tenants and paid to her. Her further case is that after the death of her father, she appointed the defendant as her manager and she was collecting the rent from the tenants and further she occupied certain portion's of the suit property purely by way of license. Her further case is that since the defendant is not paying any rent for the portion which is in her occupation, and also not giving accounts for the rent collected from the tenants and also trying to lease out the suit property to the third parties, she revoked the license by issuing lawyer's notice dated 05.05.2003 and filed the suit for permanent injunction and mandatory injunction.

21. The case of the defendant is that after purchase, she demolished the old building which was in existence in the plaintiff's property and also in her property and constructed a common three stored building by investing huge money and also borrowing amount from various source and the plaintiff is well aware of the said facts. Her further case is that taking into consideration of the fact that she had constructed the existing building, the plaintiff has not raised any objection while she occupied portions of the suit property.

22. Her further case is that she only leased out the property to the third parties and collected the rent and the said amount has been utilized for the purpose of maintaining the property and for payment of tax due on the property and if any balance amount was available that was paid to the plaintiff



proportionately. Her further case is that since she constructed the building she is also a co-owner and hence, injunction cannot be granted against her.

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23. Since the defendant has pleaded that old building demolished and constructed the new building by spending huge amount out of her funds and also by borrowing amount from the others, the burden is upon her to prove the said facts. Admittedly, the suit property is situated within the city limit and as such, for demolition of the existing building and also for construction of the new building permission should have been obtained from the municipal corporation and also from the Chennai Metropolitan Development Authority. In this case, the defendant has not produced any documentary evidence to show that she has obtained any permission before demolition of the old building and for construction of the new building from the concerned authority. Further she has not produced any accounts to show that she had spend any amount for the aforesaid construction. Even assuming that she constructed the existing building, that should be only on behalf of the plaintiff and as such, at the most, she can ask for reimbursement of the amount which was spent by her. In this case, she has not made any counter claim for recovery of the amount from the plaintiff.

24. It is to be pointed out that in para No.5 of the written statement, and also in the additional written statement, the defendant has stated that the rents received from the tenants occupying the second floor was used for the purpose of maintaining the property and for payment of the taxes due on the property. She further stated that any balance amount left was paid to the plaintiff proportionately and the practice has been followed by the defendant with the approval of the plaintiff from 1999. From the aforesaid statement also it is clear that the defendant has paid the balance amount of the rent to the plaintiff after deducting the amount which was spent for the maintenance of the property and taxes paid by her. She has not stated that she utilized the rental amount towards the amount which has been spent by her for construction of the building. If really she had constructed the building, she would have deducted the amount which was collected from the tenants towards expenses spent by her for construction.

25. It is also to be pointed out that in para-10 of the additional written statement, the defendant has stated that as already the possession earmarked by the plaintiff is in her custody only, it is really astonishing why the plaintiff has sought for possessory right. She further stated that the suit for recovery of vacant possession is only to distract the Court



as the possession is with the plaintiff and the defendant had never collected any rental income from the plaintiff's property. The aforesaid statement is contrary to the plea taken in the main written statement. In the main written statement the defendant has stated that the rent which was collected from the tenants have been utilized for maintenance of the property and for paying taxes and thereafter, if any balance amount is available and the same was paid to the plaintiff proportionately. Whereas, in the additional written statement in para No.10, she has taken a plea totally contrary to the plea taken in the main written statement and pleaded that the possession is with the plaintiff and the defendant has not collected any rent from the tenants.

26. According to the plaintiff, she has issued a lawyer's notice dated 05.05.2003 revoking the license which was given to the defendant to collect the rent from the tenants. She has produced a copy of the said notice and postal acknowledgment signed by the defendant and marked as Ex.A5. The defendant has admitted in her written statement that she has received the said notice. But she has not sent any reply denying the averments made in the said notice. On the contrary, she has stated in her written statement that she had sent a lawyer's notice on 02.05.2003 and called upon the plaintiff to remove the lock illegally put up in a portion in the second floor of the suit property by her husband and the same was returned unserved. Coming to know the said fact, the plaintiff has issued lawyer's notice but she has not produced the alleged notice dated 02.05.2003 and the returned cover before the Court and marked as exhibits. Therefore, the contention of the defendant that she had issued a lawyer's notice dated 02.05.2003 and the same was returned and only after knowing the said fact, the plaintiff has issued Ex.A5 notice cannot be accepted.

27. In Gnanasekaran Vs. Mani, (cited supra) this Court has held that in para Nos: 4 and 5 as follows:-

"4. This Court is of the considered opinion that this revision itself does not require even an admission either, or a notice to be issued to the respondent/defendant for the simple reason that a reading of the plaint would clearly indicate that what was the relief sought for by the plaintiff was one for recovery of possession of an immovable property from the hands of the defendant. Under the circumstances, the framing of the suit as one for mandatory injunction directing the defendant to hand over possession of the property, if allowed,



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all suits for recovery of possession of an immovable property will be filed with a relief of mandatory injunction. Apart from that, it would be appropriate to reproduce the provisions of Sec. 27 of Court Fees Act. Sec. 27 reads thus:

"27. Suits for Injunction: In a suit for injunction-

(a) Where the relief sought is with reference to any immovable property, and

(i) Where the plaintiff alleges that his title to the property is denied, or

(ii) Where an issue is framed regarding the plaintiff's title to the property, fee shall be computed on one-half of the market value of the property or on rupees seven hundred and fifty, whichever is higher.

(b)

(c) In any other case, where the subject-matter of the suit has a market value or not, fee shall be computed on the amount at which the relief sought is valued in the plaint or on rupees one thousand, whichever is higher."

5. A reading of the above provisions of Sec. 27(c) would clearly reveal that otherwise cases are provided therefor. In the instant case, it can be stated that the Court Fee is expected to be paid under Sec. 30 of the Act, as rightly found by the learned Subordinate Judge. Under the circumstances, it is a fit case where the Court Fee for Rs. 1,83,125/- as found by the Court Fee Examiner of this Court, has got to be paid, and if to be so, the District Munsif cannot entertain the suit in view of the pecuniary jurisdiction, and thus, he has rightly returned the plaint on that ground. This Court is unable to notice any reason to entertain the revision petition."

28. In Sant Lal Jain Vs. Avtar Singh, (cited supra) the Hon'ble Supreme Court in para Nos:6 and 7 has observed as follows:-

"6. Now the parties are bound by the following factual findings recorded by the learned Additional District Judge in the first appeal namely: (1) that the appellant who had become the sole proprietor of M/s Jain Motors in 1967 through at the time of the



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lease of the property by the original owner Lt. Col. Sadan Singh to M/s Jain Motors in 1963 he was only one of its partners, was the lessee of the property; (2) that the respondent had become a licensee of the suit shed under the appellant when the appellant was in possession of the whole of the demised premises including the suit shed as tenant under the original owner; (3) that the licence in favour of the respondent had been revoked before the institution of the present suit and (4) that subsequent to the decision in the first appeal on 7.12.1978, the respondent had purchased the entire property from the original owner by a sale-deed dated 27.8.1979. In these circumstances, there, is no merger of the lease of the whole property by its original owner in favour of the appellant by reason of the sale of the entire property by the original owner in favour of the respondent or of the licence given by the appellant to the respondent which had been revoked prior to the date of the suit. The lease in favour of the appellant continues, and it is not disputed that under the Act of 1949 referred to above, even the tenant of a vacant land in Patiala town cannot be evicted therefrom except in accordance with the provisions of that Act. In K.K. Verma & Anr. v. Union of India AIR 1954 Bom 358, Chagla, C.J. presiding over a Division Bench has observed that in India a landlord can only eject his erstwhile tenant by recourse to law and by obtaining a decree for ejectment. In Milkha Singh v. Diana AIR 1964 J & K 99, it has been observed that the principle once a licensee always a licensee would apply to all kinds of licences and that it cannot be said that the moment the licence is terminated, the licensee's possession becomes that of a trespasser. In that case, one of us (Murtaza Fazal Ali, J.) as he then was speaking for the Division Bench has observed:

"After the termination of licence, the licensee is under clear obligation to surrender his possession to the owner and if he fails to do so, we do not see any reason why the licensee cannot be compelled to discharge this obligation by way of a mandatory injunction under s. 55 of the Specific Relief Act. We might further mention that even under English law a suit for injunction to evict a licensee has always been held to be maintainable.

Where a licensor approaches the court for an injunction within a reasonable time after the licence is terminated, he is entitled to the injunction. On the other hand, if the licensor causes huge delay the court may refuse the discretion to grant an injunction on the



7. In the present case it has not been shown to us that the appellant had come to the court with the suit for mandatory injunction after any considerable delay which will disentitle him to the discretionary relief. Even if there was some delay, we think that in a case of this kind attempt should be made to avoid multiplicity of suits and the licensor should not be driven to file another round of suit with all the attendant delay, trouble and expense. 1 he suit is in effect one for possession though couched in the form of a suit for mandatory injunction as what would be given to the plaintiff in case he succeeds is possession of the property to which he may be found to be entitled. therefore, we are of the opinion that the appellant should not be denied relief merely because he had couched the plaint in the form of a suit for mandatory injunction."

30. The aforesaid decision of the Hon'ble Supreme Court has been followed by this Court in Chandrasekaran Vs. Thagattur Anna Chatram Vinayagar Mutt, Thanneerpandal Dharmam and others, (cited supra) and held that the suit for mandatory injunction for the relief of recovery of possession is maintainable.



31. In Aspinwall & Co., Ltd., Vs.Soudamini Amma, (cited supra) a Division Bench of the Kerala High Court has held that the suit for recovery of possession has to be filed only if the defendants are to be evicted as a trespasser. In this case, it is not the case of the defendant that she is in possession of the property as a trespasser and in the said circumstances, the suit for recovery of possession need not be filed. The defendant is in possession of the property only as a licensee and after termination of the said license, mere filing of the suit for mandatory injunction is sufficient for recovery of possession.

32. In R.S.Muthuswami Gounder Vs. A.Annamalai and others, (cited supra), the plaintiff filed a suit for declaration of his title to the suit property and for recovery of vacant possession of the same and also for a mandatory injunction directing the demolition of the superstructure put up on the property by the first defendant and for damages. The first defendant contested the suit by stating that he is a bonafide purchaser for value of the property and he has put up the construction on the suit property in the year 1970 and the plaintiff did not raise any objection until February 1972 and after nearly 2 ½ years, the plaintiff filed the suit for vacant possession. The trial Court and the first Appellate Court had rejected the claim of the plaintiff. In the Second Appeal, this Court taking into consideration of the concurrent findings of the Courts below and also the fact that the conduct of the plaintiff would clearly show that he has acquiesced the acts of the first defendant, this Court has held that though there may be a mistake on the part of the first defendant, the plaintiff is not entitled for delivery of vacant possession of the land but he would be entitled to receive only, compensation at the prevailing market rate.

33. Whereas, in this case, as already pointed out that it is not the case of the defendant that she trespassed into the suit property and put up any construction. Her case is that she demolished the existing building and put up a new construction and even after construction, she is collecting the rent from the tenants and after deducting the expenses for maintenance and payment of tax, the balance amount if any was paid to the plaintiff proportionately. Therefore, the aforesaid decision will not help the defendant.

34. In the written statement and also in the additional written statement, the defendant has not specifically pleaded that the suit is bad for non-joinder of the tenants as parties. As per Order 1 Rule 13 of CPC, the plea as to non-joinder of



parties or mis-joinder of parties has to be taken at the earliest time of point. If any such plea has been taken, the plaintiff would have taken steps to implead the tenants as parties. Without taking such plea in the trial Court, it is not open to the defendant for the first time to take such a plea in the Second Appeal. Further, the defendant is in possession of the suit property only as a licensee/manager of the plaintiff and in the said dispute, the tenants need not be impleaded as parties. If the defendant is evicted, the tenants can directly accept the plaintiff as their landlord and pay the rent directly to her. Therefore, the contention of the appellant that the suit is bad for non-joinder of the tenants as parties cannot be accepted.

35. In Veerappa Gounder and others Vs. Senniappan and others, (cited supra), during trial, on the side of the defendants, three witnesses were examined as DW1 to DW3 and thereafter, the third defendant has filed chief examination affidavit as DW4. The plaintiff filed an application in I.A.No.104 of 2008 for eschewing the chief examination affidavit of D3 as DW4. The trial Court allowed the said application. Being aggrieved by the said order, the defendants filed a Civil Revision Petition, before this Court. This Court has observed that taking into consideration of the fact that after filing of the chief examination affidavit of D3, no cross examination was conducted, the trial Court could have directed the party to file necessary application under Order 18 Rule 3A of CPC, seeking permission, but without following the said procedure, it allowed the application filed by the plaintiffs and eschewed the chief examination of D3. This Court, disposed of the said revision petition by giving liberty to the defendant to file an application under Order 18 Rule 3A of CPC and if any such application is filed, the trial Court has to decide the said application on merit and thereafter proceed further in accordance with law.

36. At this juncture, it would be relevant to refer to Order 18 Rule 3 A of CPC which reads thus:-

"3A. Party to appear before other witnesses.—Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage."

37. A plain reading of the aforesaid provision would show that there is no compulsion for examining any party as a witness but if a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been



examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage.

38. In this case, the plaintiff's husband was examined as PW1 and subsequently, the plaintiff examined herself as PW2. As per the aforesaid provision, no permission is necessary for examining the plaintiff's husband as PW1. But after examination of her husband as PW1, the plaintiff has chosen to examine herself as PW2. Hence, she should have obtained permission from the Court. In this case, she has not obtained any permission for appearing herself as witness at a later stage and in such a case at the most, the defendant can oppose for examination of the plaintiff as PW2, but she cannot contend that the evidence of PW1 to be eschewed. Further, at the time of examining the plaintiff as PW2 it appears that the defendant has not raised any objection. If she had raised any such objection, in view of the aforesaid decision of this Court, the plaintiff would have filed an application under Order 18 Rule 3A of CPC seeking permission of the Court, but the defendant has not raised any objection and therefore, for the first time before the Second Appeal, the defendant cannot raise such a plea. Therefore, the aforesaid decision will not help the appellant/defendant.

39. Insofar as the contention of the learned counsel for the appellant/defendant that there is no demarcation between the properties of the plaintiff and the defendant and as such delivery of possession cannot be given is concerned, it is for the Executing Court to decide whether the property can be delivered or not and the said question is left open to the decision of the Executing Court.

40. For the aforesaid reasons, this court is of the view that the courts below after taking into consideration of the entire materials on record concurrently found that the plaintiff is entitled for the relief of delivery of possession and in the said factual concurrent findings, this court cannot interfere. Accordingly, the substantial questions of law are answered against the appellant.

41. In the result, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petitions are also closed.

Sd/-

Assistant Registrar (CS-IV)

//True copy//

Sub Assistant Registrar

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To

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

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

S.A.No.232 of 2013 and
M.P. No.1 & 2 of 2013

RR(CO)
GMY(25/11/2019)