

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.07.2019

PRONOUNCED ON : 06.09.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.147 of 2016
and
CMP NO. 2961 of 2016

Arulmighu Virubatcheeswarar
Thirukkoil
A Hindu Religious Temple under the control
and supervision of Hindu Religious and
Charitable Endowment Department
Rep. by its Executive Officer At Temple premises
at Mylapore, Chennai 600 004
... Appellant/1st Respondent/Plaintiff

Vs.

1. P. Girija
2. P.K. Ragavendra Respondents 1 & 2/
Appellants 1 & 2/Defendants 1 to 7
3. P.K. Jayanthi
4. P.K. Visalam
5. P.K. Aruna
6. P.K.Jayasree
7. P.K. Uma

...Respondents 3 to 7/Respondents 2 to 6/
Defendants 2 to 6
(Respondents 2 to 6 given up in AS)

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 23.04.2015 rendered in A.S.No.452 of 2011 on the file of the XV Additional Judge, City Civil Court, Chennai reversing the decree and judgment dated 23.12.2010 rendered in O.S.No.5593 of 2006 on the file of the XII Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.S.D.Ramalingam

For Respondents: Ms. K.M.Valsala for R1 and R2
R3 to R6 given up
R7 - No appearance, set exparte vide
order dated 25.07.2019.

JUDGMENT

Challenge in this Second Appeal is made to the judgment and decree dated 23.04.2015 passed in A.S.No.452 of 2011 on the file of the XV Additional Judge, City Civil Court, Chennai, reversing the decree and judgment dated 23.12.2010 passed in O.S.No.5593 of 2006 on the file of the XII Assistant Judge, City Civil Court, Chennai.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. Suit for recovery of possession, past and future damages.

4. The case of the plaintiff, in brief, is that the plaintiff is the owner of the suit property. Krishna Aither, the husband of the first defendant and father of the defendants 2 to 7 was the tenant in respect of the suit property on a monthly rent of Rs.1,200/- and he was running a hotel in the premises and after terminating his tenancy, the plaintiff had earlier filed a suit against him for recovery of possession of the suit property in O.S.No. 5219 of 1985 and the same was decreed on 16.07.1986 and the matter went up to the High Court in S.A.No.1113 of 1989 and the same was allowed on 01.11.2000. In the second appeal abovestated, Krishna Aither entered appearance and the matter was pending from the year 1989 and the defendants have not informed either the High Court or the plaintiff about the death of Krishna Aither and suppressed the same and prevented the plaintiff from taking necessary steps with reference to the same and in the execution proceedings, the defendants had been impleaded as the legal heirs in E.P. No.80 of 2004 and subsequently the abovesaid EP was dismissed since Krishna Aither died prior to the judgment in the second appeal. In such view of the matter, the plaintiff is obliged to file the present suit after a fresh termination notice. The defendants are claiming themselves to be the legal heirs of the deceased Krishna Aither, however, they have not made any application with reference to the same to the Commissioner, H.R. & C.E for the transfer of the tenancy in their name and the value of the suit property had gone up and considering the same, the fair rent for the suit property was fixed at Rs.10,635/- and the same was communicated to the defendants by letter dated 17.10.2005 and the same was acknowledged by the first defendant. No reply had been sent to the same. Further the plaintiff had sent a notice on 10.01.2006 to the defendants and the reply was sent by them on 18.01.2006 raising untenable grounds.

Subsequently, the plaintiff sent a fresh notice of termination dated 12.05.2006 to all the legal heirs of Krishna Aither and Krishna Aither had defaulted in the payment of the rent as demanded by the plaintiff and the defendants were also paying the rent only at the old rate and the same was received without prejudice by the plaintiff and considering the location of the suit property and the value of the same having escalated, the suit property would fetch not less than Rs.15,000/- per month as rent at present and accordingly the plaintiff having terminated the tenancy, if any, that may be claimed by the defendants as the legal heirs of Krishna Aither, by way of notice dated 12.05.2006, though the plaintiff had not admitted the status of the defendants as tenants as such, according to the plaintiff, it has been necessitated to institute the suit against the defendants for appropriate reliefs.

5. The defendants resisted the plaintiff suit contending that the suit laid by the plaintiff is barred by the principles of res-judicata in view of the judgment and decree passed in A.S.No.156 of 1988 and according to them, the plaintiff's devasthanam is not the owner of the building in the suit property and only the owner of the land and in A.S.No.156 of 1988, it has been held that the plaintiff is the owner of the land alone and that the building in the suit property belongs to Krishna Aither, the husband of the first defendant and father of the defendants 2 to 7 and therefore, the plaintiff cannot contend that it is the owner of the suit property as put forth in the plaint. The defendants had not disputed the running of the hotel in the suit property by Krishna Aither and they have put forth in the written statement as to how Krishna Aither had spent various sums in putting up the construction in the suit property and carrying on the hotel business. Though the plaintiff's suit in O.S.No.5219 of 1985 was decreed in favour of the plaintiff, challenging the same, Krishna Aither filed A.S.No.156 of 1988 and the said appeal was allowed holding that the building in the suit property belongs to Krishna Aither and that the land alone belongs to the plaintiff's temple. Aggrieved by the judgment and decree of the first appellate court, the abovesaid plaintiff preferred Second Appeal in S.A.No.1113 of 1989 and before the notice was served on the Krishna Aither in the second appeal, he had died. The case of the plaintiff that Krishna Aither had entered appearance in the second appeal is false and it is false to state that the defendants had not informed the death of Krishna Aither to the plaintiff. On the other hand, the same was informed to the plaintiff by the first defendant on 14.09.1991 and requested the plaintiff to transfer the

tenancy in the name of his legal heirs. The Executive officer of the plaintiff's temple had acknowledged the said letter given by the first defendant and therefore, the claim of the plaintiff that they came to know about the death of Krishna Aither only during the execution proceedings is false. Even though the plaintiff had knowledge about the death of Krishna Aither as early as 14.09.1991, they had not chosen to take steps to implead his legal heirs in the second appeal No.1113 of 1989. Only an ex parte decree had been passed in the abovesaid appeal and consequently E.P. No.80 of 2004 filed by the plaintiff had also come to be dismissed. The present case of the plaintiff after issuing the fresh termination notice is wholly unsustainable in law. The said suit is barred by res-judicata. The defendants had made application for seeking the transfer of the tenancy in their favour. But till date, no response had been received from the plaintiff with reference to the same. The defendants are not in arrear of rent as put forth by the plaintiff. To the notice issued by the plaintiff dated 17.07.2005, a suitable reply was given by them on 31.01.2006 and to the notice dated 10.01.2006, the defendants sent a reply notice dated 18.01.2006 containing true facts. Therefore, the termination notice sent by the plaintiff is not proper and the plaintiff cannot plead termination of tenancy since they do not admit the tenancy in favour of the defendants and the plaintiff cannot claim revised rent from the defendants and even assuming that fair rent has been fixed, the same is not binding on the defendants. The defendants have every right to be in the possession and enjoyment of the premises since they are the owners of the building as determined in A.S.No.156 of 1988 and hence according to the defendants, the plaintiff is not entitled to obtain the reliefs prayed for and the suit is liable to be dismissed.

6. In support of the plaintiff's case, P.W.1 was examined and Exs.A1 to A27 were marked. On the side of the defendants, D.W.1 was examined and Exs.B1 to B3 were marked.

7. On consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to decree the suit granting the relief of recovery of possession as prayed for and dismissed the plaintiff's claim of past damages and directed the determination of future damages by way of a separate proceeding under Order 20 Rule 12 of CPC and accordingly disposed of the plaintiff's suit. The first appellate court on an appreciation of the materials available on record and the submissions made, was pleased

to set aside the judgment and decree of the trial court and thereby dismissed the plaintiff's suit. Impugning the same the present second appeal has been preferred.

8. At the time of admission, the following substantial question of law has been formulated for consideration.

"Whether the present suit filed against the legal heirs of the tenant on fresh cause of action is hit by res-judicata"?

9. The suit has been laid by the plaintiff against the defendants for the recovery of possession of the suit property and for past and future damages. The defendants have not disputed that the plaintiff is the owner of the land and their main contention is that the superstructure put up in the suit property belongs to them. Further according to them, that the superstructure put up in the suit property belongs to them i.e. their predecessor in interest Krishna Aither, had been upheld in A.S.No.156 of 1988 and therefore according to the defendants, they had mainly resisted the plaintiff's suit contending that the judgment and decree passed in A.S.No.156 of 1988 dated 22.04.1988 would operate as res-judicata to the present suit laid by the plaintiff. Further according to them, the second appeal preferred by the plaintiff challenging the judgment and decree dated 22.04.1988 passed in A.S.No.156 of 1988 in S.A.No.1113 of 1989 having been disposed of against a dead person, according to the defendants, the judgment and decree passed in the second appeal is null and void and unenforceable in law and not binding upon them. According to the plaintiff, Krishna Aither had been recognized as the tenant by the plaintiff in respect of the suit property and after his demise, the defendants, namely, his legal heirs had not been recognized as the tenants in respect of the suit property and however, inasmuch as the defendants are continuing the occupation of the suit property, according to the plaintiff, out of abundant caution, it had terminated their tenancy by way of a notice dated 12.05.2006, if any, that may be claimed by the defendants as the legal heirs of Krishna Aither and hence, according to it, the present suit laid by the plaintiff is maintainable and not barred by res-judicata and in case the defendants are held to be not the tenants of the suit property, resultantly, they being the unauthorized occupants, the plaintiff being the owner of the suit property, according to the plaintiff, on that footing also, the plaintiff is entitled to recover the possession of the suit property from the defendants and disputed the case of the defendants that its present suit is barred by res-

judicata and according to it, the judgment and decree passed in S.A.No.1113 of 1989 is valid and binding upon the defendants.

10. As could be seen from the materials placed on record, it is found that terminating the tenancy of Krishna Aither, the plaintiff had levied the suit against him for recovery of possession of the suit property in O.S.No.5219 of 1985. The abovesaid suit ended in favour of the plaintiff. Krishna Aither preferred the first appeal in A.S.No.156 of 1988 challenging the judgment and decree of the trial court. It is found that the abovesaid first appeal had been allowed by setting aside the judgment and decree of the trial court in O.S.No.5219 of 1985. Impugning the judgment and decree of the first appellate court, it is found that the plaintiff had preferred the second appeal in S.A.No.1113 of 1989. As could be gathered from the judgment and decree passed in S.A.No.1113 of 1989, it is found that as per the records available at hand, the judgment and decree passed in the second appeal reads that Krishna Aither not appearing either in person or through advocate and accordingly, it is found that based on the arguments submitted by the counsel for the plaintiff/appellant, the abovesaid second appeal had been allowed and thereby it is found that the judgment and decree dated 22.04.1988 passed in A.S.No.156 of 1988 had been set aside and the judgment and decree dated 16.07.1986 passed in O.S.No.5219 of 1985 has been restored. After the institution of the abovesaid second appeal and before the same had been concluded on 01.11.2000, it is found that Krishna Aither had expired on 17.07.1991. It is found that the plaintiff had not taken steps to implead the legal heirs of Krishna Aither in the second appeal proceedings. As abovenoted, Krishna Aither having been served and the High Court determining that he having not appeared either in person or through advocate, in such view of the matter, it is seen that even his legal heirs, namely, the defendants had chosen to get themselves impleaded in the second appeal. The case has been projected by the plaintiff that it is not aware of the death of Krishna Aither during the pendency of the second appeal. However, as could be seen from the available materials on record, particularly, Ex.B3, it is found that the first defendant had sent a letter to the plaintiff informing that Krishna Aither had expired on 17.07.1991 and thereby requested the plaintiff to transfer the tenancy right in her favour and it is found that the abovesaid letter marked as Ex. B3 had been acknowledged by the Executive officer of the plaintiff's temple. Be that as it may, the plaintiff has not impleaded the legal heirs of the deceased Krishna Aither

in the second appeal proceedings. On that score alone, it cannot be inferred straight a way that the judgment and decree passed in the second appeal is null and void and unenforceable in law and not binding upon the defendants. Inasmuch as neither the plaintiff nor the defendants had chosen to take steps to implead the legal heirs of Krishna Aither in the second appeal proceedings and the High Court having also not been informed about his death, the High Court accordingly after hearing the arguments of the counsel for the temple, had proceeded to dispose of the second appeal and in such view of the matter, considering the provisions of law as outlined under Order 22 of the Civil procedure Code, in all, it is found that despite the fact that the legal heirs of Krishna Aither had not been brought on record in the second appeal proceedings, despite the fact that the judgment and decree passed in the second appeal had been rendered against a dead person, the same having been passed by the High Court without being informed of the death of Krishna Aither, in such view of the matter, in the light of the various provisions contained in Order 22 of the Civil Procedure Code, particularly Order 22 Rule 4(a) and Order 22 Rule 6, in the light of the above position, the judgment and decree having been rendered /pronounced in the second appeal, notwithstanding the death of Krishna Aither as abovenoted, the same having not been brought to the knowledge of the High Court, it is found that the judgment and decree passed in the second appeal shall have the same force and effect as if it had been pronounced before the death of Krishna Aither took place. Though the defendants would contend that the plaintiff has failed to implead the legal heirs of the deceased Krishna Aither in the second appeal proceedings, as at present, considering the abovesaid provisions of law contained in Order 22 of the Civil Procedure Code, when till date, the judgment and decree of the High Court passed in the abovesaid second appeal had not been reversed or set aside on the footing that it had been passed against the dead person and even though the defendants would claim that Krishna Aither had not been served in the second appeal proceedings, but failed to substantiate the same with reliable and convincing materials on record, in such view of the matter, in my considered opinion, unless and until the judgment and decree passed by the High Court in the abovesaid second appeal are set aside in the manner known to law, the same would be valid and binding upon all concerned and therefore, the defendants cannot be allowed to contend that the judgment and decree passed by the High Court in S.A.No.1113 of 1989 is null and void and unenforceable in law and not binding upon them.

11. As above pointed out either Krishna Aither or the defendants do not claim that the land belongs to them. All that they would state is that the superstructure alone is belonging to them. No doubt, in A.S.No.156 of 1988, the superstructure had been held to be belonging to Krishna Aither. However, considering the march of law thereafter, particularly, the amendment carried out in the Tamilnadu City Tenants Protection Act, by way of the amendment Act 2 of 1996, by way of which amendment all the properties owned by the religious institutions have been taken out of the purview of the abovesaid act, in such view of the matter, when the validity of the Amendment Act 2 of 1996 has been upheld by the Full Bench of this Court in the judgment reported in 2000 3 L.W 271 (Sridhar Nair vs. State of Tamilnadu and others) and in such view of the matter even assuming for the sake of arguments that Krishna Aither or for the matter the defendants would be entitled to claim the protection under the Tamilnadu City Tenants Protection Act on the footing that the superstructure belongs to them, however, on and from the date of the abovesaid amendment, they had lost the said right statutorily and in such view of the matter, the contention put forth by the defendants that inasmuch as the superstructure had been held to be belonging to Krishna Aither in A.S.No. 156 of 1988, the plaintiff is not entitled to recover the possession of the suit property from them, cannot at all be accepted in any manner. By claiming the ownership over the superstructure and when the defendants have admitted that the land belongs only to the plaintiff's temple, at the foremost, the defendants would only be entitled to claim the protection under the Tamilnadu City Tenants Protection Act vis-a-vis, the superstructure said to be belonging to them. However, when by virtue of the Amendment Act 2 of 1996, the abovesaid right which the defendants had held, having been statutorily wiped out / lost by way of the abovesaid amendment, thereafter, the defendants cannot be allowed to contend that the plaintiff would not be entitled to seek the possession of the superstructure from them as now sought to be made out.

12. Furthermore, as rightly found and determined by the trial court, if really the superstructure belongs to the defendants as determined in A.S.No.156 of 1988, the defendants should have taken appropriate steps with reference to the abovesaid determination and proceeded further and endeavour to purchased the land from the plaintiff as per law. But, it is found that nothing has been done either by Krishna Aither or by the defendants thereafter and on the other hand, no further move or endeavour at all has been made by either of them to go ahead with the abovesaid determination in their favour

and till the laying of the present suit, the defendants have not moved their little finger to seek the protection available to them under the Tamilnadu City Tenants Protection Act vis-a-vis the super structure in the suit property. As above pointed out, with the march of law and coming into force of the Amendment Act 2 of 1996, the defendants having lost their right qua the same as above pointed out, in such view of the matter, the defendants cannot still be harping upon the contention that the superstructure belongs to them and that the plaintiff is not entitled to recover the possession of the suit property by way of the present suit. When admittedly, the plaintiff is the owner of the land, it is found that the plaintiff is entitled to recover the possession of the suit property by vacating the defendants in the manner known to law and accordingly it is found that the present suit has been laid by the plaintiff against the defendants.

13. No doubt, the endeavour made by the plaintiff to recover the possession of the suit property by way of the Execution Proceeding had ended in vain as the Execution Proceeding had come to be dismissed on the footing that the plaintiff cannot proceed with the Execution on the basis of the judgment and decree obtained by them in S.A. No.1113 of 1989. However, the reasons for the dismissal of the above said Execution Petition on the footing that the judgment and decree passed by the High Court in the abovesaid second appeal against the dead person is null and void and unenforceable, in my considered opinion, is not justifiable as above pointed out. When as of now, the judgment and decree passed in the second appeal has not been reversed or set aside on the footing that it had been passed against the dead person, considering the provisions contained in Order 22 of the Civil Procedure Code, notwithstanding the death of Krishna Aither, the judgment passed in the second appeal would have the same force as if the same had been passed before his death had taken place, therefore, the defendants cannot be allowed to still persist that they are entitled to claim the benefits of Tamilnadu City Tenants Protection Act on the footing that they are the owners of the superstructure. When they have lost the said right statutorily by way of the Amendment Act 2 of 1996, in such view of the matter, the defendants cannot be allowed to rely upon the judgment passed in A.S.No.156 of 1988 for stifling the plaintiff's present suit.

14. As abovenoted, the judgment and decree passed in the second appeal in S.A.No.1113 of 1989 has not been reversed or set aside till date and it remains intact. The High Court

in the abovesaid second appeal on factual aspects also considering the materials available on record held that the materials placed on record had not established that Krishna Aither is the owner of the superstructure and also noted that overwhelming evidence was available in the matter to establish clinchingly that it is only the plaintiff who is the owner of the land as well as the superstructure i.e. the suit property and thereby further held that the appellate court's finding that Krishna Aither is the owner of the superstructure and that he is only the tenant of the land on which the superstructure stands is contrary to the records and on that determination set aside the judgment and decree of the appellate court passed in A.S.No.156 of 1988. Even in the present case, the trial court has gone into the said aspect and found that considering the documents available on record, particularly the tax receipts marked as Exs.A26 and A27 and the defendants having failed to establish their claim of ownership of the superstructure in the present suit, accordingly determined that it is only the plaintiff who is the owner of both the land and the superstructure.

15. As above noted, neither Krishna Aither nor the defendants had put in action the determination of the first appellate court in A.S.No.156 of 1988 that they are the owners of the superstructure. As above pointed out, the abovesaid right had been put to an end statutorily by way of the Amendment Act 2 of 1996. Furthermore, as above pointed out, the plaintiff had only recognized Krishna Aither as the tenant. The defendants cannot claim the said right that they are also the tenants in respect of the suit property on the demise of Krishna Aither. Though the defendants by way of Ex.B3 letter had requested the plaintiff to recognize them as their tenants or continue the tenancy in the name of the first defendant, till date the commissioner H.R. & C.E had not passed any order recognizing the defendants as the tenants of the suit property. Therefore, it is found that the defendants having failed to establish that they are the tenants of the suit property and having failed to establish that they have put in action the determination of the first appellate court that they are the owners of the superstructure as per law and when they had lost the said right statutorily by the march of law in view of the Amendment Act 2 of 1996, in all, as rightly put forth by the plaintiff's counsel, as at present, the defendants can only be held to be the unauthorized occupants of the suit property.

16. Admittedly, the plaintiff being the owner of the land and the defendants having lost their right to purchase the land under the Tamilnadu City Tenants

Protection Act on the footing that the superstructure belongs to them, in view of the Amendment Act 2 of 1996, considering the abovesaid developments and when the defendants are found to paying only the old rent and not paying the enhanced rent as demanded by the plaintiff and considering the location of the suit property, as rightly put forth, the same would fetch higher rent without any doubt and when it is seen that the fair rent had also been fixed by the plaintiff and the defendants cannot plead ignorance with reference to the same and when as abovenoted, the defendants having not been recognized as the tenants by the plaintiff's temple, however, despite the above position, the plaintiff, out of abundant caution, had chosen to terminate the tenancy of the defendants, if any, that may be claimed by the defendants as the legal heirs of Krishna Aither by way of the notice dated 12.05.2006 and in view of the abovesaid factors, furthermore, as rightly contended by the plaintiff's counsel, the plaintiff having laid the present suit in the light of the abovesaid developments and not in continuation of the earlier proceedings and the plaintiff having laid the present suit by terminating the tenancy, if any, that may be claimed by them, and the same being based on a different cause of action and even if the defendants were to be held that they are not the tenants resultantly they being only the unauthorized occupants, the plaintiff being the owner of the suit property, in such view of the matter, the present suit laid by the plaintiff against the defendants on a fresh cause of action cannot be held to be hit by res-judicata as contended by the defendants. Furthermore, as rightly contended by the plaintiff's counsel, the question of ownership of the land rests with the plaintiff and the same has not been set aside even in A.S.No.156 of 1988. There cannot be any operation of res-judicata in respect of the suit land belonging to the plaintiff's temple. In such view of the matter, as the owner of the land and when the defendants' occupation of the suit property is found to be unauthorized and even assuming that they are the tenants, their tenancy having been lawfully terminated by the plaintiff as above pointed out, out of abundant caution, in such view of the matter, it is seen that the plaintiff is entitled to recover the possession of the suit property from the defendants on all angles and in such view of the matter, the judgment and decree of the first appellate court determining that the plaintiff's suit cannot be sustained in any manner are liable to be set aside.

17. The first appellate court having failed to consider the import of march of law viz., the advent of

the Amendment Act 2 of 1996 and also having failed to consider the validity and enforceability of the judgment and decree passed in S.A.No.1113 of 1989 as above pointed out and having failed to note that the defendants had not put in action the determination rendered in A.S.No.156 of 1988 that they are the owners of the superstructure and proceeded further as per law and the abovesaid right having been lost by the defendants statutorily as above pointed out and having failed to consider that the present suit has been laid by the plaintiff in the light of the abovesaid developments, in all, it is found that the judgment and decree of the first appellate court do not stand scrutiny in the eyes of law and accordingly, the substantial question of law formulated in this second appeal is answered in favour of the plaintiff and against the defendants.

18. The counsel for the defendants in support of her contentions, placed reliance upon the following decisions reported in

1. 2016(4) CTC 208 (SCC) (The City Municipal Council Bhalki vs. Gurappa and Ors)
2. 2019 (2) CTC 257 (R.Gopalakrishnan and Ors vs. K. Mani)
3. 2015(1) CTC 623 (Kuzhanthaiappa Gounder vs. Nachimuthu and ors)

The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

19. In conclusion, the judgment and decree dated 23.04.2015 passed in A.S.No.452 of 2011 on the file of the XV Additional Judge, City Civil Court, Chennai, are set aside and the judgment and decree dated 23.12.2010 passed in O.S.No.5593 of 2006 on the file of the XII Assistant Judge, City Civil Court, Chennai, are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

bga

Copy to

1.XV Additional Judge,
City Civil Court, Chennai

2.XII Assistant Judge, City Civil Court, Chennai,

3.The Section officer,
V.R. Section, High Court, Madras

+lcc to Mr.S.D.Ramalingam, Advocate, S.R.No.77024

+lcc to Mr.K.S.Kumar, Advocate, S.R.No.77192

S.A.No.147 of 2016

SVI (CO)
CB(14/08/2020)



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