

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.04.2019

C O R A M

THE HONOURABLE MR.JUSTICE M. GOVINDARAJ

CMA NO.2990 OF 2018

1.T.K.K.N.N.Vysya Charaties
New No.83, Venkatarangam Pillai Street,
Triplicane,
Chennai - 600 005.

2.D.V.S.Prasad
3.V.Dhamodhar
4.C.A.Raja
5.M.Kasinath
6.T.G.Venkatesh

... Appellants

Vs.

Shanthi Engineering Works
Rep. by its Managing Partner
Mr.J.Vijay

... Respondent

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1(v) of Civil Procedure Code against the judgment and decree dated 24.08.2018 passed in Appeal Suit No.7 of 2018 by the VI Additional City Civil Judge, Chennai.

For Appellants : Mr.V.Raghavachari
for Mr.S.N.Kirubanandam

For Respondent : Mr.S.Parthasarathy
Senior Counsel for M/s.B.K.Singh

J U D G M E N T

This Civil Miscellaneous Appeal has been preferred against the remand order dated 24.08.2018 passed by the Lower Appellate Court in A.S.No.7 of 2018.

2. The defendants / counter claimants are the appellants herein. For the sake of convenience, the parties are ranked as per their rank in the main suit.

3. The plaintiff was inducted as a tenant under the defendants to carry on their Partnership firm under the name and style of "M/s.Shanthi Engineering Works". Originally, the plaintiff filed a suit in O.S.No.2171 of 2014 for permanent injunction restraining the defendants from forcibly evicting them from the suit property without due process of law. The defendants raised their counter claim in their written statement seeking relief to direct the plaintiff to vacate and deliver vacant possession of the suit property and to determine the mesne profits at Rs.68,000/- per month or such other rate from the date of the suit till the date of delivery of possession. The defendants paid appropriate Court fee

for the relief of delivery of vacant possession and undertook to pay differential Court fee at such rate of mesne profits determined by the Court. Later, by a memo dated 12.07.2017, the relief of demanding mesne profits was given up.

4. The suit was dismissed for default on 21.09.2017 and in the counter claim, the plaintiff was set *exparte*. Against the order setting them *exparte* in the counter claim, the plaintiff filed an application under Order IX Rule 7 of Civil Procedure Code to set aside the *exparte* order vide I.A.No.13236 of 2017. The plaintiff also filed another interlocutory application to set aside the order dismissing the suit for default under Order IX Rule 9 of Civil Procedure Code vide I.A.No.13237 of 2017. Both the applications were dismissed by a common order dated 27.10.2017. The counter claim was posted for *exparte* evidence. On 01.11.2017, the respondent side evidence was closed and *exparte* evidence was taken. On 06.11.2017, an *exparte* decree came to be passed. Against the *exparte* decree dated 06.11.2017, the plaintiff has preferred an appeal in A.S.No.7 of 2018. The Lower Appellate Court allowed the appeal and restored the entire suit and remanded the matter for fresh trial on the ground that

maintainability of the counter claim is a triable issue and that all the issues framed in the suit were not decided and therefore, directed the Trial Court to give opportunity to both the parties to adduce evidence to decide all the issues. Against the said judgment and decree passed in A.S.No.7 of 2018 dated 24.08.2018, the defendants have preferred the above Civil Miscellaneous Appeal.

5. The learned counsel for the appellant would contend that the order passed by the Lower Appellate Court is contrary to law and the remand order is bad. When the *ex parte* decree alone was challenged, the Lower Appellate Court has set aside the order passed in the main suit dismissing it for default also without any appeal therefor. The Lower Appellate Court also failed to consider the conduct of the respondent / plaintiff in protracting the matter and erroneously directed the Trial Court to decide all the issues which are irrelevant to the counter claim. He would rely on the judgments of the Hon'ble Supreme Court in **JAG MOHAN CHAWLA VS. DERA RADHA SWAMI SATSANG AND OTHERS [AIR 1996 SC 2222]** and **RAMRAMESHWARI DEVI AND OTHERS VS. NIRMALA DEVI AND OTHERS [2011 (8) SCC 249]** in support of his contention.

6. Per contra, learned Senior Counsel for the respondent would contend that when seven issues were framed by the Trial Court, it is bound to answer all the issues, whereas the Trial Court has taken the issue with respect to delivery of vacant possession alone as a point for consideration and dismissed the interlocutory application. In so far as all the issues were not decided, the judgment and decree passed by the Trial Court is erroneous. When the issues with respect to termination notice under Section 106 of the Transfer of Property Act, 1882, and maintainability of counter claim, were not decided by the Trial Court, the Lower Appellate Court is correct in remanding the matter for fresh trial. Therefore, he sought for dismissal of the Civil Miscellaneous Appeal.

7. I have heard the submissions made on either side and perused the materials available on record.

8. The admitted facts are that the relationship between the parties is that of landlord and tenant. The tenancy is on month to month basis. The landlord issued notice on 18.01.2014 directing the tenant to find out alternative accommodation within 60 days from the date of

receipt of the notice. On receipt of the notice, the plaintiff taking it as a main cause of action and also the complaint lodged by them on the interference of certain officials of Revenue Department and rowdy elements, filed the suit. It is also an admitted fact that the plaintiff has not issued any reply to the notice dated 18.01.2014 issued by the landlord. The suit filed by the tenant was for permanent injunction restraining the landlord from forcibly evicting them without due process of law.

9. The landlord filed a counter claim through their written statement for the relief of delivery of vacant possession and mesne profits and also paid the appropriate Court fee. Later, by a memo dated 12.07.2017, the relief of demanding mesne profits was given up and wants to remain this as a prayer for counter claim for delivery of vacant possession. It is also admitted that the reply statement was filed by the tenant denying the averments made in his counter claim and no separate application for execution of the counter claim was filed.

10. It is relevant to note that there were 2 other suits filed by the landlord before this Court for certain relief vide C.S.Nos.286 and

293 of 2017. The tenant took adjournments in the pretext that they are taking steps to transfer the suit in O.S.No.2171 of 2014 to this Court, to be tried along with the above said Civil Suits, pending before this Court. Ultimately, the transfer application filed by the tenant was dismissed. Thereafter, the Trial Court insisted on conducting the trial.

11. It is seen from the records that the plaintiff/tenant had taken several adjournments. The defendants/landlord preferred Civil Revision Petitions viz., CRP (PD) Nos.3142 to 3144 of 2016 for early disposal of the suit. This Court, by order dated 08.12.2016, allowed the Civil Revision Petitions and directed the Trial Court to dispose of the suit on or before 31.03.2017 and to file a report before this Court. Despite the time limit fixed by this Court, the plaintiff/tenant failed to cooperate for the early disposal. Again, the plaintiff/tenant was indulging in filing petition after petition for taking adjournments. The Trial Court was constrained to take three extensions from this Court for disposal of the suit. The last such extension was granted till 30.11.2017. When the matter was posted for trial, the plaintiff failed to adduce evidence and the counsel for the plaintiff refused to conduct the suit. Therefore, the

suit was dismissed for default and *exparte* order was passed in the counter claim on 21.09.2017.

12. As mentioned above, two interlocutory applications vide I.A.Nos.13236 and 13237 of 2017 were filed for setting aside the *exparte* order and for dismissal for default, which were dismissed on 27.10.2017. *Exparte* evidence was taken on 01.11.2017 and *exparte* decree came to be passed on 06.11.2017.

13. The Lower Appellate Court while deciding the appeal against the decree passed in the counter claim, has found that the maintainability of the counter claim, is an issue to be decided. The Trial Court failed to find as to whether the notice issued under Section 106 of the Transfer of Property Act by the landlord is proper or not. When Order VIII Rule 6 specifies the exclusion, the Trial Court has failed to decide the issues. Apart from this, as many as seven issues were framed, none of the issues were discussed and therefore, the order passed by the Trial Court is bad and remanded the matter for fresh trial.

14. In this background, this Court has to consider whether the order of remand passed by the Lower Appellate Court is correct and legal.

15. It is an admitted fact in the plaint filed by the tenant that on 18.01.2014 a notice was issued by the landlord calling upon him to vacate and deliver vacant possession within 60 days from the date of receipt of the notice. When the possession is admitted and that the notice was issued under Section 106 of the Transfer of Property Act, it can be tested only when it is refuted. Admittedly, according to the plaintiff / tenant, no reply notice was given. The issuance of termination of lease notice itself was taken as a cause of action. When the validity of the notice is not disputed, it cannot be said that the notice was not proper.

16. As per Section 106 of the Transfer of Property Act, 1882, fifteen days time is specified for issuing a legal notice on tenancy on monthly rental basis. Here, 60 days notice was given and after the lapse of 60 days, the suit was filed. As per the amended provisions of Section 106 of the Transfer of Property Act, the landlord need not wait for anything and he can proceed with eviction, in the manner known to law. It is an

admitted fact that the landlord has specifically conceded that he has not taken any steps without due process of law. In that event, there is no requirement to decide any issue under Section 106 of the Transfer of Property Act, 1882, much less, it is not a triable issue at all, in view of the admission made in the trial.

17. The Hon'ble Supreme Court in **BALRAJ TANEJA AND ANOTHER VS. SUNIL MADAN AND ANOTHER [1999 (8) SCC 396]** has held as under:

"25. Thus, inspite of admission of a fact having been made by a party to the suit, the court may still require the plaintiff to prove the fact which has been admitted by the defendant. This is also in consonance with the provisions of Section 58 of the Evidence Act which provides as under;

"58. Facts admitted need not be proved.- No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing

under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

27. *In view of the above, it is clear that the court, at no stage, can act blindly or mechanically. While enabling the court to pronounce judgment in a situation where no written statement is filed by the defendant, the court has also been given the discretion to pass such order as it may think fit as an alternative. This is also the position under Order 8 Rule 10 CPC where the court can either pronounce judgment against the defendant or pass such order as it may think fit."*

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Therefore, the contention of the learned Senior Counsel for the respondent that even the admitted facts needs to be proved, is not sustainable, in view of the amended provisions of the Act.

18. The next point is that whether the denial made in the reply statement filed by the tenant in the counter claim will exclude the relief made by the landlord.

19. Order VIII Rule 6(C) of the Civil Procedure Code reads as under:

"Order VIII

6C. Exclusion of counter-claim

Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.

20. As per the above provision, when a counter claim is raised, the opposite party shall file an application to the Court to exclude

the counter claim and contest the issue, which shall be decided in an independent suit.

21. In the instant case, as discussed above, no separate application was filed for exclusion of the counter claim, as specified under Order VIII Rule 6(C) of the Civil Procedure Code.

22. It is beneficial to rely on a judgment submitted by the learned counsel for the appellant in **JAG MOHAN CHAWLA VS. DERA RADHA SWAMI SATSANG [AIR 1996 SC 2222]** and the relevant portion is extracted hereunder:

"5..... The trial Court dismissed the suit and the counter-claim. On appeal, the learned Single Judge accepted the counter-claim on a plaint in a cross suit and remitted the suit for trial in accordance with law. On appeal, per majority, this Court had accepted the respondents' plea in the written statement to be a counter- claim for settlement of their claim and defence in written statement as a cross suit. The counter-claim could be treated as a cross suit and it

could be decided in the same suit without relegating the parties to a fresh suit. It is true that in money suits, decree must be conformable to Order 20, Rule 18, CPC but the object of the amendments introduced by Rules 6A to 6G are conferment of a statutory right to the defendant to set up a counter-claim independent of the claim on the basis of which the plaintiff laid the suit, on his own cause of action. In sub-rule (1) of Rule 6A, the language is so couched with words of wide width as to enable the parties to bring his own independent cause of action in respect of any claim that would be the subject matter of an independent suit. Thereby, it is no longer confined to money claim or to cause of action of the same nature as original action of the plaintiff. It need not relate to or be connected with the original cause of action or matter pleaded by the plaintiff. The words "any right or claim in respect of a cause of action accruing with the defendant" would show that the cause of action from which the counter-claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff that occasioned to lay the suit. The only limitation is that the cause of action should arise before the time fixed for filing the written statement expires. The defendant may

set up a cause of action which has accrued to him even after the institution of the suit. The counter-claim expressly is treated as a cross suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit. Acceptance of the contention of the appellant tends to defeat the purpose of amendment. Opportunity also has been provided under Rule 6-C to seek deletion of the counter-claim. It is seen that the trial Court had not found it necessary to delete the counter-

claim. The High Court directed to examine the identity of the property. Even otherwise, it being an independent cause of action, though the identity of the property may be different, there arises no illegality warranting dismissal of counter-claim. Nonetheless, in the same suit, both the claim in the suit and the counter-claim could be tried and decided and disposed of in the same suit. In Mahendra Kumar & Anr. v. State of Madhya Pradesh & Ors. [(1987) 1 SCC 265] where a Bench of two Judges of this Court was to consider the controversy, held that since the cause of action for the counter-claim had arisen before filing of the written statement, the counter-claim was maintainable. The question therein was of limitation with which we are not concerned in this case. Thus considered we find that there is no merit in the appeal. "

Therefore, the finding of the Lower Appellate Court on this point is erroneous and illegal.

23. The finding in respect of not discussing all the issues framed in the suit is concerned, the suit filed by the plaintiff / tenant was

already dismissed for default. The plaintiff / tenant has not filed any appeal against that order. As such, the order has become final. In such an event, in a suit which was dismissed by the Trial Court, the issues relevant to that suit, by no stretch of imagination, needs to be discussed. The Lower Appellate Court proceeded on the basis as if the appeal was filed against the dismissal order in I.A.No.13237 of 2017. But the appeal filed before the Lower Appellate Court was only against the counter claim with regard to vacating and delivering vacant possession of the suit property. No other issues available to be decided as the landlord has given up his claim against mesne profits also. In that instant, the Trial Court can decide only one issue in the counter claim viz., delivery of vacant possession by the tenant, all the other issues are irrelevant. The Trial Court has rightly chosen to decide the issue relevant to the counter claim. In that event, the Lower Appellate Court ought to have discussed the correctness of the order passed by the Trial Court in respect of counter claim only. But, on the other hand, the Lower Appellate Court has set aside the decree and judgment passed in I.A.No.13236 of 2017 and indirectly allowed I.A.No.13237 of 2017 which was dismissed and restored the suit, without any appeal therefor. Such course adopted by the Lower

Appellate Court, is manifestly error apparent on the face of the records and illegal.

24. While doing so, the Lower Appellate Court, has failed to look into the conduct of the plaintiff/tenant in delaying the proceedings in violation of the directions issued by this Court to dispose of the suit within a specified time limit. The Hon'ble Supreme Court in **RAMRAMESHWARI DEVI AND OTHERS VS. NIRMALA DEVI AND OTHERS [2011 (8) SCC 249]** has held as follows:

"43. We have carefully examined the written submissions of the learned Amicus Curiae and learned counsel for the parties. We are clearly of the view that unless we ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases.

44. Usually the court should be cautious and extremely careful while granting ex-parte ad interim injunctions. The better course for the court is to give a short notice and in some cases even dasti notice, hear both the parties and then pass suitable biparte orders. Experience reveals that ex-parte interim injunction orders in some cases can create havoc and getting them vacated or modified in our existing judicial system is a nightmare. Therefore, as a rule, the court should grant interim injunction or stay order only after hearing the defendants or the respondents and in case the court has to grant ex-parte injunction in exceptional cases then while granting injunction it must record in the order that if the suit is eventually dismissed, the plaintiff or the petitioner will have to pay full restitution, actual or realistic costs and mesne profits.

45. If an ex-parte injunction order is granted, then in that case an endeavour should be made to dispose of the application for injunction as expeditiously as may be possible, preferably as soon as the defendant appears in the court.

46. It is also a matter of common experience that once an ad interim injunction is granted, the plaintiff or the petitioner would make all efforts to ensure that injunction continues indefinitely. The other appropriate order can be to limit the life of the ex-parte injunction or stay order for a week or so because in such cases the usual tendency of unnecessarily prolonging the matters by the plaintiffs or the petitioners after obtaining ex-parte injunction orders or stay orders may not find encouragement.

47. We have to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. *In Swaran Singh v. State of Punjab* (2000) 5 SCC 668 this court was constrained to observe that perjury has become a way of life in our courts.

48. *It is a typical example how a litigation proceeds and continues and in the end there is a profit for the wrongdoer.*

49. *Learned amicus articulated common man's general impression about litigation in following words:*

"Make any false averment, conceal any fact, raise any plea, produce any false document, deny any genuine document, it will successfully stall the litigation, and in any case, delay the matter endlessly. The other party will be coerced into a settlement which will be profitable for me and the probability of the court ordering prosecution for perjury is less than that of meeting with an accident while crossing the road."

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54. *While imposing costs we have to take into consideration pragmatic realities and be realistic what the defendants or the respondents had to actually incur in*

contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc.

55. The other factor which should not be forgotten while imposing costs is for how long the defendants or respondents were compelled to contest and defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years.

56. On consideration of totality of the facts and circumstances of this case, we do not find any infirmity in the well reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which we quantify as Rs.2,00,000/- (Rupees Two Lakhs only). We are imposing the costs not out of anguish but by following the

fundamental principle that wrongdoers should not get benefit out of frivolous litigation. The appellants are directed to pay the costs imposed by this court along with the costs imposed by the High Court to the respondents within six weeks from today. "

25. In fact, the Courts below ought to have imposed heavy cost for the dilatory tactics adopted by the respondent. But the Lower Appellate Court has given a premium to the dilatory tactics adopted by restoring the suit which was dismissed for default without asking for the same. Therefore, the order passed by the Lower Appellate Court is patently illegal and is liable to be set aside. In such circumstances, this Court has no hesitation to set aside the judgment and decree passed by the Lower Appellate Court in A.S.No.7 of 2018 dated 24.08.2018 and to remand the matter for fresh consideration.

26. Accordingly, the order dated 24.08.2018 passed in A.S.No.7 of 2018 by the VI Additional Judge, City Civil Court, Chennai is set aside and the matter is remanded for disposal on merits, within a period of one month from the date of receipt of a copy of this order.

27. The Civil Miscellaneous Appeal is allowed with the above observations and direction. No costs.

26.04.2019

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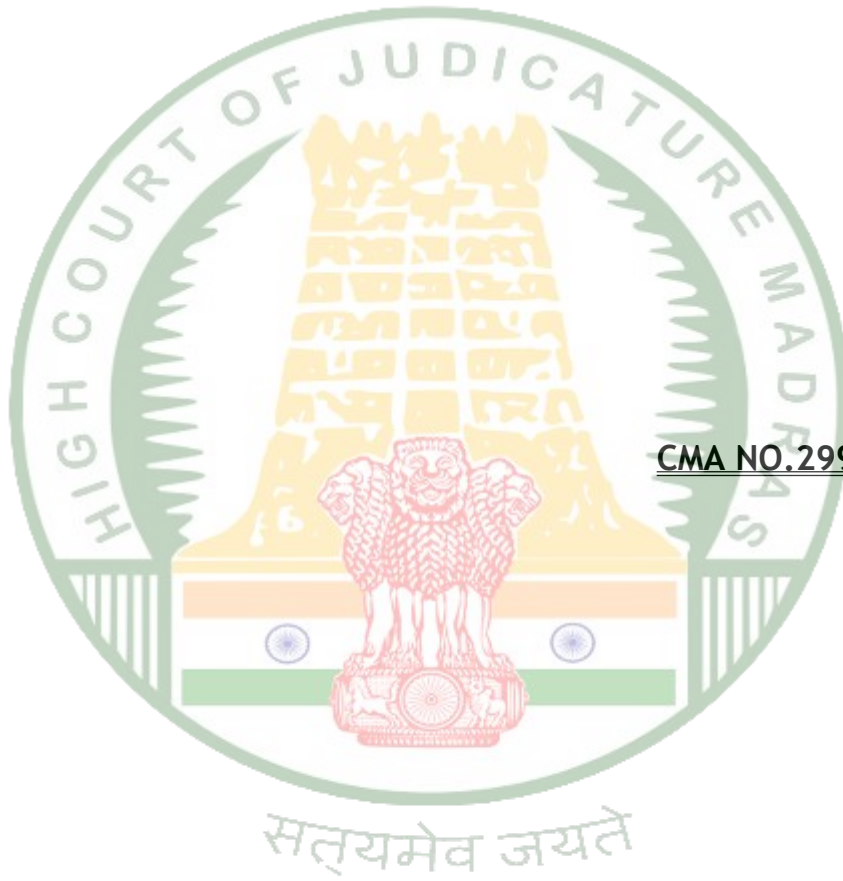
The VI Additional Judge
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M.GOVINDARAJ, J.

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