



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 19.08.2020	Pronounced on: 25.08.2020
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CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.310 of 2010
and
M.P.Nos.1 /2010 and 1 of 2015

Deivanai Ammal -1st defendant (died)

1.A.Sathish Kumar .. Appellant/2nd Respondent/
2nd Respondent

/versus/

Arulmigu Parthasarathy Swamy Temple,
Triplicane, Chennai 5,
represented by Deputy Commissioner/
Executive Officer/Fit Person .. Respondent/Appellant/
Plaintiff

Prayer: Second Appeal has been filed under Section 100 of C.P.C., against the decree and judgment dated 10.09.2009 passed in A.S.No.340 of 2008 on the file of II Additional, City Civil Court, Chennai reversing the decree and judgment dated 31.10.2007 passed in O.S.No.8545 of 2005 on the file of VIII Asst. City Civil Court, Chennai.

For Appellant : Mr.S.Nagarajan

For Respondent : M/s.Usha Tholgappian

J U D G M E N T

(The case has been heard through video conference)

This second appeal is by the defendant. Aggrieved by the judgment and decree of the Lower Appellate Court reversing the Trial Court judgment, the present appeal is filed.

2.The facts leading to the appeal:

Plaint:

Arulmigu Parthasarathyswamy Temple, Triplicane is the owner of the suit schedule property. The 900 sq.ft of the ground was let out for a rent of Rs.4/- per month to one Devaiyaniammal,



who is grand mother of the present contesting respondent A.Sathish Kumar. Superstructure on the land was put up by Devaiyaniammal and enjoyed by her. On 12/05/1993, the property was settled in favour of Sathish Kumar by Devaiyaniammal. When, permission to transfer the tenancy and put up new construction was sought from the Temple, it was refused. Despite refusal of permission, attempt to construct was made. Hence, suit in O.S. No.5167/2000 on the file of the City Civil Court, Chennai was filed by the temple against Devaiyaniammal and Sathish Kumar. This suit ended in compromise between the parties on 12/07/2001. Fresh rental agreement was entered between the parties. The HR&CE Department vide letter dated 25/07/2001 agreed for a rent of Rs.450/- p.m for a period of 3 years commencing from 01/07/2001. Permission to construct also was granted subject to conditions. However, the tenants failed to pay the agreed rent from 01/07/2001. Construction was also not carried. Hence, notice of termination dated 18/08/2005 was issued terminating the tenancy ending with 30/09/2005. Since Devaiyaniammal and Sathishkumar failed to vacate the property and handed over the possession, resulting in the suit for recovery of vacant possession, past arrears of rent and future damages.

3. Written statement:

Sathish Kumar, the second defendant contested the suit on the ground that, his grand mother who is arrayed as first defendant in the suit died on 19/01/2002. The suit filed against dead person is not maintainable. The alleged default in payment of rent denied. There is no privity of contract between the plaintiff temple and this defendant. He is not liable to pay any money to the plaintiff and the plaintiff is not entitled for recovery of possession as well.

4. Issues and finding:

Based on the above pleadings, the following issues were framed by the Trial Court:-

- 1) Whether the plaintiff is entitled to get the possession as prayed for ?
- 2) Whether the plaintiff is entitled to get past arrears as prayed for ?
- 3) Whether the plaintiff is entitled to get future damages as prayed for ?
- 4) Whether the suit is not maintainable as alleged by the defendant ?
- 5) To what relief that the plaintiff is entitled for ?

5. On appreciating the evidence, the Trial Court observed that, Ex.A-1 the letter dated 19/04/2007 sent by the first defendant (Devaiyaniammal) agreeing to pay rent of Rs.450/- pm and the proceedings Ex.A-3 issued by the HR & CE department



agreeing for compromise in O.S.No.5167/2000 are undisputed facts. However, there is no proof to show that Ex.A-8 termination notice under certificate of postings was served upon the defendants. Exs.A-8, A-9 and A-10 indicates the notice returned un-served. Since, the first defendant was dead at the time of instituting the suit, the cause of action for the suit as stated in the plaint is false.

6. Further, the Trial Court considering Ex.B-4 dated 26/07/2001 the receipt issued by the plaintiff temple for donation of Rs.10,000/- and Ex.B-5 receipt for Rs.3,250/- paid towards costs of the litigation in O.S.No.5167/2000 and Ex B-7 receipt dated 11/08/2006 for Rs.27,900/- from the second defendant towards arrears of rent pending suit, held that, admittedly, the notice of termination has not been served on the second defendant and the first defendant was no more on the date of issuance of termination notice. Therefore, the notice is not in conformity with Section 106 of Transfer of Property Act. Moreover, the part payment of rental arrears offered by the 2nd defendant pending suit has been accepted by the plaintiff, hence, the suit claim for delivery of possession is not maintainable. In the end, dismissed the suit with costs.

7. Appellate Court finding:

The temple in its appeal impugned the Trial Court judgment on the ground that the termination notice sent under certificate of posting is valid and presumed to have received by the respondents. The trial court failed to note that the second defendant claim right in the property through the settlement deed executed by the first defendant. Both the defendants entered into compromise in the earlier suit and agreeded for enhanced rent under the new rental agreement. Therefore, even if the first defendant was dead at the time of filing the suit, the suit as against the second defendant is maintainable. The trial Court failed to note these facts and erred in holding that the suit is not maintainable. The amount offered by the second defendant pending suit was received without prejudice towards damages and not towards arrears of rent. Therefore, the trial Court erred in holding that, having accepted part arrears, the plaintiff is not entitled for future damages.

8. The lower appellate Court reversed the finding of the trial Court for the reason that at the time of instituting the suit, the second defendant had become the owner of the superstructure on the plaintiff's land by virtue of the settlement deed. He has applied to the plaintiff temple for transfer of tenancy and permission for construction. In such circumstances, by impleading the first defendant, the second defendant is no way prejudiced.



9. After perusal of Ex.A-6 to Ex.A-10, the lower appellate Court, held that the statutory notice under Section 106 of the Transfer of property Act was served to the defendants through registered post as well as by certificate of postings. This notice was sent 15 days prior to the proposed date of termination of tenancy period. DW-1 (Sathish Kumar) in his cross examination had admitted that the notice was sent to his address. Hence, the termination notice sent to the correct address under the certificate of postings is proof of service of notice.

10. The Lower Appellate Court has also pointed out the trial Court finding regarding the receipt of money from the second defendant pending suit amounts to waiver of termination notice renders is erroneous.

11. Plea in the second appeal:

The learned counsel for the appellant submits that the lower appellate Court erred in holding that the suit against dead person is maintainable despite holding that at the time of instituting the suit, the first defendant was dead. After giving up the case against the first defendant, the common termination notice sent to the first and second defendant becomes infructuous. The termination notice returned unserve cannot be presumed to have been served on the tenants. By receiving donations and issuing receipt Exs.B-4 and B-5 to the second defendant, the tenancy has been impliedly attorned in favour of the second defendant. Further, pending suit, the plaintiff temple had accepted the rental arrears which amount to waiver of termination. The lower appellate Court has brushed aside these evidences leading to miscarriage of justice.

12. In the written statement, the respondent herein had pleaded that there is no privity of contract between him and the plaintiff temple. Whereas, the plaintiff temple through Exs.A-2 to A-4 had established that, the respondent herein been seeking attornment of tenancy based on the settlement deed Ex.B-2 dated 12/03/1993 executed by the first defendant who is his grand mother. Particularly, he was one of the defendant in the earlier suit in O.S.No.5167/2000 which ended in a compromise decree. Pursuant to the decree this respondent admit that he paid the donations covered under Exs.B-4 and B-5. After claiming right in the temple property by virtue of the settlement deed executed by his grandmother as early as 12/03/1993 and having participated in the earlier round of litigation ending in compromise, he cannot plead there is no privity of contract and notice of termination not binds him.

13. Regarding service of the notice, the lower appellate Court has rightly pointed, that the notices were sent both by



registered post and by certificate of postings. The notices sent by Registered post returned unclaimed and the same is marked as Ex.A-9 and Ex.A-10. The notices sent under certificate of postings did not return back. The contesting defendant who is the respondent in this appeal had admitted in his cross examination that the termination notices were sent to his address. Therefore, the finding of the lower appellate Court is legally and factually sustainable and upheld.

14. Lastly, the counsel for the appellant referring Exs.B-6 and B-7 contended that, the appellant vide his letter dated 11/08/2006 Ex.B-6 offered to pay the arrears on condition if the suit is withdrawn. To show his bonafide also paid Rs.27,900/- towards part arrears of rent. The amount was received by the plaintiff temple. Having received the rent pending suit for eviction, the notice to quit gets waived and as pointed out by the Trial Court, if the plaintiff temple intends, it should commence the proceeding after issuing notice for termination afresh.

15. The above contention of the learned counsel for the appellant is not backed by law. In fact, it is contrary to the provisions of the Transfer of Property Act, which the trial Court failed to note. As from the records we find the receipt of the money by the plaintiff temple was under protest towards arrears of future damages. This neither amount to waiver of forfeiture or waiver of noticed to quit.

16. Section 111 of the Transfer of Property Act enlists determination of lease.

17. Waiver of forfeiture will arise when the circumstances mentioned under Section 112 of the Act. Waiver of notice to quit will arise when the circumstances mention under Section 113 of the Act. The second proviso to Section 112 and illustration to Section 113 makes the legal position clear that any acceptance of rent after institution of a suit to eject the lessee on the ground of forfeiture , such acceptance is not a waiver.

18. For reference, the said provisions of law are extracted below:

Section 111 of the Transfer of Property Act enlists when a lease of immovable property determines. Under Clauses (g) and (h) its say
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(g)by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that,on breach thereof, the lessor may



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20. In the result, the Second Appeal is dismissed with costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. II Additional Judge,
City Civil Court,
Chennai.
2. VIII Assistant Judge,
City Civil Court,
Chennai.

+lcc to Mr.S.Nagarajan, Advocate, S.R.No.27552

S.A.No.310 of 2010

KJ(CO)
HS(12/08/2021)