

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.12.2020

Pronounced on : 07.01.2021

CORAM

THE HONOURABLE MR. JUSTICE **C.V.KARTHIKEYAN**

A.No.1633 of 2020
in
C.S.(Comm.Div.) No.62 of 2020

1.M/s.Bharat Petroleum Corporation Ltd.,
Having its registered office at Bharath Bhavan,
No.4 and 6, Currimbhoy Road, Ballard Estate,
Mumbai – 400 028.
Represented by its Senior Manager – Legal (South)
No.1, Rangamohan Gardens,
115, Main Road, Anna Nagar,
Chennai – 600040.

2.M/s.Bharat Petroleum Corporation Ltd.,
Representation by its Territory Manager (Retail)
No.35, Vaidyanathan Street,
Tondiarpet, Chennai – 600 081.

... Applicants / Defendants

Vs.

M/s.ATM Constructions (P) Ltd.,
Represented by its Director,
Mr.Faiz Mohammed,
No.258, Lloyds Road, Royapettah,
Chennai – 600014.

... Respondent / Plaintiff

Prayer:- This original application filed under Order XIV Rule 8 of Original Side Rules read of the Madras High Court read with Order VII Rules 11(d) of C.P.C., praying to reject the plaint in C.S.(Comm.Div.) No.62 of 2020 pending on the file of this Court as barred by law.

For Applicant / Defendant : Mr.Krishna Srinivas
For M/s.S.Ramasubramanian and Associates

For Respondent / Plaintiff : Mr.R.Balachandran

ORDER

This Application has been filed by the Defendants in the suit, under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 seeking to reject the plaint as barred under Order II Rules 3 and 4 of the Code of Civil Procedure, 1908.

2.The Suit had been filed by the Plaintiff, M/s.A.T.M.Constructions Private Limited, represented by its Director Mr.Faiz Mohammed against the Defendants, M/s.Bharath Petroleum Corporation Limited, having its registered office at Mumbai and represented by its Senior Manager – Legal (South) having office at Chennai and M/s.Bharath Petroleum Corporation Limited, represented by its Territory Manager (Retail) at Tondiarpet, Chennai, seeking a judgment and decree directing the Defendants to pay a

total liquidated damages of Rs.128,90,00,000/- together with interest at 12% per annum from 01.01.2020 till the date of realisation and for further directions against the Defendants to pay future damages at the rate of Rs.30,50,000/- per month from 01.01.2020 till the date of handing over vacant possession of the suit schedule property to the Plaintiff and also for costs of the Suit.

3.The property involved is land and a small building bearing Door No.282 (Old No.1/87 L), Mount Road (Anna Salai), Teynampet, Chennai, admeasuring a total extent of four grounds and 2330 Sq.ft.

4.The Plaintiff is the absolute owner of the said property. It was originally owned by T.Padmanabhan, T.Sethuraman and T.Gopinath. At that time M/s.Burma Shell Oil Storage and Distribution Company of India Ltd., had taken the property on lease with effect from 01.01.1958 for the purpose of erecting pump service and filling station for storage of Petrol, Diesel and for carrying on business in such products for a period of 20 years by entering into a Lease Deed dated 08.01.1958 registered in the Office of the Sub-Registrar, T.Nagar. The said company was the predecessor of the Defendants. The property was brought into public auction owing to loan

availed by the owners from M/s.Egmore Benefit Society and Mrs.S.Bharwani purchased the property in public auction by Sale Deed dated 24.06.1978. The lease period expired with effect from 31.12.1977 and the Defendants by letter dated 06.07.1978 requested Mrs.S.Bharwani to renew the lease for further period of 20 years. She refused and demanded the Defendants to vacate and hand over the vacant possession by issuing a notice dated 27.07.1978 and another notice dated 18.10.1978. The Defendants by their notice dated 17.11.1978 invoked a statutory right under the Burma Shell Acquisition of Undertaking in India Act, and renewed the lease for further period of 20 years from 01.01.1978 and refused to comply with the demand of Mrs.S.Bharwani to vacate and handover the possession to her.

5.The promoter of the Plaintiff company Mr.Altaf Ahamed entered into an Agreement of Sale with Mrs.S.Bharwani on 14.11.1996 and purchased the property by Sale Deed dated 03.01.1997, registered as Document No.509 of 1997 in the office of the Sub-Registrar, Chennai – Central. He also executed a Deed of Declaration dated 04.04.2003 registered as Document No.180 of 2003 registered in the office of the Sub-Registrar, Chennai – Central, whereby, the Plaintiff was declared to be the absolute

owner of the said property. The Plaintiff claimed that the extended lease period of 20 years also expired on 31.12.1997 and further claimed that the Defendants should vacate and handover vacant possession to the Plaintiff by 01.01.1998. It is the stand of the Plaintiff that the Defendants are in unlawful occupation of the property.

6.The Plaintiff issued notices dated 02.12.1997, 09.01.1998, 10.11.2000 and 24.06.2005 demanding the Defendants to vacate and handover vacant possession. The request of the Defendants to grant renewal of lease for further period of 30 years by letter dated 29.11.2000 was rejected by the Plaintiff. The Plaintiff then filed O.S.No.711 of 2006 before the City Civil Court Chennai, seeking delivery of vacant possession of the said property. The Defendants filed I.A.No.6009 of 2006 under Section 9 of the Tamil Nadu City Tenants Protection Act, 1921. The said petition was dismissed by the III Additional City Civil Court, Chennai, by order dated 27.11.2009. An Appeal preferred by the Defendants in C.M.A.No.20 of 2010 was also dismissed on 15.20.2010 by the III Additional City Civil Court, Chennai. The revision filed by the Defendants in the High Court in CRP (PD) No.610 of 2011 was also dismissed by order dated 09.01.2012. In the plaint it had been stated that the Defendants had filed Special Leave

Petition before the Hon'ble Supreme Court in SLP.No.17435 of 2012 and that it was pending. However, it has been disclosed during arguments that the said Special Leave Petition which was taken on file as C.A.No.769 of 2020 had also been dismissed by the Hon'ble Supreme on 28.01.2020. The Defendants claimed that they have filed Review Petitions which have been numbered as 1063 to 1067 of 2020, which, presumably are still pending.

7.In the meanwhile, the Suit in O.S.No.711 of 2006 was taken up for trial and was decreed by judgment dated 30.10.2010. The Defendants then filed A.S.No.361 of 2010 and it is stated that the same is still pending on the file of the XVIII Additional City Civil Court Chennai. It is the claim of the Plaintiff that the Defendants are occupying the scheduled property as rank trespassers and are enjoying the property by carrying on business and earning profits by illegal and unlawful occupation from 01.01.1998. It had been further stated that they have not paid any rent from 01.01.1998. They have also not made any deposit of rental amount into Court. It had been stated that the Courts have held that the Defendants are in unlawful possession. It had also been claimed that the Plaintiff could not put the property to effective use, and thereby has incurred loss of income continuously from 01.01.1998. It had been stated that the property is

situated in the heart of Chennai city and the area occupied by the Defendants is 11930 Sq.ft., and that the market value of the property had been arrived at by the Plaintiff by taking the minimum value determined under Section 47(A)(A) of the Indian Stamp Act, 1899, during the relevant years from 01.01.1998 till 31.12.2019. It is under these circumstances that the Plaintiff had filed the Suit claiming the reliefs as stated above.

8. Along with the Suit, the Plaintiff also filed A.No.650 of 2020 for a direction against the Defendants to deposit on or before the 5th of every succeeding calendar month a sum of Rs.30,50,000/- as future damages payable from 01.01.2020 to the credit of the Suit in this Court. The Plaintiff also filed A.No.651 of 2020 seeking a direction against the Defendants to furnish security to the claim of liquidated damages of Rs.128,90,00,000/- either by way of providing Bank Guarantee or depositing title deeds relating to any immovable property. Both the Applications are pending.

9. A perusal of the records reveal that the Defendants have not filed their written statement.

10. The Defendants have however filed the present Application under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 claiming that the

plaint should be rejected as barred by law, and more particularly, under the provisions of Order II Rules 3 and 4 of the Code of Civil Procedure, 1908.

11. In the affidavit filed in support of the said Application, the Territory Manager (Retail) had stated that the Defendants are in legal occupation of the property, since A.S.No.361 of 2010 filed questioning the judgment and decree of eviction passed in O.S.No.711 of 2006 is still pending. It has also been stated that the remedy under Section 9 of the Tamil Nadu City Tenant Protection Act, 1921 is still pending in Review Petition Nos.1063 – 1067 of 2020 filed by the Defendants before the Hon'ble Supreme Court. It has also been stated that the Defendants had sent a cheque towards the lease rentals for the period from 01.08.1997 to 31.07.2005 amounting to Rs.33,600/- to the Plaintiff by letter dated 27.08.2005, but it was returned. It had been further stated that the Defendants had offered a rental of Rs.3,50,000/- per month to the Plaintiff by letter dated 27.03.2020 and have also sought renewal of the lease for 29 years and have also offered an amount of Rs.48,00,000/- towards the rental arrears, which propositions have also been rejected by the Plaintiff. It was therefore claimed it was not proper on the part of the Plaintiff to categorize the Defendants as being in unlawful occupation of the property.

12.It was claimed that the Defendants are interested in purchasing the suit property. The Plaintiff's claim to title of the property and the fact that the predecessor of the Defendants had originally entered into a Lease Deed registered as Document No.305 of 1958 in the office of the Sub-Registrar, T.Nagar with the erstwhile owners namely, T.Padmanabhan, T.Sethuraman and T.Gopinath for a period of 20 years have been affirmed by the Defendants. The invocation of the provisions of the Burmah Shell Acquisition of Undertaking Act, and continuing to remain in possession of the property for a further period of 20 years has also been affirmed by the Defendants. The purchase by S.Bharwani of the property has also been affirmed. The purchase by the Plaintiff has also been affirmed. The Defendants however claim that they had attorned the tenancy with the Plaintiff by letter dated 07.10.2005. The Plaintiff had also issued a Legal notice dated 23.07.2005 calling upon the Defendants to vacate the suit property. It had been claimed that the Defendants had issued a reply to the said Legal notice. The institution of the Suit in O.S.No.711 of 2006 and that it had been decreed by judgment dated 30.04.2010 had also been affirmed by the Defendants.

13.The Defendants claimed that they are running a Retail Petroleum outlet catering to the needs of the general public and therefore, continuing possession has been justified. It had also been stated that they have put up various structures over the property at their own costs over a period of six decades. It had been however stated that the claim of the Plaintiff is imaginary and without any basis. It had been further stated that there is no agreement between the Plaintiff and the Defendants with respect to the property for trade or commercial purposes and therefore, the issues raised cannot be categorized as a commercial dispute. It was further stated that invoking the commercial jurisdiction of this Court is “mischievous and nothing but yet another instance of abuse of process of Court”. It had been stated that the Suit is barred by the provision of Order II Rule 3 of the Code of Civil Procedure, 1908 as the Plaintiff did not choose to seek the relief for damages in O.S.No.711 of 2006. It had been stated that Order II Rule 4 of C.P.C., explicitly states that claim for mesne profits, damages for breach etc., can be joined in a suit for recovery of immovable property without leave of the Court. It had been stated that the Plaintiff had omitted to claim damages in the earlier suit and leave had also been not granted by the Court to make such claim at a later date. It was therefore stated that the Plaintiff is deemed to have relinquished / abandoned their claim and therefore was not

entitled to sue for the relief of damages in the present Suit which is a subsequent Suit. It was also stated that having failed to obtain leave to claim damages, the Suit is also barred by limitation.

14.In view of the above reasons, it was sought that the plaint should be rejected in terms of Order VII Rule 11(d) of C.P.C., owing to the provisions under Order II Rules 3 and 4 of C.P.C.

15.A counter affidavit had been filed by the Plaintiff, wherein, the facts as stated in the plaint had been affirmed. The claim that the Plaintiff should be deemed to have relinquished / abandoned their claim for damages and thus was not entitled to sue for the relief of damages in the present Suit had been disputed. It was also stated that Order II Rule 3 of C.P.C., read with Order II Rule 4 of C.P.C., are only enabling provisions which gives discretion / option to the Plaintiff either to join the different causes of action in the same suit and to seek reliefs by joining different causes of action without the leave of the Court.

16.It was stated that the earlier Suit in O.S.No.711 of 2006 was valued at Rs.4,200/- under Section 43 of the Tamil Nadu Court Fees and

Suits Valuation Act, 1955 and was filed before the City Civil Court Chennai, whereas, the present Suit has been valued at Rs.128,29,90,000/- under Section 22 of the Tamil Nadu Court Fees and Suits Valuation Act, 1955 and at Rs.30,50,000/- for the relief of the future damages, again under Section 22 of the said Act, and that this valuation would be much beyond the pecuniary jurisdiction of the City Civil Court Chennai. It was therefore stated that joinder of causes of action as provided under Order II Rule 3 read with Order II Rule 4 of C.P.C., does not arise. The claim in the plaint had been justified as lawful. It was reiterated that the Defendants have no right to continue in possession of the property.

17.It was stated that the Plaintiff, as landlord, had refused to receive the rent tendered by the Defendants and thereby refused to grant consent for continuation of possession by the Defendants. It was reiterated that the Defendants are trespassers and that the Plaintiff is entitled for mesne profits / damages for illegal continuation of unlawful possession of the property. It was stated that the property is in a commercial area and had been put to commercial use. A calculation of fair rent had also been given in the Counter affidavit. It was stated that the Application should be dismissed by the Court.

18.A reply affidavit had been filed by the Defendants reiterating that the suit was not maintainable and the plaint was liable to be rejected. In the affidavit filed in support of the Application it was denied that the cause of action of the present suit could not be joined with the cause of action of the earlier suit. It was implied that the causes of action for both the suits namely O.S.No.711 of 2006 and the present suit are one in the same. It was stated that the Defendants are in possession of the suit property on the basis of the interim order granted by the Hon'ble Supreme Court, directing both the parties to maintain status quo with respect to possession. It was therefore stated that the Defendants cannot be made liable for damages, either liquidated nor unliquidated. The calculation of fair rent by the Plaintiff had been challenged. It was again reiterated that the plaint has to be rejected and the Application be allowed.

19.Heard arguments advanced by Mr.Krishna Srinivas, learned counsel for M/s.S.Ramasubramanian Associates for the Applicants / Defendants and by Mr.R.Balachandran, learned counsel appearing on behalf of the Respondent / Plaintiff.

20.For the sake of convenience, the parties would be addressed as Plaintiff and the Defendants.

21.There are no disputes regarding the following facts:-

i).The property bearing Door No.282 (Old No.1/87 L), Mount Road (Anna Salai), Teynampet, Chennai, originally belonged to T.Padmanabhan, T.Sethuraman and T.Gopinath. M/s.Burma Shell Oil Storage and Distribution Company of India Ltd., had entered into a registered Lease Deed on 08.01.1958 taking the property on lease for erecting pump service and filling station for storage of Petrol, Diesel and for carrying business in such products for a period of 20 years.

ii).Mrs.S.Bharwani purchased the property by Sale Deed dated 24.06.1978.

iii).The Defendants by letter dated 06.07.1978 had requested renewal of lease for a further period of 20 years and on refusal, invoked their statutory right under Burma Shell Acquisition of Undertaking in India Act, and renewed the lease by notice dated 17.11.1978 for a further period of 20 years commencing from 01.01.1978.

iv).The Defendants paid a sum of Rs.79,100 to Mr.J.P.Bharwani for the lease rentals from 01.10.1978 to 31.07.1997.

v).The property was purchased by Mr.Altaf Ahamed, the promoter of the Plaintiff by Sale Deed dated 03.09.1977. It was then declared by Document No.180 of 2003 dated 04.04.2003, that the purchase was on behalf of the Plaintiff company. The Defendants had forwarded a cheque for Rs.2,450/- being the monthly rent for a period from 01.08.1997 to 28.02.1998 by letter dated 02.02.1998, which was returned by Mr.Altaf Ahamed.

vi).The Defendants forwarded a cheque dated 19.07.2005 being the monthly rentals payable for a sum of Rs.33,600/- for the period between 01.08.1997 and 31.07.2005, which was also returned by Mr.Altaf Ahamed.

vii).The Plaintiff issued a Legal notice dated 23.07.2005 calling upon the Defendants to vacate the suit property.

viii).The Defendants by their letter dated 07.10.2005 attorned the tenancy in favour of the Plaintiff.

ix).The Plaintiff filed O.S.No.711 of 2006 for eviction, which was decreed on 30.04.2010.

x).The Defendants have filed A.S.No.361 of 2010 and the same is pending.

xi).In the said suit, the Defendants had filed an Application under Section 9 of the City Tenants Protection Act, 1921, which was dismissed; the

Civil Miscellaneous Appeal was dismissed; the Civil Revision Petition was dismissed; and the Appeal before the Hon'ble Supreme Court was also dismissed. It is stated that Review Petitions are pending.

22.During the course of arguments, the Defendants have not whispered whether they have deposited in any separate bank account the monthly rents for each and every month, from the last date on which they had paid. It is to be mentioned that according to the Defendants the monthly rent is Rs.350/-. It has also not been mentioned whether they had deposited the said amount before the City Civil Court either to the credit of O.S.No.711 of 2006 or that they are depositing the said amount every month to the credit of A.S.No.361 of 2010 or that they are depositing the same to the credit of the present suit.

23.As a matter of fact, the Defendants have addressed the Plaintiff stating that they are withholding payment of rent which is evident from the affidavit filed in support of the Application. Be that as it may, the main thrust of arguments of Mr.Krishna Srinivas, learned counsel for the Defendants is that the Plaintiff filed O.S.No.711 of 2006 on the file of the City Civil Court, Chennai, for a direction against the Defendants to deliver

vacant possession of the property as leased by the registered Lease Deed dated 08.01.1958 and for costs of the Suit.

24.It was claimed by the learned counsel that the Plaintiff had not included any relief seeking damages for use and occupation, whether lawful or unlawful in the said suit. It was further claimed that no leave had been applied to the Court seeking permission to claim the said relief in a later suit. It was further claimed that the Court had not granted any permission under Order II Rule 2 of C.P.C., to institute a subsequent suit for claiming damages. The learned counsel further pointed out that the cause of action for the earlier suit and the present suit are practically the same and therefore, the relief which has been now sought in the present suit could very well have been claimed in the earlier suit. Even otherwise, a further contention was raised that the claim is now barred by the law of limitation. In support of the said propositions advanced by him, the learned counsel also relied on precedents and urged the Court to reject the plaint as barred by law.

25.Even before examining the precedents stated by Mr.Krishna Srinivas, learned counsel for the Defendants, it would be worthwhile to extract not just Order II Rules 1, 3 and 4 of the Code of Civil Procedure, 1908, but also Section 12 of the Code of Civil Procedure, 1908.

26.It is to be mentioned that both the learned counsels did not make any mention of Section 12 of the Code of Civil Procedure, 1908. Section 12 of the Act, is as follows:

“Section 12. Bar to further suit —Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.”

27.This is the section which is further explained under Order II of C.P.C. Order II Rules 1, 3 and 4 of C.P.C., are as follows:

“ORDER II : Frame of Suit

1. Frame of suit.—Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them

2.

3. Joinder of causes of action.—(1) Save as

otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

4. Only certain claims to be joined for recovery of immovable property.—No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except—

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(b) claims for damages for breach of any contract under which the property or any part thereof

is held'; and

(c) claims in which the relief sought is based on the same cause of action: Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.”

28.This Application is primarily based on the claim that the suit is barred by Order II Rules 3 and 4 of C.P.C.

29.Order II Rule 3 relates to Joinder of Causes of Action and liberty is granted to the Plaintiff to unite in the same suit, several causes of action against the same Defendant or same Defendants jointly. However, under Order II Rule 4 of C.P.C., in a suit for recovery of immovable property there should be joinder of causes of action only with the leave of Court except for the claims as provided under sub clause (a), (b) and (c) stated as above. These claims include claims for mesne profit or arrears of rent or for damages for breach of contract and claims in which the relief sought is based on the same cause of action.

30.The issue to be now decided is whether this subsequent suit in

which the Plaintiff had sought the relief of damages is maintainable, since the said relief was not asked in the earlier suit instituted for eviction in O.S.No.711 of 2006. This should be examined in the background of the facts as stated being the cause of action in the earlier suit.

31.It had been stated that the actual cause of action in the earlier suit arose when the Plaintiff by notice dated 23.07.2005 had called upon the Defendants to surrender possession of the property and on 02.08.2005 when the Defendants declined to surrender the possession of the property. The Defendants claimed to be in lawful possession. In the affidavit filed in support of the present Application, it had been stated that the Defendants had forwarded on 25.07.2005 a cheque for a sum of Rs.33,600/- bearing No.834058 dated 19.07.2005 being the monthly rentals payable to S.Althaf Ahmed for the period from 01.08.1997 to 31.07.2005. This cheque was returned by S.Althaf Ahmed and it was informed that the Plaintiff herein was the owner of the property and thereafter, the Defendants claimed, that by their letter dated 07.10.2005, they attorned the tenancy in favour of the Plaintiff.

32.The facts asserted by the Plaintiff in the earlier suit was that the

Defendants were in unlawful possession. This assertion was denied by the Defendants. They claimed to be in lawful possession. This was the issue which was decided in the earlier suit. Depending on the decision on such issue, the status of the Defendants can then be determined namely, whether the Defendants can be termed to be lawful tenants or can be termed to be in illegal use and occupation. The categorization of the payment to be made by the Defendants towards their continuous use and occupation of the premises can only then be determined, namely whether it can be categorized as monthly rents or whether it can be categorized as damages for use and occupation. This issue was further widened by the Defendants who claimed a statutory right to purchase the property under Section 9 of the City Tenants Protection Act, 1921. They agitated such right up to the Hon'ble Supreme Court, where their claim was rejected. Had their claim been accepted then, they can be categorized as being in lawful possession with right to purchase the property. The nature of the monetary payments to be paid for such occupation, whether as rent or as damages, could only then be crystallized. It has been crystallized by the Decreetal of the suit in O.S.No.711 of 2006 and further crystallized by dismissal of the Special Leave Petitions by the Hon'ble Supreme Court, in February 2020.

33.The issues framed for trial in O.S.No.711 of 2006 were as follows:

“1.Whether the Plaintiff is entitled for delivery of vacant possession of the suit property after removal of super structure including tanks?

2.Whether the termination notice of tenancy dated 23.07.2005 is valid and proper?

3.Whether the suit is maintainable one?

4.To what any other reliefs?”

34.The decision on the above issues would determine the nature of possession of the Defendants. Till then, the Plaintiff had no cause of action to seek damages for unlawful occupation.

35.The learned counsel for the Defendants relied on **2020 SCC Online SC 562, Dahiben V. Arvindbhai Kalyanji Bhanusali (Gajra)(D) Thr Lrs and others**. The facts in that case was that the Plaintiffs filed an Application on 13.05.2008 before the Collector, Surat, seeking permission to sell the suit property, which was under restrictive tenure as per Section 73 (A)(A) of the Land Revenue Code. The Collector granted permission and fixed the sale price of the property at Rs.2,000/- per sq.mtr. After obtaining permission, the Plaintiffs sold the property to the 1st Respondent before the

Hon'ble Supreme Court by registered sale deed dated 02.07.2009. The consideration was also paid by 36 cheques in favour of the Plaintiffs. Thereafter, the 1st Respondent subsequently sold the property to the 2nd and 3rd Respondents by registered sale deed dated 01.04.2013. On 15.12.2014, the Plaintiffs instituted Special Civil Suit No.718 of 2014 before the Principal Civil Judge, Surat against the original purchaser and also the subsequent purchasers seeking to cancel the sale deed dated 02.07.2009 on the ground that the sale consideration fixed by the Collector was not paid in entirety by the 1st Respondent. The issue of limitation was taken up and the Trial Court held that the suit was barred by limitation. Articles 58 and 59 of the Schedule of the Limitation Act, 1953 were examined and it was determined that the period of limitation commenced from the date when the right to sue first accrued. It was therefore held that when the suit had been filed in the year 2014 seeking cancellation of the sale deed dated 02.07.2009, the suit was barred by the law of limitation. This finding was upheld by the Hon'ble Supreme Court.

36.The issues in the present case are entirely different. The Defendants continue to be in possession. They must either pay rent, if they are in lawful possession or damages, if they are in unlawful possession. Therefore, the facts of the above case are totally distinguishable.

37.The learned counsel for the Defendants relied on **(2017) 10 SCC 643, Raptakos Brett and Company Limited V. Ganesh Property**. In that case, the Plaintiff actually claimed mesne profits / arrears of rent in a suit filed for ejectment of the tenant. In the suit proceedings, the Plaintiff relinquished his rights vis-a-vis mesne profits or arrears of rent. Later a 2nd suit was filed for mesne profits or arrears of rent. It was held that “*by not pressing the claim of mesne profits raised in a suit before the court, unconditionally and without any reservation, the Plaintiff cannot thereafter turn around and claim the same relief by filing a fresh suit*”. It was therefore seen that in the said case there was a specific relinquishment / abandonment of claim. It is also to be noted that in the said case, the 1st suit was decreed without grant of mesne profits, since the same was not pressed by the Plaintiff. They waived their claim for mesne profits. The Hon'ble Supreme Court in appeal proceedings had directed that if the appellant hands over peaceful vacant possession of the premises in question on or before 08.10.1998, then they would have to pay Rs.2,500/- for the use and occupation charges for the month of October 1998 otherwise Rs.50,000/- will have to be paid. Possession was handed over. Subsequent suit claiming mesne profits for the very same period for which a fixed amount was paid by the lessee and accepted by the Plaintiff without objection was held to be not

maintainable.

38.In the instant case, the Defendants continue to be in occupation. They have not handed over possession. They have refused to handover possession. They have not deposited a single rupee in the Court either in the City Civil Court or before this Court, either towards rent or towards damages for use of occupation. In fact they very boastfully claim that they withhold the rents. It is thus seen that the facts in the present case are again distinguishable.

39.The learned counsel for the Defendants also relied on **(2013) 1 SCC 625, Virgo Industries (Eng.) Private Limited V. Venturetech Solutions Private Limited.** In that case, two suits were filed for permanent injunction restraining the Defendant from alienating and encumbering the suit properties over which the Plaintiff had two agreements to purchase. Subsequently, the Plaintiff filed two further suits seeking specific performance of the said agreements. It was found as a fact that prior to the filing of the first set of suits, the Plaintiff was aware of the intention of the Defendant that he would not honour the said agreements to sell and the fact was also pleaded in the first set of suits. Therefore, even when the first set of

suits were filed there was a cause of action for non performance of the agreements. Under those circumstances it was held that the institution of the second set of two suits would not be maintainable and they were rejected.

40.To repeat, the facts in the present case, as is evident, are entirely different.

41.The learned counsel for the Defendants then relied on ***AIR 1964 SC 1810, Gurbux Singh V. Bhooralal***, wherein, the Plaintiff had made a claim for recovery of mesne profits for the period ending with February 10, 1950. The suit was decreed. Later the Plaintiff filed C.S.No.20 of 1954 in the Court of the Sub Judge / First Class, Kekri against the Defendant claiming possession of the property on the ground that the Defendant was in wrongful possession and that he had failed to vacate the same and therefore, he was also liable to pay the mesne profits claimed.

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42.In that second suit, the Defendants raised a plea of maintainability of the suit under Order II Rule 2 of C.P.C. The suit went for trial and the 4th issue framed was “*Whether Order II Rule 2 of C.P.C., is a bar*”. This was taken as a primary issue and the suit was directed to be

dismissed. The Plaintiff then filed an appeal before the Additional District Court and the Additional District Court, held that the pleadings in the earlier suit had not been filed and the precise allegation in the previous suit were not known. Thereafter, the entire issue was remanded back to the Trial Court and the dismissal of the suit was set aside. The Defendant then filed a Second Appeal before the High Court of Rajasthan, which was also dismissed. He then filed a further Appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court in the course of its order observed as follows:

“6.In order that a plea of a bar under O.2 R2 (3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish

primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under O.2 R.2, Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits.”

43.The Hon'ble Supreme Court had thus stipulated the manner in

which a bar under Order II Rule 2 of C.P.C., can be established. They again

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reaffirmed the position as follows:

“7.Just as in the case of a plea of res judicata which cannot be established in the absence on the record of the judgment and decree which is pleaded as estoppel, we consider that a plea under O.2 R.2, Civil Procedure Code cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar. As the plea is basically founded on the identity of the cause of action in the two suits the defence which raises the bar has necessarily to establish the cause of action in the previous suit. The cause of action would be the facts which the plaintiff had then alleged to support the right to the relief that he claimed. Without placing before the Court the plaint in which those facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed. It is not impossible that reliefs were claimed without the necessary averments

to justify their grant. From the mere use of the words 'mesne profits' therefore one need not necessarily infer that the possession of the defendant was alleged to be wrongful. It is also possible that the expression 'mesne profit' has been used in the present plaint without a proper appreciation of its significance in law. What matters is not the characterisation of the particular sum demanded but what in substance is the allegation on which the claim to the sum was based and as regards the legal relationship on the basis of which that relief was sought. It is because of these reasons that we consider that a plea based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced. We therefore consider that the order of remand passed by the learned Additional District Judge which was confirmed by the learned Judge in the High Court was right. The merits of the suit have yet to be tried and this has been directed by the order of remand

which we are affirming.”

44.In the instant case, the Appeal in A.S.No.361 of 2010 is still pending. The Defendants therefore can never assert that the relief sought in the present suit could have been claimed in the earlier suit. They still continue to be in occupation. The nature of their possession has not been finally determined. They are liable to pay damages or rent as the case may be.

45.The facts in the judgment referred above are also distinguishable. The ratio laid down in the judgment referred above is that the Defendant cannot merely rely on the cause of action paragraph and claim that the present relief could have been claimed in the earlier suit. As stated, the cause of action in the earlier suit was with respect to possession by the Defendant and for a direction to surrender and handover the vacant possession.

46.The Defendants in the present suit are in continuous occupation without payment of rent / damages. The Plaintiff has also claimed the loss incurred by such occupation by the Defendants though the Plaintiff had called upon the Defendants to vacate and handover possession. The causes

of action are different. Therefore, though the principles laid down in the Hon'ble Supreme Court are binding, the facts of the present suit stands on a different footing and I hold that this judgment would not come to the assistance of the Defendants herein.

47.The learned counsel for the Defendants then relied on **(2019) 6 SCC 621, Pramod Kumar and Another V. Zalak Singh and Others**. The ratio laid down in the said case was that the cause of action in both the suits must be in identical to attract bar under Order II Rule 2 of C.P.C. There were two sale deeds executed by the same person. A suit was first filed to set aside the first sale deed, though at that time both the sale deeds had been executed. The second suit was filed seeking a similar relief against the second sale deed. Both the suits contained identical averments with respect to the two sale transactions. The Hon'ble Supreme Court held that the second suit was barred by Order II Rule 2 of C.P.C.

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48.In the instant case, the Defendants seek assistance of Order II Rules 3 and 4 of C.P.C. The earlier suit was for eviction. Order II Rule 4 of C.P.C., is an enabling provision which specifically mentions about the claim for damages. Therefore, the facts are certainly distinguishable. Further Order

II Rule 2 of the C.P.C., is not the basis for filing the present Application.

49.The learned counsel for the Defendants then relied on *AIROnline 2019 SC 1959, Vurimi Pullarao S/o. Satyanarayana V. Vemari Vyankata Radharani Dhankoteshwarrao and Anr.* Again it must be pointed out that the facts in the said case are totally distinguishable. The law applied was Order II Rule 2(3) of C.P.C., which is not the provision now urged by the learned counsel for the Defendants. The first suit was for injunction. The agreement contained a recital of an agreement to sell, the price was fixed, the payment of earnest money was fixed, the handing over of possession was fixed, the demand for performance and the consequence of failure to perform the contract was also stated. It was found that even at that time, the Plaintiff had a cause of action to institute a suit for specific performance. Under those circumstances, institution of second suit for specific performance was held to be barred under Order II Rule 2(3) of C.P.C.,

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50.The facts in the present case are totally totally different. As a matter of fact, the Hon'ble Supreme Court also distinguished the earlier judgment relied on by the learned counsel for the Defendants reported in *AIR 1964 SC 1810, Gurbux Singh V. Bhooralal, (referred supra).*

51.The learned counsel for the Defendants then relied on **(2007) 8 SCC 600, Shiv Kumar Sharma V. Santosh Kumari**. In that case, a suit was filed for possession and injunction to restrain interference with possession. Claim for damages / mesne profits were not made. The suit was decreed. The Defendant filed an appeal before the High Court. The High Court upheld the decree for possession and injunction and thereafter, passed directions for payment of compensation to the Plaintiff and also granted liberty to the Plaintiff to file a separate suit for damages / mesne profits. The Hon'ble Supreme Court held that the High Court was not correct in framing additional issues of its own which did not arise for consideration in the suit or in the appeal. It was also observed that if the law permits, the Plaintiff may file another suit, but not on the basis of the opinions expressed by a Superior Court. With respect to the maintainability of the second suit, it had been observed as follows in paragraph 20:

“20.A suit for recovery of possession on declaration of one's title and/or injunction and a suit for mesne profits or damages may involve different causes of action. For a suit for possession, there may be one cause of action; and for claiming a decree for

mesne profits, there may be another. In terms of Order 2 Rule 4 CPC, however, such causes of action can be joined and therefore no leave of the court is required to be taken. If no leave has been taken, a separate suit may or may not be maintainable but even a suit where for a prayer for grant of damages by way of mesne profits or otherwise is claimed, must be instituted within the prescribed period of limitation.....”

It is thus seen that the Hon'ble Supreme Court had also stated that a separate suit “may or may not be maintainable” but had held that it should be instituted within the prescribed period of limitation. The limitations commences only when the Defendant hands over the possession.

52.In the instant case, the Defendants continue to be in possession.

The facts again in the present case are distinguishable.

53.The learned counsel for the Defendants also relied on **(2011) 9 SCC 126, Khatri Hotels Private Limited and Another V. Union of India and Another**. This judgment had been cited to urge upon the Court that the suit is barred by the Limitation Act, 1963. Article 58 is as follows:

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
58. To obtain any other declaration.	Three years	When the right to sue first accrues.

54. In the said case, a definite finding was found that the suit was barred by limitation as the same was filed 16 years after the accrual of the cause of action and further the suit was barred by provision of Order II Rule 2 of the C.P.C.

55. In the instant case, the nature of occupation of the Defendants will have to be examined. There has been a series of correspondences between the Plaintiff and the Defendants. The Defendants actually claimed that they have attorned tenancy with the Plaintiff instead of the landlords attorning tenancy of the Defendants. The Plaintiff has refused to acknowledge the Defendants as tenant. The Defendants have also not come forward to deposit any amount either towards rent or towards damages in the Court. As a matter of fact, they stated that they are withholding the payment of rents. This indicates a continuous cause of action. On facts the said judgment is distinguishable.

56. The learned counsel for the Defendants then relied on **2020 (1)**

CTC 101, Ambalal Sarabhai Enterprises Ltd., V. K.S.Infraspace LLP and another. This was cited to examine whether the issues raised in the plaint could be termed as a 'commercial dispute'. I disagree with the contention of the learned counsel for the Defendants that the lis in the instant case is not a 'commercial dispute'.

57.The Defendants are running commercial activity in the premises. It had been held by the Hon'ble Supreme Court in the very same judgment that the Commercial Division would have jurisdiction and a dispute would be termed as a Commercial Dispute depending on the “*nature of the use of the immovable property in trade or commerce as on the date of the suit*”. The nature of use of the present property is certainly for commercial use.

58.The learned counsel for the Defendants stated that there is no agreement between the Plaintiff and the Defendants. The existence of an agreement has been insisted upon by the Defendants who claim that they are tenants. They claim that they are lawful tenants. Therefore, they claim relationship of landlord tenancy. The Defendants can claim such relationship only based on an agreement. The nature of use for which the property is put is entirely for commercial purposes. They are not using it for any residential

purpose. I therefore hold that this judgment would not come to the assistance of the Defendants to non-suit the Plaintiff.

59.The learned counsel for the Defendants also relied on the Full Bench Judgment of the Allahabad High Court reported in **1976 SCC Online All 374, Sardar Balbir Singh V. Atma Ram Srivastava**. That was a reverse suit. The Full Bench rendered a decision that the second suit was barred under Order II Rule 2 of C.P.C. Three Judges upheld such proposition and two negated it. The first suit was filed for an arrears of rent. The second suit was filed for ejectment of the Defendant. The Plaintiff filed application for leave of the Court to file a suit for ejectment. The court also granted permission to file another suit. Both the suits were pending. In the second suit also, the relief of mesne profits which had accrued subsequent to the earlier suit was claimed. It was under those facts that the Hon'ble Full Bench of the Allahabad High Court was called upon to give a finding whether the second suit would be barred under Order II Rule 2 of C.P.C.

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60.The facts in the present case are totally different. The first suit was filed for eviction. The Suit has been decreed. An Appeal is pending. In the said suit, the Defendants had filed an Application seeking protection under the City Tenants Protection Act, 1921. The right was not granted. That order

was affirmed in appeal and in revision by the High Court and in further Appeal by the Hon'ble Supreme Court. The Defendants however, continue to be in occupation without paying any rent, either to the credit of the suit or to the credit of any other legal proceedings or even as damages or even without prejudice to their rights. The Suit has been decreed. The First Appeal is still pending. It is under these circumstances that the Plaintiff has come forward to seek damages for use and occupation.

61.On the above facts, I hold that the Plaintiff cannot be non-suited under the provision of Order II Rule 3 and Order II Rule 4 of C.P.C. The facts being different, the ratio laid down in the said judgment will not be strictly applicable to the present case.

62.The learned counsel for the Defendants have forwarded a compilation of judgments, in which quite apart from the above judgments, the following judgments were also included namely,

a).**2010 (5) CTC 563, Sornam & others V. A.Venugopal & another;**

b).**2014 SCC Online Mad 125, N.Suresh & others V.**

T.Radhakrishnan; and

c).**MANU/DE/3048/2016, Perpetuuti Technosoft Services Pvt. Ltd.**

V. Sanovi Technologies (India) Pvt. Ltd. And others.

63.The learned counsel for the Defendants did not advance any arguments with reference to the applicability of the said judgments.

64.However, I have examined the said judgments.

65.**2010 (5) CTC 563, Sornam & others (referred supra)** relates to institution of a subsequent suit for specific performance, which was held to be barred under Order II Rule 2 of C.P.C., since, the Plaintiff had instituted an earlier suit for injunction. It was found on facts that injunction was sought seeking protection from forcible eviction and trespass into the property and it was held that those very acts constituted violation of an existing agreement of sale and therefore, when the suit for injunction was filed, relief for specific performance of the agreement should also have been sought. To repeat the facts in the present suit are entirely different.

66.**2014 SCC Online Mad 125, N.Suresh & others (referred supra)** examined the maintainability of a subsequent suit seeking declaration of title when an earlier suit had been filed for injunction alleging that the Defendants were proceeding with unauthorized construction in the suit

property which belonged to the Plaintiff, but which the Defendants contested that they were the owners. The Court held that the relief of declaration of the Sale Deed in favour of the Defendants as null and void was available to the Plaintiff on the date of filing of the plaint in the earlier suit itself and therefore, held that the subsequent suit seeking declaration of title was not maintainable. To repeat, the facts in the present suit are entirely different.

67.In **MANU/DE/3048/2016, Perpetuuti Technosoft Services Pvt. Ltd.,** (*referred supra*) the issue was whether circulation of notices by the Defendants which the Plaintiff contended was a tortuous interference, with business can be considered to be a commercial dispute. The said contention was rejected by a learned Single Judge of the Delhi High Court. It had been already held that the issue raised in the present suit is a Commercial Dispute, in view of the fact that the Defendants are conducting commercial and business activity in the property.

68.I would rely on the judgment of the Full Bench of this Court reported in **ILR (Madras) VolXXXVIII 829, Ponnammal V. Ramamirda Aiyar and Two others.** A Division Bench of the Madras High Court had referred the following question to be tested by the Full Bench of this Court:

“If a plaintiff sues for possession only when be

might have joined in the same action claims for

profits and damages, is it open to him to sue subsequently for the profits which became payable before the institution of the suit and which might have been included in such suit.”

69.The Full Bench answered the reference as follows:

“The answer to the reference must be in the affirmative. It seems to us that claims for possession and claims for mesne profits have always been treated as separate causes of action in the Codes of Civil Procedure following in this the English law. At common law claims for ejectment and for mesne profits were separate causes of action, and before the Common Law Procedure Act, 1852, an action for mesne profits did not lie until judgment had been recovered in ejectment. Section 10 of the Code of the 1859 expressly provided that a claim for the recovery of land and a claim for mesne profits arising out of such land should be deemed to be distinct causes of action within the meaning of the two preceding

sections which dealt with joinder of causes of action in the same suit. When the Code was remodelled in 1877 after the Judicature Act and the Rules of Practice framed thereunder had come into force in England, the language of these rules was in many instances substituted for the language of the Code of 1859, and in this way section 10 dropped out and was replaced by section 44 (now Order II, rule 4 of the Civil Procedure Code, 1908), the language of which was taken from Order XVII, rule 2 of the English rules. The effect however is the same because, when the rule says that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property except (a) claims for mesne profits or arrears of rent in respect of the property claimed, or any part thereof, it is quite clear that the legislature considered that claims for the recovery of land and claims for mesne profits were separate causes of action, and that it was not intended to depart from

*the express provisions to that effect in section 10 of
the Code of 1859. ”*

70.Though more than a century has passed from the date of the above judgment, still the law on pleadings and evidence has not changed. They remain the same. The Full Bench had clearly stated with specific reference to Order II Rule 4 of the Code of Civil Procedure, 1908, which is worded the same today and has not been amended, claims for recovery of land and claims for mesne profits are separate causes of action. This one judgment itself answers all the issues raised by the Defendants. The Full Bench of the Madras High Court laid down the law in the core issue in succinct terms and there can be no quarrel over the interpretation provided.

71.The learned counsel for the Plaintiff had relied on ***CDJ 1995 SC 009, R.V.Bhupal Prasad V. State of Andhra Pradesh & Ors.***, with respect to the Juridical possession, with respect to legal and lawful possession of a tenant who continues to be in possession after determination of tenancy. This is an issue which will have to be decided only on the evidence to be adduced and with due respects, it would not be appropriate to examine the nature of holding of the Defendants, since the issue is still fluid and pending

in A.S.No.361 of 2010 before the XVIII Additional City Civil Court Chennai.

72.In view of the above discussions, when the facts of the present case are analysed, the following becomes evident.

i).The Defendants have suffered an order of eviction in O.S.No.711 of 2006 by judgment dated 30.04.2010.

ii).The Appeal in A.S.No.361 of 2010 is still pending before the competent court.

iii).The Defendants have also suffered an order of dismissal of their Appeal before the Hon'ble Supreme Court, wherein they had claimed right for protection under the City Tenants Protection Act, 1921.

iv).The Defendants continue to be in occupation.

v).The Defendants have not deposited into the Court either before the City Civil Court or before this Court any amount towards the monthly payment either in the form of rent or in the form of damages.

vi).The Defendants have however written to the Plaintiff that they are withholding payment of rent but that they are attorning the tenancy in favour of the Plaintiff.

vii).The Plaintiff on the other hand, has rejected the request for

execution / renewal of Lease Deed and for permission to regularize the possession.

viii).The Plaintiff had called upon the Defendants to vacate and handover possession.

73.The Plaintiff claims damages for use and occupation. This aspect will have to be determined only during trial. The amount of damages claimed has also been questioned by the learned counsel for the Defendants. That is an issue which can be established only on evidence adduced during trial. It is to be again noted that the Defendants have also raised an issue whether the dispute is a commercial dispute or not. The very fact that they are using the property for commercial purposes and the very fact that they claim there is an existing relationship between them and the Plaintiff and the very fact that they claim that they had attorned the Plaintiff as their landlord shows that, even viewed from the angle of the Defendants, since they are putting the property to the commercial purposes, the issues raised in the suit can be categorized as a commercial dispute. If the Defendants claim that there is no agreement, then they must in the same breathe admit that they are trespassers.

74.For all the reasons stated, the Application is dismissed, with costs of Rs.1,00,000/- (Rupees One Lakh only) payable to the Plaintiff forthwith.

Sd./-C.V.K.J
07.01.2021

//Certified to be true copy//
Dated at Madras this the day of 2021.

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.

JJ 18/01/2021



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