



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATE: 16.02.2021

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A. (MD) .No.1159 of 2009

and

M.P. (MD) .No.1 of 2009

K.P.Mathew

... Appellant/Appellant/Defendant

Vs.

1.Jacob Joseph

2.Mathai Joseph

... Respondents/Respondents/Plaintiffs

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree dated 10.07.2009 passed by the learned Subordinate Judge, Kuzhithurai in A.S.No.56 of 2006 in confirming the judgment and decree, dated 28.11.2005 passed by the learned Principal District Munsif, Kuzhithurai in O.S.No.509 of 2001.

For Appellant : Mr.P.Prabhakaran

For Respondents : Ms.J.Anandhavalli

JUDGMENT

Aggrieved over the concurrent findings and decree and judgment of the Courts below granting decree for recovery of possession and mesne profit at the rate of Rs.600/- per annum from 01.04.1997 till the date of recovery of possession, the present Second Appeal is filed.

2. For the sake of convenience, the parties are referred to herein, as per their ranking before the Trial Court.

3. The brief facts leading to filing of the present Second Appeal is as follows:-

3.(1). The plaintiffs are the owners of the property. The defendant entered into the possession of the property as lessee with the plaintiffs and occupied the plaint schedule building on a monthly rent of Rs.50/-. The rent agreement was for a period of two years terminable by 01.04.1997. The tenancy stood terminated and immediately, the plaintiffs sent a legal notice for eviction. However, the defendant had evaded eviction and on the contrary, he has filed a suit in O.S.No.238 of 1995, before the Munsif Court, Kuzhithurai, for permanent injunction. The suit in O.S.No.509 of 2001 is filed for recovery of possession.



4. It is the contention of the defendant that the defendant is the brother-in-law of the plaintiffs. The properties were managed by the defendant since the first plaintiff was working in a foreign country and the second plaintiff was working in the State of Maharashtra. It is also the contention of the defendant that the plaintiffs agreed to execute the sale deed in favour of the defendant in respect of one acre of land in R.S.No.173/5 inclusive of the suit building to the defendant for a sum of Rs.1,00,000/- (Rupees One Lakh only) and paid a sum of Rs.85,000/- (Rupees Eighty Five Thousand only) as an advance. His contention is that the alleged rental agreement has not taken effect in view of the agreement for sale and acceptance of the advance.

5. Based on the above pleadings, the trial Court has framed the following issues:-

"1. Whether the plaintiffs are entitled to the decree for eviction against the defendant in the suit building and recovery of the same through Court?

2. Whether the plaintiffs are entitled to the mesne profit at the rate of Rs.600/- per annum from 01.04.1997 till the date of recovery of possession?

3. To what relief and costs?"

6. During trial, on the side of the plaintiffs, P.W.1 was examined and Ex.A.1 to Ex.A.3 were marked. On the side of the defendant, Ex.B.1 and Ex.B.2 were marked and no witnesses were examined.

7. The trial Court had appreciated the evidence and decreed the suit and the First Appellate Court also confirmed the same, as against which the present Second Appeal is filed.

8. While admitting this Second Appeal, the following substantial questions of law have been framed by this Court:-

"(1).Whether the Courts below are right in holding that there is landlord tenant relationship between the parties, who are none other than brother-in-law, when the rental agreement was not produced before the Court?

(2).Whether the Courts below are right in shifting the burden to the defendants in proving the tenancy?"



9. It is the contention of the learned counsel appearing for the appellant that the Courts below have not considered the documents, viz., Ex.B.1 and Ex.B.2 properly and in fact, the appellant is in possession of the property pursuant to the agreement for sale and therefore, the finding of the Courts below was not based on proper evidence of law. Hence, he prayed for allowing this Second Appeal.

10. The learned counsel appearing for the respondents would submit that both the Courts below have factually considered the evidence and arrived at a factual conclusion. Therefore, the judgment and decree of the Courts below do not require any interference. Hence, he prayed for the dismissal of this Second Appeal.

11. Heard the learned counsel on either side.

12. I perused the entire materials.

13. It is not in dispute that the suit property is owned by the plaintiffs and the defendant is none other than the brother-in-law of the plaintiffs. The suit has been laid for recovery of possession on the basis of the relationship of the landlord and the tenant. It is the specific contention of the plaintiffs that since the defendant has failed to vacate the premises after the expiry of lease granted for a period of two years, the suit has been laid.

14. Whereas, the contention of the defendant is that the tenancy agreement has not given effect to as the plaintiffs have agreed to execute the sale deed after receipt of Rs.85,000/- (Rupees Eighty Five Thousand) as an advance. The further contention of the defendant is that he is in possession of the property pursuant to the agreement for sale. However, no such document whatsoever has been filed before the Courts below. Therefore, the defendant has admitted the ownership of the plaintiffs that there was agreement for sale, it is for him to establish that he has performed his obligation as per the agreement. However, the so-called agreement for sale, is not seen the light of the day.

15. It is, in a nutshell, the entire defence appears to be under Section 53-A of the Transfer of Property Act, 1882 and the same reads as follows:-

"53-A.Part Performance-Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,



and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:"

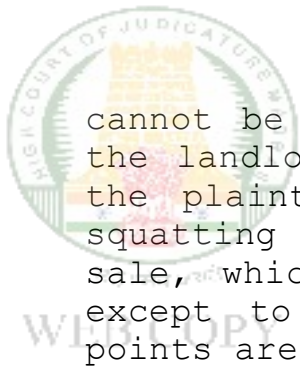
Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

16. To avail such benefit under Section 53-A of the Transfer of Property Act, 1882, the written agreement signed by the parties, is a *sine-quo-non*. Here, no such document is available on record. That apart, there is no iota of evidence to show that he has performed his part of obligation and he is always ready and willing to perform his part of contract.

17. Such view of the matter, merely on the basis of the so-called agreement, which is not seen the light of the day one cannot resist the owner from recovering the properties. Admittedly, the plaintiffs, who are the owners of the property, but, as per the defendant, he himself was inducted into the possession which appears to be a permissible.

18. Therefore, this Court is of the view that the defendant has no right whatsoever to remain in possession of the property by squatting on the property owned by the brother-in-law of the plaintiffs. The very pleadings of the defendant indicate that he was allowed to manage the property as the plaintiffs are far away from the property and they are working outside the State.

19. Such view of the matter, once the defendant has come into the possession as a caretaker with the permission of the plaintiffs, he has no right to squat on the property. When the defendant himself admitted the tenancy agreement, originally, the plaintiffs are not obliged to establish such a relationship when the admission itself proves tenancy agreement. Therefore, there



cannot be any shifting of burden on the plaintiffs to establish the landlord and tenant relationship. When the facts pleaded in the plaint are not disputed and the defendant has been simply squatting on the property on the basis of the oral agreement of sale, which is also not established and he has no other option except to surrender the possession and accordingly, all these points are answered.

20. The judgments of the Courts below do not require any interference and the same stands confirmed. Accordingly, the Second Appeal stands dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

tsg

To

1.The Subordinate Judge, Kuzhithurai.

2.The Principal District Munsif, Kuzhithurai.

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Madurai Bench of Madras High Court, Madurai.

+1 CC to Mr.P.PRABHAKARAN, Advocate (SR-5298[F] dated
16/02/2021)

+1 CC to Ms.J.ANANDHAVALLI, Advocate (SR-5424[F] dated 16/02/2021
)

Judgment made in
S.A. (MD) .No.1159 of 2009
16.02.2021

KM (04.03.2021) 5P 7C