



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 16.09.2021

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WEB COPY

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.77 of 2007

- 1.V.Ashok Kumar (Died)
- 2.Geetha Ashok Kumar
- 3.Sharath Kumar
- 4.Minor Varshini Shalika ... Appellants/Respondents/Defendants

(4th appellant is represented by 2nd appellant in the capacity of mother and natural guardian)

(Appellants 2 to 4 are brought on record as LRs of the deceased sole appellant vide order dated 28.09.2011 made in M.P.(MD)Nos.2 and 3 of 2011 in S.A.(MD)No.77 of 2007 by RKJ)

Vs.

Bala Thirupathi S.V.Baluchamy Ayyar and
his brothers Family Trust,
By its Managing Trustees

- 1.P.Venkatachalapathy
- 2.S.P.Ramamoorthy
- 3.S.K.Pathmanaban ... Respondents/Appellants/Plaintiffs

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree made in A.S.No.88 of 2004 dated 27.10.2006 on the file of the Principal Sub Court, Dindigul, partly allowing the judgment and decree made in O.S.No.888 of 1997 dated 02.01.2002 on the file of the learned Principal District Munsif Court, Dindigul.

For Appellants : Mr.P.Ganapathi Subramanian
For Respondent : MrH.Lakshmi Shankar

JUDGEMENT

The defendant in O.S.No.888 of 1997 on the file of the Principal District Munsif Court, Dindigul, filed this second appeal. The respondent herein is a family trust. The suit property



admittedly belongs to the said trust. The original appellant was inducted as a tenant way back in the year 1975. To evict him, the respondent herein filed O.S.No.888 of 1997. The defendant resisted the suit. Issues were framed.

2.On the side of the plaintiff, one of the trustees was examined as P.W.1 and Exs.A1 to A3 were marked. The tenant/defendant examined himself as D.W.1 and marked Exs.B1 to B6. An advocate commissioner was appointed and his report and plan were marked as Exs.C1 and C2. An engineer valued the building and his valuation report and sketch were marked as Exs.C3 and C4.

3.After a consideration of the evidence on record, the trial Court by judgment and decree dated 02.01.2002 dismissed the suit. Aggrieved by the same, the plaintiff filed A.S.No.88 of 2004 before the Principal Sub Court, Dindigul. By the impugned judgment and decree dated 27.10.2006, the decision of the trial Court was reversed and the appeal was allowed and the suit was decreed and the tenant was directed to hand over possession of the property. Challenging the same, the tenant filed this second appeal. During the pendency of the second appeal, the tenant passed away and his legal representatives were brought on record.

4.The second appeal was admitted on the following substantial questions of law:-

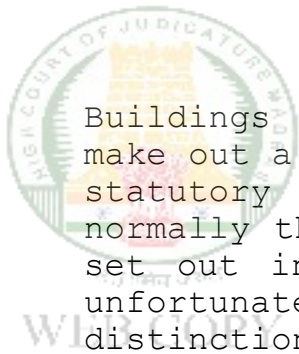
"1.Whether the default committed by the defendant could be constructed as willful in the absence of any material evidence?

2.Whether the lower Court is correct in holding that Section 106 of the Transfer of Property Act has been strictly followed and complied with in the absence of production of such notice by the plaintiffs? and

3.Can the lower appellate Court decree the suit on the basis of Section 106 of Transfer of Property Act when the plaintiffs have not raised any pleading regarding notice under Section 106 of the Transfer of Property Act and when both the Courts below have not framed any issues on that aspect?"

Heard the learned counsel on either side.

5.There is no dispute that the suit property belongs to the plaintiff/trust and that the defendant was a tenant. The trial Court dismissed the suit on the ground that the wilful default attributed to the tenant was made good during the pendency of the suit. The trial Court had lost sight of the fact that the subject eviction proceedings is not an R.C.O.P. Only if the proceedings for evicting the tenant have been instituted under the Tamilnadu

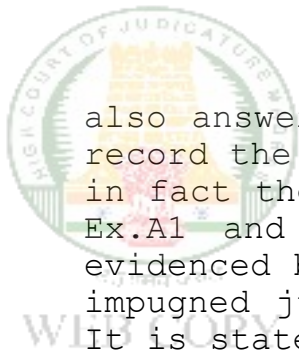


Buildings (Lease and Rent Control) Act, the landlord will have to make out a case of eviction. The tenant will be entitled to certain statutory defences. On the other hand, in an ejectment suit, normally the landlord will only have to comply with the requirement set out in Section 106 of the Transfer of Property Act. It is unfortunate that the trial Court lost sight of this fundamental distinction. Therefore, the first substantial question of law is answered against the appellants.

6.The second and third substantial questions of law proceed on the premise as if the plaintiff did not adhere to the mandate set out under Section 106 of Transfer of Property Act. As rightly pointed out by the learned counsel for the plaintiff, the said provision opens with the expression "in the absence of a contract to the contrary". In the present case, the tenant had made an endorsement on 16.04.1993 that he would vacate and hand over possession of the suit property by September 1997 and that he would not ask for any extension. This endorsement made by the tenant was marked as Ex.A3. The learned counsel for the plaintiff draws my attention to the decision reported **AIR 1983 Madras 142 (Krishnan Servai Vs. Arulmigu Kaliyamman Temple, Batalagundu)**. Paragraph No.4 of the said decision reads as follows:-

A similar question came up for consideration in Batoo Mal v. Rameshwar Nath, MANU/DE/0044/1971 : AIR1971Delhi98, before a Division Bench and that Division Bench took the view that waiver is of a right; parties may enter into contract to the contrary at the time of entering into a lease; since the lease itself is based on a contract, the parties may agree to vary its terms by a subsequent contract; one of the parties may even agree to abandon a right given to it by S. 106, in the absence of a contract to the contrary; and if the requirement of notice can thus be waived by an agreement between the parties, it would be reasonable to think that it could also be waived by such contract as would be the evidence of the intention of the parties. In my view, this appears to be the reasonable and the practical construction that could be put on S. 106 of the Act, with reference to the contract to the contrary contemplated therein."

7.In the case on hand, since the tenant under Ex.A3 had agreed to vacate by the end of September 1997, it would amount to a contract to the contrary and therefore, it is not open to the defendant to insist on a further notice of termination in accordance with the terms of Section 106 of the Transfer of Property Act. Therefore, the second and third substantial questions of law are



also answered against the appellants. Of course, it is my duty to record the contention of the learned counsel for the respondent that in fact the statutory notice was actually issued as is evidenced by Ex.A1 and that it was also duly received by the tenant as is evidenced by Ex.A2. I do not find any ground to interfere with the impugned judgment and decree. The second appeal stands dismissed. It is stated that there was a direction to the tenant to deposit the monthly rent. It is open to the plaintiff to withdraw the same without notice to the other side. No costs.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

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Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

- 1.The Principal Sub Judge,
Dindigul.
- 2.The Principal District Munsif,
Dindigul.

Copy to:

The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court, Madurai. (2 copies)

+1 CC to M/s.H.LAKSHMI SHANKAR, Advocate (SR-29268[F]
dated 16/09/2021)

S.A. (MD)No.77 of 2007
16.09.2021

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