



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 20.04.2021

CORAM

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.930 of 2011

Krishna Pillai

... Appellant/Respondent/
Defendant

Vs.

S.Anbu

... Respondent/Appellant/
Plaintiff

Prayer: Second appeal filed under Section 100 of C.P.C., against the Decree and Judgment in A.S.No.58 of 2010 dated 11.04.2011 on the file of the I Additional Sub Court, Nagercoil, reversing the well considered Decree and Judgment passed by the learned Principal District Munsif, Nagercoil, in O.S.No.403 of 2007 dated 08.10.2009.

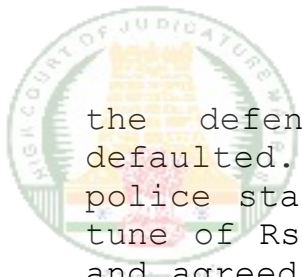
For Appellant : Mr.K.P.Narayana Kumar

For Respondent : Mr.R.J.Karthick,
for Mr.R.Subramanian.

J U D G M E N T

The defendant in O.S.No.403 of 2007 on the file of the Principal District Munsif, Nagercoil, is the appellant in this second appeal.

2. The respondent herein, namely, Anbu filed the said suit seeking recovery of a sum of Rs.60,000/- with interest at the rate of 12% p.a. from the date of plaint till the date of payment. The case of the plaintiff is that he is the owner of Jeyalakshmi Modern Rice Mill, bearing Door No.154, Puliyadi, Kalungadi Road, Vadasery Village. The defendant took over possession of the said Modern Rice Mill as lessee. After entering into rent deed dated 25.02.2004, the defendant deposited a sum of Rs.5,00,000/- with the plaintiff. It was agreed that the monthly rent will be Rs.30,000/-. The agreement was to be for a period of three years. The allegation of the plaintiff is that for the first 18 months



the defendant paid the rent regularly and thereafter, he defaulted. The plaintiff lodged a complaint before the local police station for recovering the arrears of 6 months rent to the tune of Rs.1,80,000/-. Though the defendant admitted his liability and agreed to clear the same, he paid only a sum of Rs.30,000/- on 11.04.2006. Thereafter, the defendant filed O.S.No.75 of 2006 on the file of the II Additional Sub Court, Nagercoil, claiming damages from the plaintiff and for restraining the plaintiff from interfering with his possession of the rice mill. The suit was dismissed on 09.04.2007 and thereafter, he filed A.S.No.34 of 2007 before the District Court, Nagercoil. The plaintiff would claim that the defendant voluntarily surrendered the possession of the Rice Mill on 21.05.2007. The rental arrears, according to the plaintiff came to Rs.5,60,000/-. After deducting the advance amount of Rs.5,00,000/- and for recovering the balance amount of Rs.60,000/-, he had filed the said suit.

3. The appellant herein filed his written statement opposing the suit prayer. The defendant would claim that there was no default in the matter of payment of rent. He also denied the claim of the plaintiff that the possession was amicably handed over. According to the defendant, the plaintiff took forcible possession on 21.05.2007. The defendant had registered a police case against the plaintiff in Crime No.1234 of 2007 on the file of Vadasery police station. The very institution of the suit was a counterblast to the earlier suit filed by the defendant in O.S.No.75 of 2006. The trial Court framed the issue as to whether the plaintiff was entitled to recover money as prayed for. The plaintiff examined himself as P.W.1 and marked Ex.A.1 to Ex.A.5. The defendant examined himself as D.W.1 and marked Ex.B.1 to Ex.B.4. The learned trial Munsif came to the conclusion that the plaintiff had not filed any document except Ex.A.3 to show that the defendant was in arrears of rent. Since the plaintiff had not examined any independent witness to substantiate the case, the trial Court dismissed the suit by Judgment and Decree dated 08.10.2009. Questioning the same, the plaintiff filed A.S.No.58 of 2010 before the I Additional Sub Court, Nagercoil. By Judgment and Decree dated 11.04.2011, the Judgment of the trial Court was set aside and the appeal was allowed. Questioning the same, this second appeal came to be filed.

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

" 1) Whether the first appellate Court was wrong in decreeing the money suit by directing to pay rent, for the period when admittedly no landlord tenant relationship exists and

2) Whether the first appellate Court failed to appreciate that the plaintiff has not proved his case independently?"



5. Heard the learned counsel on either side.

6. The learned counsel appearing for the appellant submitted that the trial Court after a detailed consideration of the evidence on record had rendered a finding that the plaintiff has not proved his claim that the defendant was in arrears and that the defendant owed to pay money to the plaintiff. The appellate Court had misdirected itself by assuming that the suit suffered dismissal on the ground that the plaintiff instead of filing a suit for damages for use and occupation had filed the suit for recovery of rental arrears. According to the appellant's counsel, the first appellate Court failed to consider the fact that the plaintiff had not proved the case independently. He would also contend that going by the case of the plaintiff, the defendant should be considered as tenant at sufferance and in other words, his position was akin to a trespasser. The plaintiff had claimed that the tenancy expired on 26.02.2007. Therefore, the suit for payment of rent for the period from the date of termination of tenancy from 21.05.2007 will not arise at all. He wanted this Court to answer the substantial questions of law in favour of the appellant and to set aside the Judgment passed by the first appellate Court and restore the decision of the trial Court.

7. Per contra the learned counsel appearing for the respondent submitted that the impugned Judgment passed by the first appellate Court does not call for any interference. He prayed for dismissal of the second appeal.

8. I carefully considered the rival contentions and went through the evidence on record.

9. Though the plaintiff had stated that the agreement was terminated only in the mid night of 25.02.2007, he had not characterised the defendant as a trespasser. The lessee occupying the premises after the termination of tenancy will be either a tenant at sufferance or tenant holding over. He will be a tenant holding over if the lessor accepts rent from the tenant for occupation. If the lessor does not accept rent and insists on ejecting the tenant, he will be a tenant at sufferance.

10. The Hon'ble Supreme Court in the decision reported in 1995 (5) SCC 698 (R.V.Bhupal Prasad V. State of Andhra Pradesh and others) had clearly stated that tenant at sufferance is akin to trespasser, though initially he had lawfully entered. However the distinction must be noted. It is open to the lessor to accept rent from the person whose tenancy had already expired. In that event, the status of the occupant will be tenant holding over. Therefore, it is not open to the appellant to make a self-



11. According to the appellant's counsel, the respondent should have instituted a proper suit for damages. The learned counsel would also draw my attention to the decision reported in 2003-1-L.W. 751 (Palani Municipal Council V. C.Sadasivam). In the said case, the learned Judge had set out the distinction between the two situations. That was the case involving a local body. The lessees of the local body had committed default. The local body filed a suit. It was also decreed. Thereafter, a second suit was filed for recovering damages for unauthorised use and occupation. The second suit was dismissed by invoking Order 2 Rule 2(2) of C.P.C. The High Court set aside the Judgments and Decrees passed by the Courts below and allowed the second appeals in the following terms:-

"3. The question as to whether the respondents are entitled to Section 116 of the Transfer of Property Act arises for consideration of this Court. Under Section 116 of the Transfer of Property Act, for an entitlement of holding over, a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, agreeing to the purpose for which the property is leased, as specified under Section 106. In order to satisfy the said section, there must be a determination of lease and after the determination of lease, the lessee must be in possession of the shop and the owner of the shop should also receive the rent. Only in compliance of all the three conditions, the lessee should be deemed to have holding over of the shop in question. Facts of this case reveal that by efflux of time, the lease expired on 31.3.86 and there was no express extension of renewal of lease. On and after 1.4.86, the respondents who were the lessees are not entitled to continue as lessees of the shops. Secondly, it is not the case of the lessees/respondents that after 31.3.86, the landlord namely the appellant had received the rent for the shops in question. The only condition that has been complied with by the lessees is as to their occupation of the shops. In the absence of non compliance of the other two conditions, it cannot be considered that the respondents/tenants are entitled to the provisions of Section 116 of the Transfer of Property Act. When once it is admitted that the respondents/tenants continued to be in possession even after the expiry of lease



period on 31.3.86 and in the absence of other two conditions being complied, they should be considered as persons occupying the shops without any lease agreement and consequently, their possession shall be deemed to be unauthorised. In such event, cause of action for claiming the amount from 1.4.86 shall be only by way of damages and not by way of arrears of rent. Hence, the suits filed by the appellant on an earlier occasion which were decreed for recovery of arrears of rent are entirely on different cause of action. In such circumstances, Order 2 Rule 2(2) of C.P.C. is not applicable, as Order 2 Rule 2(2) of C.P.C. is applicable only where the plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. "

12. Though I sustain the contention of the learned counsel appearing for the appellant that there is distinction between rental arrears and damages for use and occupation, as far as the case on hand is concerned, it virtually a distinction without difference. The trial Court ought to have considered whether the suit was valued under Section 22 of the Tamil Nadu Court-Fees and Suits Valuation Act. The Court Fee payable is 7.5% of the suit claim. A mere look at the suit prayer would show that the respondent had only characterised it as recovery of a certain sum of money. Since the court fee has been correctly paid, there is no need to quibble over nomenclature. I therefore answer the first substantial question of law against the appellant.

13. The suit rice mill admittedly belongs to the respondent. The appellant obtained possession only in the capacity of a lessee. The specific case of the landlord is that the appellant paid rent without default for the first 18 months and thereafter there was default on his part. There is no dispute that the possession was taken over by the landlord only on 21.05.2007. The specific allegation of the landlord is that the rental arrears came to Rs.5,60,000/- and that after deducting advance amount of Rs.5,00,000/-, balance amount payable by the lessee was Rs.60,000/-. The trial Court had erroneously cast the burden of proof on the landlord. When the landlord makes an allegation that the tenant has not paid the rent, it is the tenant who has to establish that the rent has been paid. The landlord cannot be called upon to prove the negative. The second substantial question of law is answered against the appellant. I do not find any ground to interfere. Even though the substantial question of law is answered against the appellant, award of interest at 12% p.a. appears to be on the higher side. It is reduced from 12% p.a.



14. This second appeal is partly allowed. No costs.

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Sd/-

Assistant Registrar (CS-II)

/ /2021

Sub Assistant Registrar(CS)

PMU

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 I Additional Sub Judge,
Nagercoil.
2. The Principal District Munsif,
Nagercoil.

Copy to
The Record Keeper, VR Section-2 copies
Madurai Bench of Madras High Court, Madurai.

+1 CC to Mr.K.P.NARAYANA KUMAR, Advocate (SR-16897[F] dated 21/04/2021)

+1 CC to Mr.R.J.KARTHICK, Advocate (SR-17284[F] dated 23/04/2021)

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