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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.09.2021

Pronounced on : 24.01.2022

CORAM:

THE HONOURABLE MRS. JUSTICE S. KANNAMMAL

S.A.No.616 of 2021
and
C.M.P.No.12846 of 2021

K.M.Palanisamy ...Appellant/Appellant/Defendant

Versus

K.Rajasekaran ...Respondent/Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree of the III Additional District & Sessions Court, Erode at Gobichettipalayam made in A.S.No.20 of 2019 dated 15.10.2020 in confirming the decree and judgment of the Subordinate Court, Gobichettipalayam in O.S.No.13 of 2015 dated 13.02.2019.

For Appellant :Mr.R.Thangavel

For Respondent :Mr.Mukundan

JUDGMENT

This appeal has been preferred against the decree and judgment dated 15.10.2020 passed in A.S.No.20 of 2019 by the III Additional District & Sessions Court, Erode, Gobichettipalayam, confirming the decree and judgment dated 13.02.2019 passed in O.S.No.13 of 2015 by the Subordinate Court, Gobichettipalayam.

2.The appellant herein is the defendant and the respondent herein is the plaintiff. The respondent / plaintiff filed a suit in O.S.No.13 of 2015 against the appellant herein, seeking for eviction of the appellant and also to direct him to vacate and deliver vacant possession of the suit property to the respondent and also pay damages for committing act of waste and for illegal occupation for enjoyment of the property from



15.07.2014 till the date of actual delivery of possession.

3.The case of the respondent/plaintiff is that the suit property was originally belonging to his wife who got the property by virtue of sale deed dated 06.09.1984. The appellant/defendant had taken the property on bogiyam for a sum of Rs.2,00,000/- and an un-registered mortgage deed dated 03.01.2004 was executed. The agreement between the parties was that there is no need to pay rent by the appellant/defendant till the appellant/defendant repays the amount of Rs.2,00,000/- to the plaintiff. The period of mortgage was 360 days from 15.01.2004 and there was no extension of time. As such, the appellant/defendant continued to be in possession for nearly 8 years and he has not asked for repayment of Rs.2,00,000/-. While so, according to the plaintiff, his family required the suit premises for personal use. The wife of the plaintiff who is the original owner of the suit property nominated the plaintiff herein as her power agent. Therefore, the plaintiff demanded the defendant to vacate and hand over the possession of the suit property. The appellant/defendant requested time till June 2011. Later, the wife of the plaintiff had settled the property in favour of the plaintiff dated 04.08.2011 by registered settlement deed and thereby the plaintiff had become an absolute owner of the suit property and informed the same to the appellant/defendant by letter dated 12.08.2011 and also made an offer to let out the suit premises on a monthly rent of Rs.10,000/- and treating the initial amount of Rs.2,00,000/- as advance. However, in his reply dated 22.08.2011, the defendant refused the offer and demanded repayment of Rs.2,00,000/- as a condition precedent to vacate the suit property. Later, the appellant/defendant without vacating the suit premises filed a suit in O.S.No.144 of 2012 against the plaintiff for permanent injunction to restrain from evicting him from the suit premises except due process of law. In the said suit, the plaintiff deposited a sum of Rs.2,00,000/- in the Court. Later, the suit filed by the appellant/defendant came to be dismissed for default. Therefore, the respondent/plaintiff claimed that the appellant/defendant is liable to vacate the suit premises by receiving the amount deposited by the plaintiff in the above said suit. However, contrary to the same, the appellant/defendant has been continuing in possession of the suit premises as a trespasser.

4.It is also the case of the plaintiff that the suit premises will fetch not less than Rs.10,000/- per month as rent and the appellant/defendant is bound to pay the damages for his illegal use and occupation and further the appellant/defendant



removed the barbed fence put up around the suit property and also demolished the sun shade of RCC roof structure made within the compound without permission of the plaintiff. Therefore, the plaintiff also claimed for damages. Hence, the suit.

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5. Resisting the suit, the appellant/defendant filed a written statement inter alia denying all the averments made in the plaint. According to the appellant/defendant after getting the suit premises on payment of Rs.2,00,000/- (interest free), he started M/s.ABT Parcel Service. Since the defendant found it difficult to carry the parcel service business as the vehicles and goods could not reach the suit property freely, the plaintiff himself removed the compound wall entrance gate. It is also the case of the defendant that without repaying the bogiyam amount, the plaintiff used to disturb his peaceful possession and enjoyment over the suit property which prompted the appellant/defendant to file a suit in O.S.No.144 of 2012 before the District Munsiff Court, Gobichettipalayam. The appellant/defendant approached the plaintiff and his wife for repayment but they have not repaid but keep on postponing the same under some pretext or the other. The appellant/defendant arranged a new building for bogiyam and if the plaintiff and his wife repaid the bogiyam amount, he would have taken the new building. But, since the plaintiff failed to repay the bogiyam amount in time, the appellant/defendant could not pay the advance for new building and in such circumstances, he was not in a position to vacate the premises by searching another building and shift his business there. The defendant was ready to vacate the suit property when he arranged the new building to shift his business and was waiting for repayment of bogiyam amount but it was only on the failure of the plaintiff, he lost the new building. The plaintiff is not entitled to seeking delivery of possession as he had not repaid the bogiyam amount even after expiry of the bogiyam period. The defendant has been in lawful possession and the plaintiff is not entitled to claim any damages much less rent for Rs.10,000/- per month.

6. To prove the respective cases, on behalf of the respondent/plaintiff P.Ws. 1 to 3 were examined and Exs.A1 to A17 were marked. While on behalf of the appellant/defendant, D.Ws.1 and 2 were examined and no documentary evidence was adduced.

7. The trial Court on consideration of both oral and documentary evidence, adduced by both parties, has categorically come to the conclusion that the respondent/plaintiff has made out the case since as per the agreement Ex.B1, the appellant/defendant had agreed that he would vacate the suit



premises once he received the amount of Rs.2,00,000/- from the plaintiff's wife and the said amount was already deposited in the suit filed by the appellant/defendant in O.S.No.144 of 2012. Therefore, when the amount was deposited it is for the appellant/defendant to withdraw the said amount and vacate the premises which the appellant/defendant has failed to do so. In such circumstances, the trial Court has ordered eviction of the appellant/defendant and directed him to vacate and deliver the vacant possession to the plaintiff within a month. The trial Court has also granted damages for the use and occupation of the suit property from 15.07.2014 till the delivery of possession, taking note of the fact that the respondent/plaintiff deposited the bogiyam amount on 14.07.2014 into the Court. As such, the trial Court by judgment and decree dated 13.02.2019, decreed the suit. Aggrieved by the same, the appellant/defendant preferred an appeal in A.S.No.20 of 2019 before the III Additional District & Sessions Court, Erode, Gobichettipalayam.

8.The lower appellate Court on consideration of the findings rendered by the trial Court as well as the evidence available on record, has confirmed the decree and judgment of the trial Court. Challenging the judgment and decree of the lower appellate Court, the appellant/defendant has preferred the present appeal.

9.While admitting the present Second Appeal, this Court, framed the following substantial questions of law:

"A.Whether a suit for recovery of possession under usufructuary mortgage is maintainable without impleading the original mortgagor as a party to the suit?

B.Whether a deposit made by the successor of the property in a suit for bare injunction could be treated as a valid or proper repayment so as to claim for possession of the property under usufructuary mortgage?

C.Whether the defendant could be made liable for damages for use and occupation when the repayment of the loan is not in accordance with the usufructuary mortgage loan agreement?

D.Whether the Courts below are right in holding that the loan amount is repaid by the respondent and that the appellant is required to vacate the hand over the possession of the suit property to the respondent?

E.To what relief? "



10. Heard the learned counsel for the appellant as well as the learned counsel for the respondent and perused the materials available on record.

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11. The learned counsel for the appellant would contend that the original owner of the suit property was the wife of the plaintiff and she was not arrayed as a party and thereby the suit was bad for non-joinder of necessary party. He would also contend that the suit filed by the appellant/defendant in O.S.No.144 of 2012 was only for bare injunction and there was no necessity to deposit the amount by the plaintiff in his suit. However, both the Courts below have not considered this aspect. He would also contend that when the appellant/defendant was ready to vacate the suit premises and was waiting for repayment of bogiyam amount. Admittedly, neither the plaintiff nor the plaintiff's wife repaid the bogiyam amount by which the appellant/defendant was not able to finalise the new building. He would also contend that the respondent/plaintiff has not made out case for damages with effect from 15.07.2014 onwards. With these contentions, the learned counsel for the appellant/defendant prays this Court to set aside the findings of the Courts below.

12. Admittedly, the appellant/defendant was put in possession of the suit property and payment of bogiyam amount of Rs.2,00,000/- under un-registered mortgage deed dated 03.01.2004 and the agreement between the parties was that the lease period was 360 days and thereafter as and when the plaintiff repays the bogiyam amount, the defendant has to vacate the premises. While so, the plaintiff has never asked the defendant to vacate the premises and as such he continued his possession over the suit premises for nearly 8 years. Thereafter, the wife of the plaintiff who was the original owner of the suit premises had settled the suit property in favour of the plaintiff and the plaintiff after becoming as owner of the suit property, demanded the appellant/defendant to accept the offer made by him that to pay a sum of Rs.10,000/- per month towards rent also to treat the bogiyam amount of Rs.2,00,000/- as advance, which was not accepted by the appellant/defendant. The plaintiff all along for the past 8 years, has not disturbed the possession of the appellant/defendant and only in the year 2011 by letter dated 12.08.2011 made an offer to let out the suit premises for rent claiming a sum of Rs.10,000/- as rent and also treating bogiyam amount as advance. If the appellant/defendant is not inclined to the offer made by the plaintiff, he has to demand the repayment of bogiyam amount but instead, he rushed to the Civil Court and filed a suit in O.S.No.144 of 2012 against the plaintiff



restraining him from evicting and interfering with his peaceful possession over the suit premises. The plaintiff has rightly deposited the bogiyam amount in the said suit since the appellant/defendant was not willing to receive and vacate the suit premises, despite the letter dated 12.08.2011 sent by the plaintiff. It is pertinent to note that the appellant/defendant allowed his suit to be dismissed for default by absenting himself to prosecute the suit. Therefore, both the Courts below have rightly found that since the agreement between the parties was that as and when the appellant/defendant receives the bogiyam amount of Rs.2,00,000/- he has to immediately vacate and hand over the possession. But in this case, the appellant/defendant has cleverly moved the Civil Court and file the suit and later allowed it to be dismissed for default only for the purpose of dragging the matter so as to continue his possession in the suit property. Once the amount has been deposited in the suit filed by the appellant/defendant, it is incumbent upon the appellant/defendant to withdraw the said amount and fairly vacate the premises. However, in order to frustrate the concurrent judgments and decrees passed by the Courts below, the appellant/defendant has preferred the present appeal with untenable grounds. Further, it is pertinent to note that the plaintiff has deposited the bogiyam amount in the suit as early as on 14.07.2014 itself and there was no impediment for the appellant/defendant to withdraw the said amount and vacate the premises. In such circumstances, when the appellant/defendant failed to do so. Therefore, the Courts below have rightly come to the conclusion that the appellant/defendant was in un-lawful possession from 15.07.2014 onwards which this Court also concur the same as such the respondent/plaintiff is entitled to the damages which both the Courts' below have granted the same. Therefore, in view of the concurrent and categoric findings of the Courts below, this Court does not find any scope to interfere with the same. Accordingly, all the substantial questions of law, are answered against the appellant and as such, this Court is of the view that the present appeal is liable to be dismissed.

13. In the result, this Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS-II)

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Sub Assistant Registrar



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To

1.The III Additional District & Sessions Judge,
Erode at
Gobichettipalayam

2.The Subordinate Judge,
Gobichettipalayam.

Copy to:
The Section Officer,
V.R.Section,
High Court, Madras.

+lcc to Mr.Mukundan, Advocate SR.No.4546
+lcc to Mr.C.Anbu, Advocate SR.No.3917

S.A.No.616 of 2021

KV(CO)
CB(03/03/2022)