



S.A.(MD)Nos.619 & 620 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 02.12.2022

CORAM

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

S.A.(MD)Nos.619 & 620 of 2022 and
CMP(MD) No.8687 of 2022 in
SA(MD) No.619 of 2022

S.A.(MD)No.619 of 2022:-

Soundarammal (Died)

- 1.Balamani
- 2.Nagarani
- 3.Dhanalakshmi

Appellants

Vs.

- 1.Purusothaman (Died)
- 2.Mohana
- 3.Sathyanarayana
- 4.Saratha
- 5.Padmavathi
- 6.Alamelu @ Ayisha Banu
- 7.Moorthy
- 8.Meenal
- 9.Raman
- 10.Rukmani
- 11.Balamani
- 12.Shanmugasundari
- 13.Baby
- 14.Parthasarathy
- 15.Booja Priya

Respondents

(Respondents 13 to 15 are brought on record as legal heirs of the deceased first respondent vide Court order dated 29.09.2022 made in CMP(MD) No.9061 of 2022 in SA(MD) No.619 of 2022 by BPJ)



S.A.(MD)Nos.619 & 620 of 2022

S.A.(MD)No.620 of 2022:-

Soundarammal (Died)

1.Balamani

2.Nagarani

3.Dhanalakshmi

Appellants

Vs.

1.Purusothaman (Died)

2.Baby

3.Parthasarathy

4.Booja Priya

Respondents

(Respondents 2 to 4 are brought on record as legal heirs of the deceased sole respondent vide Court order dated 29.09.2022 made in CMP(MD) No.9062 of 2022 in SA(MD) No.620 of 2022 by BPJ)

PRAYER in SA(MD) No.619 of 2022:- Second Appeal filed under Section 100 of Code of Civil Procedure, to set aside the Judgment and decree of the lower Appellate Court dated 17.06.2019 passed in A.S.No.3 of 2013, on the file of the Subordinate Court, Ramanathapuram, confirming the Judgment and decree of the trial Court, dated 18.10.2012 passed in O.S.No.179 of 2005, on the file of the District Munsif Court, Ramanathapuram.

PRAYER in SA(MD) No.620 of 2022:- Second Appeal filed under Section 100 of Code of Civil Procedure, to set aside the Judgment and decree of the lower Appellate Court dated 17.06.2019 passed in A.S.No.4 of 2013, on the file of the Subordinate Court, Ramanathapuram, confirming the Judgment and decree of the trial Court, dated 18.10.2012 passed in O.S.No.58 of 1999, on the file of the District Munsif Court, Ramanathapuram.



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For Appellants : Mr.M.Saravanan

For Respondents : Mr.H.Arumugam

COMMON JUDGMENT

These second appeals are filed as against the concurrent findings of the Courts below in A.S.Nos.3 & 4 of 2013, dated 17.06.2019 confirming the judgment and decree passed in O.S.No.179 of 2005 and O.S.No.58 of 1999, dated 18.10.2012 respectively.

2.Since the issue involved in these Second appeals and the parties are interlinked, these Second appeals are taken up for hearing and disposed of by way of this common judgment.

3.The mother of the appellants, one Soundaram filed a suit in O.S.No.58 of 1999 before the District Munsif Court, Ramanathapuram for the relief of declaration and for permanent injunction with regard to the suit schedule house property. The defendant in O.S.No.58 of 1999 has filed a subsequent suit in O.S.No.179 of 2005 to declare that the suit schedule property belongs to him and also for recovery of possession. Both the suits were jointly tried by the trial Court. The suit filed by Soundaram in



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O.S.No.58 of 1999 was dismissed and the suit in O.S.No.179 of 2005 was decreed by the trial Court. As against the findings in O.S.No.58 of 1999 and O.S.No.179 of 2005, dated 18.10.2012, Appeal suits were filed in A.S.No.3 & 4 of 2013 before the Subordinate Court, Ramanathapuram. By order dated 17.06.2019, the first Appellate Court dismissed the appeals, as against which, the present Second Appeals have been filed by the legal heirs of the deceased Soundaram, in SA(MD) No.619 & 620 of 2022.

4.SA(MD)No.619 of 2022 is filed on the following substantial questions of law:-

- i. Whether the Courts below have committed a serious error in law in granting the relief sought for in the suit in O.S.No.179 of 2005 filed by the deceased 1st respondent viz Purushothaman without considering the crucial issue that no positive and acceptable evidence have been produced to substantiate that the suit schedule property is also the subject matter of the documents marked as Ex.B1 & B4?
- ii. Have not the Courts below erred in law in merely placing the entire burden of proof on the plaintiff in O.S.No.58 of 1999 without adverting that the first respondent now deceased has also filed an independent suit in O.S.No.179 of 2005, as



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such the burden of proof is also equally on the plaintiff in O.S.No.179 of 2005 especially the relief sought for is declaration of title and recovery of possession?

iii. Whether the judgment and decree of the Courts below is vitiated in granting the relief of recovery of possession as well in O.S.No.179 of 2005 as confirmed in A.S.No.3 of 2013, without considering the very plea raised by the respondents, more specifically the plaintiff in O.S.No.179 of 2005 is that the appellants' predecessor vis., Soundaram is a tenant in the property?

iv. Whether the suit in O.S.No.179 of 2005 itself is maintainable, without first invoking the provisions of Tamil Nadu Building (Lease and Rent Control) Act, 1960 when it is the specific plea of the plaintiff in O.S.No.179 of 2005 that the 1st defendant viz., Soundaram is a tenant in the suit property?

5.SA(MD) No.620 of 2022 is filed on the following substantial questions of law:-

i. Whether the Courts below have committed a serious error in law in granting the relief sought for in the suit in O.S.No. 179 of 2005 filed by the deceased 1st respondent viz



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Purushothaman without considering the crucial issue that no positive and acceptable evidence have been produced to substantiate that the suit schedule property is also the subject matter of the documents marked as Ex.B1 & B4?

ii. Have not the Courts below erred in law in merely placing the entire burden of proof on the plaintiff in O.S.No.58 of 1999 without adverting that the first respondent now deceased has also filed an independent suit in O.S.No.179 of 2005, as such the burden of proof is also equally on the plaintiff in O.S.No.179 of 2005 especially the relief sought for is declaration of title and recovery of possession?

iii. Whether the judgment and decree of the Courts below is vitiated in granting the relief of recovery of possession as well in O.S.No.179 of 2005 as confirmed in A.S.No.3 of 2013, without considering the very plea raised by the respondents, more specifically the plaintiff in O.S.No.179 of 2005 is that the appellants' predecessor vis., Soundaram is a tenant in the property?

iv. Whether the suit in O.S.No.179 of 2005 itself is maintainable, without first invoking the provisions of Tamil Nadu Building (Lease and Rent Control) Act, 1960 when it is the specific plea of the plaintiff in O.S.No.179 of 2005



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that the 1st defendant viz., Soundaram is a tenant in the suit property?

6.The learned counsel appearing for the appellants by relying upon the judgment of the Honourable Supreme Court in ***East India Corporation Ltd Vs.Shree Meenakshi Mills Ltd***, reported in ***1991 3 SCC Page No.230*** submits that the mother of the appellants, namely, Soundaram, who filed the suit in O.S.No.58 of 1999 is only a tenant. When a specific stand has been taken by the defendant that the appellants' mother ought to have filed an application before the concerned Rent Controller and she ought not have filed the suit and therefore, on this ground the Second Appeals have to be admitted and notice has to be ordered.

7.The learned counsel further submits that the judgment and decree passed in the above suits can be set aside and remanded back to the Rent Controller for fresh adjudication as to whether the appellants' mother is a tenant and whether there is any arrears of rent?

8.The Honourable Supreme Court in the case of ***East India***



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Corporation Ltd Vs.Shree Meenakshi Mills Ltd, reported in **1991 3 SCC**

Page No.230 has held as follows:-

“9.What is stated in the second proviso to section 10(1) is the sole circumstance in which the civil court is invested with jurisdiction in matters of evictions. But this jurisdiction cannot be invoked otherwise than as stipulated in the second proviso. This means that the condition precedent to the exercise of jurisdiction by a civil court is that the tenant should have denied the title of the landlord or claimed right of permanent tenancy and the Controller should, on such denial or claim by the tenant, reach a decision whether such denial or claim is bona fide. Upon such decision, the Controller must record a finding to that effect. In that event, the landlord is entitled to sue for eviction of the tenant in a civil court. Where these conditions are satisfied, the civil court will have jurisdiction to pass a decree for eviction on any of the grounds mentioned, in section 10 or Sections 14 to 16, notwithstanding that the Court has found that the tenant's denial of the landlord's title does not involve forfeiture of the lease, or, his claim of right of permanent tenancy is unfounded. Except to this limited extent, the jurisdiction of the civil court in matters of eviction of a tenant is completely barred and the jurisdiction in such matters is



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vested in the tribunals set up under the statute.

*10. Significantly, the jurisdiction of the civil court can be invoked only where the controller comes to a decision, and records a finding, that the denial or claim by the tenant, as aforesaid, is bona fide. If the Controller were to come to the opposite conclusion, no question of invoking the jurisdiction of the civil court would arise. But the decision of the controller is concerned solely with the bona fides and not the correctness or validity, of the denial or claim, for these difficult questions of title are by the statute reserved for decision by the appropriate civil court which is the more competent forum in such matters (See the principle discussed in *Magiti Sasamal v. Pandap Bissoi*, [1962] 3 SCR 673. In such an event, the civil court will become competent to pass a decree for eviction on any of the grounds mentioned in section 10 or sections 14 to 16. On the other hand, if the decision of the controller is that the tenant's denial or claim is not bona fide the jurisdiction of the civil court cannot be invoked by the landlord and the Controller will then be the competent authority to order eviction, after affording the parties a reasonable opportunity of being heard, on any one of the grounds specified under the statute, including the ground that the tenant has, without bona fide, denied the landlord's title or*



claimed right of permanent tenancy. What is significant is that the decision of the Controller, duly recorded by him, as regards the bona fide denial or claim by the tenant is the condition precedent to the invocation of power of the civil court. Any suit instituted by the landlord for eviction of a tenant from a building falling within the ambit of the Act, otherwise. Than as stipulated by the section, is, therefore, incompetent for lack of jurisdiction of the Court and any decree of the Court in such a suit is null and void and no effect.

11.In the present case, the procedure stipulated in the second proviso to section 10 has not been complied with. At the time of the institution of the suit, the building in question did not come within the ambit of the Act, owing to the exclusionary provision contained in clause (ii) of section 30, but after leave to appeal was granted by this Court, the applicability of the Act was extended to the building by reason of the decision of this Court in Rattan Arya & Ors. v. State of Tamil Nadu & Anr., [1986] 3 SCC 385 declaring the invalidity of clause (ii) of section 30 on account of its inconsistency with Article 14 of the Constitution. Whatever be the consequence of that declaration - whether it has rendered the statutory provision null and void and of no effect. See Behram



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Khurshed Pesikaka v. The State of Bombay, [1955] 1 SCR 613 and Saghir Ahmed v. The State of U.P. and others, [1955] 1 SCR 707 or merely inoperative, unenforceable and dormant to be revitalised on subsequent removal of the constitutional ban. See Bhikaji Marain Dhakras and Others v. The State of Madhya Pradesh and Another. [1955] 2 SCR 589 and M.P.V. Sundararamier & Co. v. The State of Andhra Pradesh & Another, [1958] SCR 1422 in either event, the Civil Court acting without the aid of the exclusionary provision in clause (ii) of section 30, during the period of invalidity, has become coram no judice and its proceedings resulting in the decree a nullity. See Kiran Singh & Others v. Chaman Paswan & Others, [1955] 1 SCR 117 at 121.”

9.However, in this case, the appellants' mother filed a suit in O.S.No.58 of 1999 for declaration, declaring that the suit schedule house belongs to her and also sought for an injunction, restraining the defendant from interfering with her peaceful possession and therefore, the defendant in the suit was constrained to file another suit in O.S.No.179 of 2005 to establish his title over the suit schedule house property by way of declaration and for recovery of possession. It is to be noted that pending



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the appeal suits, the said Soundaram died and her legal heirs have been impleaded as appellants in the Appeal Suits.

10.The appellant has raised the issue of maintainability of the OS.No.179 of 2005 for the first time in these second appeals. The appellant has neither pleaded nor proved this ground in both the suits. The Hon'ble Supreme Court in *Deepak Tandon v. Rajesh Kumar Gupta*, reported in (2019) 5 SCC 537 held that the plea of maintainability cannot be raised for first time in appeal. The relevant portion is extracted as follows:-

“15.In our considered opinion, the High Court committed jurisdictional error in setting aside the concurrent findings of the two courts below and thereby erred in allowing the respondent's writ appeal and dismissing the appellants' application under Section 21(1)(a) of the 1972 Act as not maintainable. This we say for the following reasons:

15.1.First, it is not in dispute that the respondent (opposite party) had not raised the plea of maintainability of the appellants' application under Section 21(1)(a) of the 1972 Act in his written statement before the Prescribed Authority.

15.2.Second, since the respondent failed to raise the plea of maintainability, the Prescribed Authority rightly did not decide this question either way.



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15.3.Third, the respondent again did not raise the plea of maintainability before the first appellate court in his appeal and, therefore, the first appellate court was also right in not deciding this question either way.

15.4.Fourth, it is a settled law that if the plea is not taken in the pleadings by the parties and no issue on such plea was, therefore, framed and no finding was recorded either way by the trial court or the first appellate court, such plea cannot be allowed to be raised by the party for the first time in third court whether in appeal, revision or writ, as the case may be, for want of any factual foundation and finding.

15.5.Fifth, it is more so when such plea is founded on factual pleadings and requires evidence to prove i.e. it is a mixed question of law and fact and not pure jurisdictional legal issue requiring no facts to probe.”

11. In view of the above, these Second Appeals are dismissed.

No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes/No

Internet: Yes/No

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To
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- 1.The Subordinate Court, Ramanathapuram.
- 2.The District Munsif Court, Ramanathapuram.
- 3.The Section Officer,
Madurai Bench of Madras High Court,
Madurai.



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B.PUGALENDHI, J.

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Judgment made in
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