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S.A.No.534 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30..03..2023

Coram

THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN

Second Appeal No.534 of 2007

1. K.Balasubramaniam (Died)
2. G.Parameswari (Died)
3. K.Ambujam
4. B.Thilakavathi
5. B.Kanniappan
6. U.Malarkodi
7. R.Jayakodi
8. B.Thenmozhi
9. G.Babu

[Appellants 4 to 7 brought on record as legal representatives of the deceased 1st appellant viz., K.Balasubramaniam and the Appellants 8 & 9 brought on record as legal representatives of the deceased 2nd appellant viz., G.Parameswari vide court order dated 15.09.2021 in C.M.P.No.11138, 11127 and 11146 of 2021 in S.A.No.534 of 2007]

..... Appellants

-Versus-

1. Akbbar Sahib
2. Hameed Khan
3. Ansar
4. K.Anbazhagan

..... Respondents



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Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 27.11.2006 made in A.S.No.27 of 2005 by the learned Subordinate Judge, Kancheepuram, reversing the judgement and decree dated 24.03.2005 made in O.S.No.1403 of 1994 by the learned Principal District Munsif, Kancheepuram.

*For Appellant(s) : Mr.R.Singaravelan,
Senior Counsel for
Mr.N.S.Sivakumar*

*For Respondents : Mr.N.Rajavadivelu for RR 2 & 3
[No Appearance]
No Appearance for RR 3 & 4*

JUDGEMENT

The plaintiffs are the appellants. Challenge in the Second Appeal by the plaintiffs is against the reversal of decree of the trial court by the first appellant court in allowing A.S.No.27 of 2005 and dismissing the suit in O.S.No.1403 of 1994.

2. The case of the plaintiffs is that they are the absolute owners of the suit schedule mentioned property. It originally belonged to the plaintiffs' father one Subramania Mudaliar. The said Subramania Mudaliar had entered into a registered lease agreement with one Yusuf Khan, the father of the defendants 1 to 3. This agreement was entered into on 29.03.1942. On the expiry of the said lease, Kanakasabapathy Mudaliar Son of Subramania Mudaliar entered into an



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other lease deed with Rajunnisa wife of Yusuf Khan on 15.05.1961. Alleging that Rajunnisa has sub-let the property to K.Anbazhagan for running a Metal Store under the name and style of M/s.Visalakshi Metal Store and also alleging that Rajunnisa was pulling down the existing superstructure and attempting to construct a new one, the present suit had been filed.

3. A written statement was presented by Rajunnisa, the 1st defendant admitting to the registered lease deed dated 15.05.1961. According to the written statement, the lease deed permits putting up a superstructure and, therefore, the 1st defendant pleaded that putting up an additional construction is not barred. She would state that the allegations that she defaulted in payment of rent is false and that she is a tenant holding over, as she had been continuing in possession of the property after the expiry of the lease. She would claim that she is entitled to the benefits of Section 9 of The Tamil Nadu City Tenants' Protection Act. She challenged the plaintiffs to file the suit for ejectment and denied the sub-tenancy. Pending suit, original plaintiff – S.Krishnasami and the 1st defendant – Rajunnisa passed away. Their legal representatives were brought on record as 2 to 4 plaintiffs and defendants 3 to 5 respectively.

4. The trial court decreed the suit as prayed for and the same was reversed by the first appellate court.

5. Aggrieved by the same, the present second appeal has been presented



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by the plaintiffs. This court while admitting the Second Appeal framed the

following substantial questions of law:-

1. Whether the findings of the Lower Appellate Court are correct in law in holding that in the absence of any recital in Ex.A2 – Lease Deed dated 15.05.1961, the defendants are entitled to put up a construction on the suit property?

2. Whether the Lower Appellate Court is correct in law in reversing the findings of the trial court in the absence of any documentary evidence let in by defendants 2 to 5?

3. Whether the Lower Appellate Court is correct in law in reversing the decree for mandatory injunction also even though the defendants 2 to 5 have not proceeded any documentary evidence to show that they have planning permission to put up construction on the suit property?

4. Whether the Lower Appellate Court is correct in law in holding that the second defendant was not a sub-tenant under the deceased first defendant?

6. I have heard Mr.R.Singaravelan, Senior Counsel appearing on behalf



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of Mr.N.S.Sivakumar, learned counsel on record for the appellants.

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7. The matter was adjourned on 28.02.2023, 09.03.2023, 15.03.2023, 16.03.2023 and finally on 20.03.2023. On all those occasions, the learned counsel for the appellants was ready and made his submissions. I entertained a doubt as to why the respondents are not appearing before the court and requested the counsel on record for the appellants to take fresh notice to the respondents. Ms.K.Janani, learned counsel who was representing the counsel on record for the appellants submitted that she had taken fresh notice and filed affidavit of service (AOS) in USR 10683 dated 27.03.2023. Notice taken to the respondents 2 and 3 through Registered Post with Acknowledgement Due have been returned with an endorsement “parties have left”. There is no representation on behalf of the respondents 2 and 3 and also for the respondents 1 and 4. Being left with no other alternative, I am entering the judgement on merits of the case.

8. The relationship between the parties is not in dispute. The plaintiffs are the landlords and the defendants 1, 3 to 5 are the tenants. The 2nd defendant is the alleged sub-tenant. The trial court found that construction activities are going on and therefore, granted an order of injunction. This is as per the Advocate Commissioner's Report which has been marked as Ex.C.1 and the Sketch as Ex.C.2.



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9. I have gone through the Advocate Commissioner's Report and Sketch.

It is clear that the Advocate Commissioner had given notice to the plaintiffs as well as to the 2nd defendant. If the 2nd defendant was not interested in the property, the question of him being present at the time of inspection would not arise at all.

10. The first appellate court had held that the plaintiffs have not proved the sub-tenancy between the 1st defendant and the 2nd defendant. This turns the concept of burden of proof on his head. By the very nature of things sub-tenancy is a secret arrangement/agreement between the original tenants and the sub-tenant. The landlords would never be put on notice about the alleged sub-tenancy unless and until the contract specifies to the contrary. Sub-tenancy being secret agreement between the 1st defendant and the 2nd defendant, demand of the first appellate court that plaintiffs should have proved the sub-tenancy by production of records is like expecting the plaintiff to prove an impossibility. It was an agreement, as already stated, between the 1st defendant and the 2nd defendant and the 2nd defendant was present at the time of inspection in the suit property. I would draw an inference that if the 2nd defendant was unconnected with the suit, he had no business to be at the location as the person not interested in the proceedings would not venture to give assistance to an Advocate Commissioner. Therefore, the finding of the first appellate court that



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the sub-tenancy has not been proved by the plaintiffs is a perverse finding. It

has shifted the burden from the defendants 1 and 2 to the plaintiffs. This is contrary to Section 106 of the Evidence Act.

11. I move on to the 2nd aspect as to whether there is any construction in the premises. Para 2 of the Advocate Commissioner's Report, which is extracted hereunder shows that the previous construction had been pulled down and a new construction has been raised. The relevant portion of the Advocate Commissioner Report read as under:-

“2. The suit property is situated at Gandhi Road, Kancheepuram, bearing door No. The suit property was identified by the plaintiff. The portion shown as A B C D in the rough plan measures East to West 16 feet and North to South 43 feet. In this place some old building should have been in existence. At the time of my inspection actually the construction work has been in progress. There are five pillars on the eastern side and another five pillars on the western side. They have been shown as P1, P2, P3, P4, P5, P6, P7, P8, P9, & P10 in the rough plan filed herewith. They are raising this building with pillar foundation. The eastern side wall AC has been raised to a height of 8' 6”. The western side wall



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DB has been has been raised to a height of 5 feet. The southern side wall CD has been raised to a height of 4 feet. These walls are all new brick wall constructions with cement. I have seen a heap of new bricks and another heap of cement mixture stored inside the AB CD portion. CD EF is a separate room situated to the south of A B C D portion. In the CD wall I have seen the remainings of old structure. In the A B C D portion some old building must have been in existence.”

12. A reading of Ex.C.1 -Advocate Commissioner's Report and Ex.C.2 Sketch would show that there was an existing building which by virtue of the agreement dated 29.03.1942 one can presume belonged to Yusuf Khan and that building was pulled down and a new superstructure was sought to be raised. It is here that 2 particular provisions of the Transfer of Property Act become relevant viz., Section 108(m) and 108(p) of the Transfer of Property Act. Section 108(m), empowers a tenant to carry out repairs over his superstructure. If mere repair work had been going on, the landlords do not have a right or cannot plead that they are entitled to an order of injunction. In this case, as already pointed out, Ex.C.1 and Ex.C.2 show positively that the existing superstructure had been pulled down and a new superstructure was being put up. Thus, I feel it comes within the mischief of section 108(p) of the Transfer



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of Property Act.

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13. The existing building of Yusuf Khan had been pulled down by the tenant herself in the year 1994 that put an end to the tenancy as per Section 108(e) proviso. The question of reading of 15.05.1961 document as the permission for the tenant to demolish the existing superstructure and put up a new one is a perverse finding. All that the agreement speaks about is that, at the end of the tenancy, the tenant is entitled to remove the superstructure. It was further agreed that she is duty bound to restore the land to its original position. By no stretch of imagination, can such a clause be treated as a consent of the landlord to pull down the existing superstructure and put up a new one. The Transfer of Property Act does not give unbridled right to the tenant to demolish any part of the superstructure. A unilateral act of the tenant in demolishing the superstructure is defying his status as the tenant and in fact, makes himself liable to be ejected from the property. In this case, the nature of construction is permanent as is clear from the Advocate Commissioner's Report. Under Order 26, Rule 10 of CPC, an Advocate Commissioner's Report can be read as evidence in the suit and I read it so. I am not able to read Ex.A.2 as granting express or implied consent for the tenant to put up superstructure after pulling down the existing one. It is the right of the landlord to negotiate and decide as to how much of the land that he wants to be burdened with the superstructure



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on the tenant. The tenant does not have unilateral right or permission to put up a permanent superstructure over the land as and how he pleases. Section 108(p) of the Transfer of Property Act is negative in content and if the tenant is not able to prove the permission from the landlord, injunction should follow. This is the view of the Supreme Court in **Purushottamdas Bangur v. Dayanand Gupta** reported in (2012) 10 SCC 409. The superstructure being permanent and there being no permission, I have no other option but to reverse the judgement of the first appellate court and decree the suit as prayed for.

14. The question of law framed by this court are answered accordingly in favour of the appellants and as against the respondents. This Second Appeal is allowed and the decree and judgement of the first appellate court is liable to be set aside and the judgement and decree passed by the trial court is to be restored and the suit should be decreed as prayed for. As the tenant indulged in the act of demolition and reconstruction without the consent of the landlords, I feel the cost should follow throughout.

In the result, this Second Appeal is allowed. The Decree and Judgement dated 27.11.2006 made in A.S.No.27 of 2005 by the learned Subordinate Judge, Kancheepuram, reversing the judgement and decree of the trial court is set aside and decree and judgement dated 24.03.2005 made in O.S.No.1403 of



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1994 by the learned Principal District Munsif, Kancheepuram, is restored.

Costs throughout.

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Index : yes / no
Neutral Citation : yes / no
Speaking / Non Speaking Order
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To

- 1.The Subordinate Judge, Kancheepuram, Kancheepuram District.
- 2.The Principal District Munsif, Kancheepuram, Kancheepuram District.



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V.LAKSHMINARAYANAN, J.
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