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S.A(MD)No.445 of 20



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.10.2024

CORAM

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

**S.A(MD)No.445 of 2006
and
C.M.P(MD)No.3756 of 2006**

1.Karupayee @ Vellaithayee Ammal
2.Ramasamy ... Appellants/Appellants/Defendants

Vs.

Kathariya Tharka Trust,
Khajiman Street,
Madurai Town,
Through its President,
M.Syed Khader Meher Ali Sahib

... Respondent/Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 15.06.2005 made in A.S.No.167 of 2004 on the file of the 3rd Additional Sub Court, Madurai, confirming the judgment and decree, dated 20.04.2004 made in O.S.No.526 of 1995 on the file of the Additional District Munsif Court, Madurai.

For Appellants : Mr.PT.S.Narendravasan

For Respondent : Mr.A.Abdul Hameed



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JUDGMENT

The Judgments and decrees passed in O.S.No.526 of 1995 on the file of the Additional District Munsif Court, Madurai and in A.S.No.167 of 2004 on the file of the 3rd Additional Sub Court, Madurai, are being challenged in the present Second Appeal.

2.The respondent herein as plaintiff instituted a suit in O.S.No.526 of 1995 on the file of the trial Court against the appellants/defendants for the relief of recovery of possession, permanent injunction and to pay damages for use and occupation of the suit property from June 1995 till date of possession.

3.For the sake of convenience, the parties are referred to as, as described before the trial Court.

4.According to the plaintiff, it is a Muslim Public Religious and Charitable Trust. Many persons have endowed the properties to the Trust. The properties belonging to the plaintiff including the suit



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scheduled property bearing Survey No.90/1 has been surveyed by the Commissioner of Wakfs as per Section 4(3) of the Wakf Act. The Government of Tamil Nadu has forwarded the said survey report to the State of Wakf Board and the Board published the Plaintiff's Trust in Official Gazette, dated 27.05.1969 in serial No.98 and 115 of the Gazette. As per Section 6 of the Wakf Act, the character and nature of Wakf has become final and conclusive. The plaintiff's Trust is functioning under the General Supervision of the Tamil Nadu Wakf Board. The Trust is also paying contribution to the Wakf Board, as per Wakf Act. The plaintiff-Trust has created for the purpose of commorating the memory of Saint Mohaideen Abdul Khader Jolani for performing certain functions on the eleventh day of every month, performing Santhanakoodu every year free feeding to poor on the Ramjan days, conducting Moulooth and Kandoories in the month of Rabiya Avval in the name of Prophet Mohammad and in the month of Rabiya Akeer in the name of Saint Mohideen Abdul Khader Jilani and running Arabic School and other functions mentioned under the byelaws of the Trust. While so, the first defendant has taken the Door No.84 from the plaintiff on a monthly rent of Rs.50/- and Door No.84A on a monthly rent of Rs.50/- as per English Calender month. For the rents paid by the first defendant printed receipts have been issued to



the first defendant. The first defendant is occupying the suit property as a tenant under the plaintiff. At the time of vacating the suit property, the first defendant has to surrender whatever improvements made to the suit property to the plaintiff's Trust after removing the super structure. The first defendant has paid the rent till February 1995 to the plaintiff and obtained the receipts on 11.03.1995. The first defendant has not paid the rent beginning from March 1995 till date. She has also vacated the suit property and has not surrendered the suit property to the plaintiff. In law, the first defendant is to handover vacant possession to the plaintiff when the first defendant has illegally and unauthorisedly and even without the written consent of the plaintiff-Trust transferred and handed over the possession of the suit property to the second defendant. The occupation of the second defendant in the suit property is neither legal nor proper. Also, it is not binding on the plaintiff. There is no privity of contract between the plaintiff and the second defendant. The second defendant never obtained any written permission from the plaintiff to take any lease hold right over the suit property. By the conduct of the first defendant in allowing the second defendant to occupy illegally and unauthorisedly the suit property, the Plaintiff's Trust has been put to irreparable loss. The second defendant has no right in law to put up the construction in



the property of the plaintiff. The Office bearers of the plaintiff went to the spot and prevented the second defendant in anyway putting up construction. The plaintiff informed the Madurai Municipal Corporation, on 17.06.1995 that the Second Appellant/Second Defendant is putting up the constructions unauthorisedly and illegally and also without the permission of the plaintiff and also any plan from the Corporation in the suit property. The first defendant is a tenant of the plaintiff's Trust. She has unauthorisedly and illegally without the written consent of the plaintiff's Trust vacated and handed over the possession to the third party, viz., the second defendant. The first defendant has no right to part away the property to the second defendant. The first defendant is not in occupation of the suit property and also not paid the loan from March 1995 to the plaintiff. Hence, the plaintiffs have filed the said suit for the abovestated relief.

5.The defendants had filed a written statement stating that the plaintiff is not a Public Trust as alleged by it. The plaintiff is to prove that the suit property has been endowed to it and that the said trust has been supervised by the Commissioner of Wakf as per Section 4(3) of the Wakf Act. The plaintiff is not a public Religious and Charitable Trust. The suit property is a site belongs to the plaintiff. The



first defendant has been inducted as a tenant of the vacant site in respect of the suit property, in the year 1954. The first defendant at present has been paying the site rent of Rs.100/- per month. There is no arrears of rent by the first defendant, as averred by the plaintiff. There is no agreement to surrender with all the improvements made by the first defendant to the plaintiff. The first defendant had put up the super structure and she is the owner of the super structure. Further, the first defendant is paying the super structure tax to the Madurai Corporation. The first defendant is a City Tenant entitled to the benefits as per City Tenants Protection Act, 1921. The superstructure put up by the first defendant is worth Rs.1,50,000/-. The first defendant alone is in possession and enjoyment of the suit property from the year 1954. The plaintiff claimed an increased rent of Rs.200/- from the month of March 1995 and refused to receive the March 1995 rent which has been tendered to the plaintiff. The demand for an increase in rent of Rs.200/- is without any basis and unreasonable. The first defendant has vacated the portion and the second defendant is in occupation of the same. The second defendant is an employee of the first defendant. The first defendant alone is the tenant. The second defendant is helping the first defendant. The suit property is a tiled structure and continues to be the same. Periodical repair works will have to be



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carried out. The second defendant has nothing to do with the suit property and the first defendant is entitled to the benefits of the City Tenants Protection Act 1921 and therefore, she filed a Petition as per Section 9 of the Act in O.P.No. 2 of 1996. The suit is not maintainable in law and it is liable to be dismissed in limini. Notice to quit has not been issued by the plaintiff to the first defendant terminating tenancy. Without terminating the tenancy, the present suit filed by the plaintiff is not maintainable.

6.The averments of Additional Written Statement filed by the defendants are that in as much as the suit is one for vacating the site tenant. Notice to quit as per Section 106 of the Transfer of Property Act is mandatory. No notice has been issued as per Section 106 of the Transfer of Property Act. Furthermore, the relief for recovery of possession as prayed by the plaintiff is not sustainable in law or on facts. Indeed, the plaintiff ought to have filed the suit for ejectment only and prayed for dismissal of the suit.



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7.The plaintiff filed a reply statement stating that the plaintiff Trust never permitted the second defendant as the tenant. The first defendant is not in occupation of the suit site and only the second defendant is in occupation of the suit site without any authority. The first defendant after selling the superstructure to the second defendant is no longer a tenant of the plaintiff. The first defendant is only a formal party to avoid plurality of proceedings. The main relief has been sought against only the second defendant.

8.Before the trial Court, on the side of the plaintiff, P.W.1 and P.W.2 were examined and Exs.A1 to A12 were marked. On the side of the defendants, no witness has been examined and no documents have been marked.

9.On the basis of the rival pleadings made on either side, the trial Court, after framing necessary issues and after evaluating both the oral and documentary evidence, has decreed the suit.



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10. Aggrieved by the Judgment and decree passed by the trial Court, the defendants as appellants, had filed an Appeal Suit in A.S.No.167 of 2004 on the file of the first Appellate Court.

11. The first Appellate Court, after hearing both sides and upon reappraising the evidence available on record, has dismissed the appeal and confirmed the Judgment and decree passed by the trial Court.

12. Challenging the said Judgments and decrees passed by the Courts below, the present Second Appeal has been preferred at the instance of the defendants as appellants.

13. At the time of admitting the present second appeal, this Court had framed the following substantial question of law for consideration:

'i) Whether the Courts below are right in finding that the suit for recovery of possession is maintainable without a notice of termination of tenancy



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under Section 106 of the Transfer of Property Act, particularly when the plaintiff paid the court fee on annual rental value under Section 43(2) of the Tamil Nadu Court Fees and Suits Valuation Act?'

14.The learned counsel appearing for the appellants/defendants would submit that the Courts below erred in finding that since the first defendant sold the superstructure to the second defendant, the first defendant was not in possession of the suit property and therefore, notice under Section 106 is not necessary, particularly, when the first defendant is a tenant under the plaintiff only in respect of vacant site; the Court below have failed to see that the mere suit for recovery of possession is not maintainable in the absence of notice under Section 106 of the Transfer of Property Act is mandatory in nature; the Courts below erred in finding that the plaintiff is entitled for a decree for recovery of possession, since the landlord and tenant relationship between the plaintiff and the defendants has not been proved; the Courts below have failed to see that P.W.2 himself categorically stated that the superstructure sold by the first defendant to the second defendant will not bind him. Under such circumstances, the Courts below ought to have held that the tenancy is still in



existence; the Courts below erred in finding that the first defendant lost her tenancy right on the date of execution of sale deed in respect of the superstructure in favour of the second defendant and hence notice under Section 106 of the Transfer of Property act is not necessary, particularly when the plaintiff leased out vacant site alone to the first defendant and the first defendant still continues to be a tenant under plaintiff in respect of the vacant site; without issuing notice of termination of tenancy, the suit is not maintainable and the Courts below have failed to see that the second defendant never claims any tenancy right under the plaintiff and further the second defendant was not a tenant under the plaintiff and under such circumstances, notice terminating the tenancy of the first defendant under Section 106 of the Transfer of Property Act is mandatory and prayed for allowing the Second Appeal.

15.The learned counsel appearing for the respondent/plaintiff would submit that the plaintiff has issued notices to the appellants and one Durgesh and the parties can work out their remedy before the concerned Court, wherein new proceedings are to be initiated on the fresh cause of action.



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16.Heard the learned counsel appearing for the appellants/defendants and the learned counsel appearing for the respondent/plaintiff and also perused the records carefully.

17.When the matter is taken up for hearing today, the learned counsel appearing for the defendants would submit that earlier, this Court, by judgment dated 01.11.2011, disposed of the Second Appeal. However, the said judgment was restored on its file on 26.08.2019.

18.Further, the learned counsel appearing for the appellants would submit that the plaintiff issued a notice to the defendants 1 and 2 and one Durgesh on 29.04.2024, calling upon them to vacate and hand over vacant possession of the schedule property immediately on such termination of tenancy, failing which, appropriate legal proceedings will be initiated. Thereafter, second notice/statutory notice has been issued under Section 106 of the Transfer of Property Act to the defendants on 03.06.2024, wherein, the plaintiff had stated that the property bearing Door Nos.84 and 84A situated at Theni Main Road, Kalavasal, Madurai, was originally leased out to one Karupayee



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@ Vellaiyathayee Ammal and they paid rent till 1995 and the said Karupayee @ Vellaiyathayee Ammal not handed over the vacant possession to the Wakf Board and she handed over the possession of the suit property to the second defendant. Hence, the Management filed a suit for recovery of possession against the defendants. The second appeal was allowed. Hence, the suit for recovery of possession without issuance of notice under Section 106 of the Transfer of Property Act is taken care by this Court and this Court is of the view that no notice has been sent under Section 106 of the Transfer of Property Act. Hence, the new Management, who has taken charge on 15.03.2022, was of the view that they have to take fresh action in accordance with law as against all the parties, who are in possession. The second defendant had sub-letted the suit property to one Durgesh, who is in possession of the Wakf property. The alleged illegal transfer of Wakf property is void and it is not binding on the Wakf and they are all encroachers of the said Wakf property and they illegally attempting to alienate Wakf property to create fraudulent transaction, hence, with no other alternative remedy, as from 1995 onwards no rent has been paid and the litigation is pending, they have issued a notice that the lease issued in favour of the first defendant stands terminated upon issuance of two following notices as per law and the Wakf is



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terminating the lease by notice dated 29.04.2024 and lease was terminated and second notice is issued, since they failed to vacate the premises. The Wakq has determined the lease in favour of the first defendant and that the same has been terminated and third notice has also been issued to call upon the first defendant to pay the arrears of rent/damages from March 1995. As the defendants 1 and 2 and one Durgesh were found in illegal occupancy and proceeded against them under due process of law for eviction.

19.As the new notice has been issued against the defendants 1 and 2 and one Durgesh, since the Second Appeal which has been listed before this Court has to be considered whether the suit for recovery of possession is maintainable without a notice of termination of tenancy under Section 106 of the Transfer of Property Act, it is decided that there cannot be any such termination of tenancy except under due process of law. Hence, this Court is inclined to dispose of the Second Appeal on the ground that already eviction under due process of law has been initiated by making the parties to work out the remedy before the concerned Court of law, wherein new proceedings are to be initiated on the fresh cause of action.



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20. Accordingly, the Second Appeal is disposed of. No costs.

Consequently, connected Miscellaneous Petition is closed.

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To

- 1.The 3rd Additional Sub Court,
Madurai.
- 2.The Additional District Munsif Court,
Madurai.
- 3.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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V.BHAVANI SUBBAROYAN, J.

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Judgment made in
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