IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30/04/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.1209 of 1993

A.Koman .. Appellant

-Vs-

T.S.Balasubramaniyan .. Respondent

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree passed in A.S.No.53 of 1992 dated 25.6.1993 by the Subordinate Judge, Kumbakonam, setting aside the judgment and decree passed by the District Munsif, Kumbakonam, in O.S.No.354 of 1981 on 24.8.1992.

!For Appellant : Mr.T.P.Sankaran

^For Respondent : Mr.P.Valliappan
for M/s.M.S.Krishnan

:JUDGMENT

This second appeal has been brought forth from the judgment of the learned Subordinate Judge, Kumbakonam, made in A.S.No.53/92, wherein the judgment of the trial Court dismissing a suit for recovery of possession, lease amount and mesne profits was reversed.

2. The respondent/plaintiff filed the suit for the said reliefs with the following averments in the plaint:
The defendant took on lease the building and the site door No.1A (Now 1-B) in R.S.No.260, Natham. He executed a registered rent deed in favour of the plaintiff's father Sundaresam Pillai on 1.4.1978. The lease was for a period of three years from 1.4.1978 to 31.3.1981. The monthly rental was Rs.50/-. Sundaresam Pillai executed a Will on 1 8.10.1975, bequeathing the property in favour of the plaintiff. Sundaresam Pillai died. The defendant was never regular in the payment of rental. The defendant was in arrears from 1.4.1980. In view of the wilful default, the plaintiff issued a notice on 26.12.1980 to the defendant. The tenancy also expired by efflux of time. Thus, the plaintiff is entitled to recover possession of the suit properties and also the past rental of Rs.600/-. Out of 20 feet east west and 102

feet north south in the second item of property, Rajamani Ammal was entitled to 10 feet east west and 60 feet north south, and the plaintiff was not

claiming the portion of Rajamani Ammal. Hence, there arose a necessity for filing the suit.

3. The suit was resisted by the appellant/defendant with the following averments:

(a) The original landlord Sundaresam Pillai died on 27.5.1979, and he had got other heirs namely his wife Sethu Ammal, son Visvalingam Pillai and 7 daughters. The alleged will could not be a genuine one. The plaintiff has to first get a declaration of his sole right in a properly framed suit. The suit was bad for non-joinder of all the necessary parties. The defendant and his father paid the rent to the plaintiff subsequent to the receipt of the notice. The plaintiff never used to pass a receipt for the amount received from him. The advance amount paid by him to Sundaresam Pillai has not been given credit by the plaintiff. It has to be construed as lease for an indefinite period i.e. lease for life. He is entitled to the benefits of the City Tenants Protection Act. The suit was premature.

(b) He was only a lessee to the suit site. R.S.No.260 is a natham, government poramboke as per the government record. The plaintiff has no right to the suit property. The defendant was in possession of the suit property for more than 12 years, and he has constructed a building in that land for business purpose. Admittedly, the suit site belonged to Arunajadeswara Swamy Koil, Thirupanandal. Hence, the temple and the government were necessary parties to the suit. The government alone can have the right to evict him. He was always ready to pay the necessary charges if levied. The plaintiff was estopped to plead any additional claim or right over any other property in this suit. He has to file a separate suit for the same. The defendant is an engineer. The Tamil Nadu Government has recommended him to start an Agro Service Centre at Thirupanandal. Accordingly, he started the same with the help of the State Bank of India. If he is given trouble to vacate, it will affect the whole efforts of the government to assist the farmers. Hence, the suit was liable to be dismissed.

4. The trial Court framed the necessary issues, tried the suit and dismissed the same. An appeal was preferred by the plaintiff therefrom, which was taken up for enquiry by the learned Subordinate Judge, Kumbakonam. On enquiry, the learned Subordinate Judge set aside the judgment of the trial Court and granted the relief, as asked for by the plaintiff. Aggrieved, the defendant has brought forth this second appeal.

5. At the time of admission, the following substantial questions of law were formulated by this Court:

(1) Whether the appellant was estopped from questioning the title of the respondent under Section 116 of the Evidence Act in respect of item 2 of the suit property in this case?

(2) Whether the plea of estoppel as enunciated under Section 116 of the Evidence Act has any application to the present case especially when the appellant was under the threat of eviction from the Government and acted upon B Memos issued by the Government and paid the necessary charges?

(3) Whether the lower appellate Court was right in allowing the Application I.A.No.1292 of 1987 in O.S.No.354 of 1981 praying for amendment of the plaint especially after the order of remand made in A.S.No.2 2 of 1986?

6. This Court has heard the learned Counsel for the appellant/ defendant and also the learned Counsel for the respondent/plaintiff on those

contentions.
7. As could be seen above, the respondent/plaintiff filed the suit for delivery of possession of the first item of plaint Schedule property and to deliver the vacant possession of the second item of plaint Schedule property and to pay the arrears of rent and mesne profits till delivery of possession of the suit properties. According to the plaintiff, the appellant/defendant entered into a registered rent deed with one Sundaresam Pillai, the father of the plaintiff, on 1.4.1978 ; that the property was taken for a period of three years from 1.4.19 78 to 31.3.1981; that the monthly rental then was fixed at Rs.50/-; that Sundaresam Pillai executed a registered Will on 18.10.1975 making a bequest of the suit properties in favour of the respondent/ plaintiff; that the defendant was irregular in making the payment of rent, and thus, the necessity arose for filing the suit for the said reliefs. The suit was contested by the defendant stating that the alleged Will executed in favour of the respondent/plaintiff, was not true; that the rents were paid to the plaintiff; but, no receipts were issued for the rent received; and that he had put up a thatched shed in the vacant site, which entitled him to the benefit of City Tenants Protection Act, and hence, the claim was to be rejected.
8. At this juncture, it has to be pointed out that originally the suit was taken up for trial on the issues framed by the trial Court, and the same was decreed. Aggrieved, the defendant took it on appeal in A.S.No.22 of 1986 on the file of the Sub Court, Kumbakonam. By a judgment dated 27.10.1987, the learned Subordinate Judge maintained the judgment and decree of the trial Court with respect to the item 1 of the suit properties. As far as item 2 of the suit properties was concerned, a remittal order was passed to the trial Court to decide the same with a direction to decide the dispute regarding the identity of the plaint Schedule item No.2 with reference to the additional document under Ex.B4 settlement deed dated 11.6.1975. After remand, the plaint was amended by the plaintiff, and an additional written statement was also filed by the defendant. While in the course of the additional written statement, the defendant raised a new plea stating that the second item of suit properties was a government proramboke, and therefore, the respondent did not have any right over the said property, the trial Court again took up the matter for trial and dismissed the suit. Aggrieved over the same, the plaintiff took it on appeal, wherein the judgment of the trial Court was set aside by the first appellate forum by granting a decree in favour of the plaintiff, which is the subject matter under challenge.
9. At the outset, it has to be pointed out that the judgment of the trial Court made originally on 16.12.1980 in respect of the first item of suit properties, has become final, since the same was affirmed by the first appellate Court in the first appeal, then preferred by the defendant, which culminated in a judgment of the Sub Court on 27.10 .1987. Hence, the area of controversy is in respect of the second item of property only.
10. The Sub Court in its judgment in A.S.No.22 of 1986 dated 27.10.1987, remanded the matter to the trial Court with a direction to decide the dispute regarding the identity of the plaint Schedule item No.2 . After remand, the plaintiff filed an application seeking to amend the plaint Schedule item No.2 also, by which he claimed an area of 20 feet east west and 102 feet north south stating that out of the said extent, the plaintiff's sister Rajamaniammal was entitled to 10 feet east west and 60 feet north south

on the southern side. It is not in dispute that Ex.A1 was a lease deed executed by the defendant in favour of Sundaresam Pillai, the father of the plaintiff. While so, the property what is actually demised therein under Ex.A1, can also be shown as the second item of property in the plaint. Item No.2 is shown in Ex.A1 with a measurement of only 57 x 10 feet. Therefore, it has to be necessarily pointed out that showing item No.2 in the plaint Schedule with an extent in excess of what is found in Ex.A1, was not proper, but defective.

11. What was contended by the respondent/plaintiff before the Courts below and equally here also is that the defendant in the course of the additional written statement came with a new plea that the entire second item of suit properties was a natham poramboke, and therefore, the respondent/plaintiff did not have any right to the property; that it was not only a new plea, but also unsustainable in law for the simple reason that having admitted Ex.A1 rent deed, the defendant was prevented from either questioning the relationship of the landlord and tenant or questioning the ownership of the plaintiff in respect of the second item of property as found under Ex.A1 deed. Added further, the learned Counsel for the respondent that the defendant has not only accepted the property found under Ex.A1 rent deed and got into possession as a tenant, but also has been paying the rent to the plaintiff and has further stated that the receipts were not given by the plaintiff; that the statement so made in the written statement would be clearly indicative of not only the recognition of the ownership of the plaintiff by the defendant in respect of both the items of properties in Ex.A1 deed, but also the new plea taken by him that it belonged to the Government, and such a plea cannot be countenanced in law; and that the defendant was prevented from making such a plea during the subsistence of the lease.

12. In answer to the said contentions, the learned Counsel for the appellant/defendant would urge that the trial Court has not exceeded its limits in deciding the ownership of the land, but has correctly held that the second item of property did not belong to the plaintiff; that it is true that the defendant was prevented from making such a plea during the subsistence of the lease; but, in the instant case, the lease was determined by a notice issued by the plaintiff, and hence, the least was not in subsistence. Added further the learned Counsel that it cannot be said to be a new plea, since the plaintiff even after the remand, was given an opportunity to file an application for amendment, wherein he has claimed a larger extent in respect of item No.2; that after the amendment was allowed, the appellant/defendant was given an opportunity to file his additional written statement, whereby he questioned the title of the plaintiff, since the second item of property continued to vest with the State; and that there was also a threat of eviction by the paramount owner namely the Government.

13. After hearing the rival contentions, this Court is able to see force in the contentions put forth by the appellant's side.

14. It is pertinent to point out that after the remand, the plaintiff filed an application seeking to amend the plaint in respect of the second item of property, through which he claimed a larger extent. When the defendant filed his additional written statement, he questioned the title of the plaintiff in respect of the second item of property stating that the property actually vested with the Government, and B memo has been served on him by the Government, the paramount title holder. Under such circumstances, without

deciding the question of title of the plaintiff in respect of the second item of property, the dispute in controversy could not be decided. It is true that under Order 41 Rule 23A of the Code of Civil Procedure, the Court, which decides the matter after the order of remand, cannot go beyond the scope of the said order of remand. In the instant case, the facts and circumstances warranted for a decision as to the title to the property, and hence, it cannot be stated that when there was a specific direction by the superior Court to decide the dispute regarding the identity of the plaint Schedule item No.2, the trial Court has exceeded its limits and has gone beyond the scope of the remand order and has decided the title to the second item of property.

15. The next contention of the appellant's side is that the government alone could have the right to evict the illegal occupants from the said place and not the plaintiff; that the suit site belonged to Arunajadaswara Swamy Koil, Thirupanandal; that a part of the property is also a government natham; and hence, the temple and the government were necessary parties to the suit. The instant civil action was one for ejectment based on a rent deed Ex.A1. It is pertinent to point out that the defendant has also recognised the ownership of Sundaresam Pillai and has also paid the rent to Sundaresam Pillai and his son, the present plaintiff, and hence, the said contention cannot be countenanced in law.

16. The learned Counsel for the appellant would urge that the trial Court has rightly placed reliance on the decisions reported in AIR 19 87 S.C. 2192 (D.SATYANARAYANA VS. P.JAGADISH) and 1987 (1) MLJ 357 (N.KANNAYIRAM VS. SRI KALLALAGAR DEVASTHANAM) and held that the estoppel under Sec.116 of the Evidence Act could not be applied to the present facts of the case; that the trial Court has also found that the plaintiff has no right or title in respect of the item 2 of the properties, and hence, it has got to be upheld. The learned Counsel for the appellant would further submit that the rule of estoppel embodied under Sec.116 of the Evidence Act, cannot be applied to the present facts of the case in view of the threat made by the paramount title holder namely the Government, who have issued Ex.B8 B memo and the payment of penalty by the defendant under Exs.B9 and B10.

17. Needless to say that the rule of estoppel enshrined under Sec.116 of the Evidence Act is that a tenant, who has been put in possession, cannot deny the landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to the landlord. The tenant cannot acquire by prescription a permanent right of occupancy, during the continuance of the tenancy, in derogation of the landlord's title by mere assertion. But, it is well settled position of law that the estoppel under Sec.116 of the Evidence Act is restricted to the denial of the landlord at the commencement of the tenancy, from which it would be clear that an exception follows, that it is open to the tenant even without surrendering possession to show that since the date of tenancy, the title of the landlord came to an end or that he was evicted by the paramount title holder or that even though there was no actual eviction or dispossession from the property, under a threat of eviction he had attorned to the paramount title holder. It would be suffice, if a threat of eviction was made by serving a notice by the paramount title holder, and in consequence of the threat, if the tenant attorns to the claimant, then he could well set up as a good defence to an action for eviction by the opposite party.

18. In the instant case, as rightly pointed out by the learned Counsel for the appellant, the Government has issued a B memo under Ex.B8, and in pursuance of the same, he has also paid penalty under Exs.B9 and B10. It is true that under Ex.A1 rent deed, the defendant was put in possession in respect of the items 1 and 2. In respect of item No.1, no controversy has been raised. But, in respect of item No.2 , it is the specific defence that was raised before the trial Court by way of an additional written statement, that there was a threat by the paramount title holder namely the Government under Ex.B8, and he has also paid the penalty under Exs.B9 and B10.

19. The estoppel contemplated under Sec.116 of the Evidence Act is restricted only to the denial of the title at the commencement of the tenancy, and thus, it would be clear that the tenant was not estopped from contending that the title of the landlord has come to an end. In the instant case, originally the properties what were leased out, were items 1 and 2. Since there is no controversy in respect of item No.1, the order of eviction granted by the first appellate Court has got to be maintained. As regards item No.2, the plaintiff sought for a relief that he was entitled to the item 2 of the property measuring 20 feet east west and 102 feet north south in Survey No.260 . However, the defendant is able to show that he was served with B memo under Ex.B8 stating that he is in occupation of the property measuring 0 .01.0 hectare in Survey No.260. In view of the settled position of law, the plaintiff cannot maintain a suit in respect of the property found under Ex.B8. Therefore, excepting the property what is found under Ex.B8 having an extent of 0.01.0 hectare, there cannot be any impediment for granting the relief in favour of the plaintiff in respect of the second item of property as found under Ex.A1. Hence, the judgment of the first appellate Court granting the decree as regards the second item of property in entirety is modified as follows.

(a) The plaintiff is entitled to the recovery of the first item of property.

(b) As far as the second item is concerned, the plaintiff is entitled to the recovery of the second item of property as found under Ex.A1, excepting the measurement found under Ex.B8 namely 0.01.0 hectare in Survey No.260.

20. Accordingly, this second appeal is partly allowed. The defendant is directed to hand over possession what has been referred to above, within a period of two months herefrom. The parties shall bear their costs.

Index: yes
Internet: yes

To:
1. The Subordinate Judge
Kumbakonam
2. The District Munsif
Kumbakonam
3. The Record Keeper
V.R. Section
High Court, Madras.

nsv/