

(1996) 12 MAD CK 0059
In the Madras High Court

Anjuman-E-Palah-Millan Dharul Hifaz and Others	APPELLANT
Vs	
Mohammed Obaidullah	RESPONDENT

Date of Decision : 24-12-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 151

Citation : (1997) 1 MLJ 378

Hon'ble Judges : S.M. Abdul Wahab, J

Bench : Division Bench

Judgement

S.M. Abdul Wahab, J.—C.R.P. No. 1815 of 1996 is against the order dated 29.2.1996 in M.P. No. 158 of 1996 in R.C.A. No. 458 of 1990 on the file of the VII Judge of Small Causes Court, Madras.

2. C.R.P. No. 1817 of 1996 is against the order dated 29.2.1996 in M.P. No. 157 of 1996 in R.C.A. No. 457 of 1990, on the file of the VII Judge of Small Causes Court, Madras.

3. M.P. No. 158 of 1996 has been filed before the appellate authority under Sections 144 and 151 of Civil Procedure Code, for redelivery of the building to the respondent herein. Similarly M.P. No. 157 of 1996 was filed for similar relief in respect of another building.

4. The petitioners herein are the landlords in both the Rent Control Appeals and the petitions mentioned above. Since, the petitioner and the respondent are the same persons in both the civil revision petitions and the facts and law are similar in both the petitions, both the civil revision petitions are taken up together for consideration with the consent of the parties.

5. The substance of the case is that the petitioner, who is the landlord in both the civil revision petitions, filed two Rent control original petitions against the very same respondent/tenant for eviction. The eviction petitions were dismissed. Therefore, two appeals, namely, R.C.A. Nos. 457 and 458 of 1990 were filed by the petitioner before the same appellate authority.

6. During the pendency of the appeal the petitioner filed the petitions u/s 11(4) of the Tamil Nadu Buildings (Lease and Rent Control) Act. The appellate authority directed the tenant to deposit all the arrears within a specified period. Since the tenant/respondent failed to comply with the same, eviction order was passed by the appellate authority. As against the orders passed in the petitions, namely, M.P. Nos. 188 and 193 of 1991, filed u/s 11(4) of the Act, the respondent herein filed two civil revision petitions in the High Court, namely, C.R.P. Nos. 2441 and 2442 of 1992. Pending the civil revision petitions, the petitioner landlord herein took delivery of possession from the tenant/respondent by executing the eviction orders. Thereafter on 12.8.1994, the C.R.P. Nos. 2441 and 2442 of 1992 were allowed by this Court.

7. After succeeding in the High Court, the respondent filed the petitions for redelivery before the appellate authority. The appellate authority allowed the petitions for redelivery. Aggrieved by the same, the landlords have filed the above two civil revision petitions.

8. The learned senior counsel Mr. A.L. Somayaji, for the petitioner contended that when the R.C.O.P. Nos. 3041 and 3042 of 1985 were dismissed on 7.9.1989, R.C.A. Nos. 457 and 458 of 1990 were filed by the petitioners. He also filed M.P. Nos. 188 of 193 of 1991 for direction to the tenant to deposit the rent. The order was passed on 1.10.1991 by the appellate authority. As there was no deposit, on 19.10.1992 eviction orders were passed. Aggrieved by that orders C.R.P. Nos. 2441 and 2442 of 1992 were filed in this Court. The said two civil revision petitions were against the order passed u/s 11(4). Even though they were admitted that there was no stay, on 29.1.1993 the said two civil revision petitions were dismissed. On 12.8.1993, two execution petitions, namely, E.P. Nos.210 and 211 of 1993 were filed by the petitioner and took delivery of the building on 12.8.1993. After a lapse of about three years, on 7.2.1996, applications for redelivery were filed. In the circumstances, the learned senior counsel for the petitioner raised two contentions, namely that restitution u/s 144 of CPC is an equitable remedy. Since the respondent could not get stay in the civil revision petition, possession was taken. He also contended that as a result of the order passed in C.R.P. Nos. 2025 and 2026 of 1993, the Rent Control Appeal Nos. 457 and 458 of 1990 have been revived and they are pending on the file of the appellate authority. If the petitioner succeed before the appellate authority, the question of redelivery will not arise at all. He also added that after taking delivery of possession as early as on 6.8.1993, the petitioners, have leased out the said building to a new tenant by name Hussain Sheriff, pursuant to a rental agreement dated 1.9.1993. The new tenant has paid an advance of Rs. 30,000 also.

9. Mr. S.V. Jayaraman, learned Counsel appearing for the respondent contended that once an order pursuant to which the delivery was taken is set aside the restitution must be automatically allowed. The induction of the new tenant was not at all raised before the lower court and the same is raised for the first time in

the reply affidavit, therefore, the said fact should not be taken into account by this Court.

10. The fact of inducting the new tenant is averred in the reply affidavit filed by the petitioner. The counsel for the respondent was permitted to file a counter to the said reply affidavit. In the counter, he has disputed the genuineness of the new tenancy agreement dated 1.9.1993. Even though the genuineness of the document is disputed, the carrying on of the business by the new tenant is admitted. What is contended is the new tenant is conducting lottery business, which is prohibited one according to Islamic tenets.

11. The legal position that restitution is possible u/s 144 of CPC applies to the Rent Control proceedings also is not disputed. But what is mainly contended is that since the restitution is a equitable remedy u/s 144 of the Civil Procedure Code, the restitution cannot be ordered in this particular case, because, the petitioner is a charitable institution. After taking possession in 1993 the petitioner could not keep the building idle, which will result in the loss of income to the institution and the charitable objects cannot be carried on. Hence, they have let out the building to a new tenant in 1993 itself. Since, there was no stay at all from letting out the building to new tenant and receiving advance. In (ailing to obtain on interim order in the proceedings preventing the petitioner from letting out the building to the new tenant, the respondent has enabled the petitioner to let out the building in question. Therefore, he is not entitled to the equitable remedy of restitution.

12. The learned Counsel for the petitioner cited a decision reported in Lal Bhagwant Singh Vs. Rai Sahib Lala Sri Kishen Das, . In the said judgment, the Apex Court has held in paragraph 14 as follows:

An order of restitution in the manner asked for in the circumstances of this case would be contrary to the principles of the doctrine of restitution which is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the court to enforce that obligation unless it is shown that restitution would be clearly contrary to the real justice of the case.

13. In Binayak Swain Vs. Ramesh Chandra Panigrahi and Another, , the earlier decision i.e., Lal Bhagwant Singh Vs. Rai Sahib Lala Sri Kishen Das, , has been followed. In Union Carbide Corporation, etc., etc. Vs. Union of India, etc. etc., , it is stated that restitution is equitable remedy.

14. The learned Counsel for the respondent cited a decision reported in Gurjoginder Singh Vs. Jaswant Kaur (Smt) and Another, . In the said ease, what was considered was the restriction between the bona fide auction purchaser and the tenant inducted into possession. The Supreme Court has pointed out the distinction between the two and held that in the case of bona fide purchaser in a court auction sale, he would not be bound for restitution of possession. On the

other hand, a tenant inducted into possession during the pendency of the proceedings was bound for restoration of possession. In the said case, the principle of equity was not at all considered. Further in this case, we have seen that a new tenant has been inducted into possession as early as on 1.9.1993. In a counter to the said reply, as we have seen earlier, it is submitted that a new tenant is carrying on lottery business. But yet, he has not been impleaded as a party in the petitions for restitution.

15. In *Gurjoginder Singh Vs. Jaswant Kaur (Smt) and Another*, it is seen from the narration of facts that the second respondent was the new tenant who was impleaded as the party and he filed his objections. But in the present case, the new tenant is not impleaded. The respondent has not chosen to implead the said new tenant as a party. The default to implead him is only on the part of the respondent. Further Section 144 of the CPC contains the words "so far as may be." Since a new tenant has come into possession and he has been in possession for the past three years, it would not be equitable to disturb his possession.

16. Further in the reply affidavit, there is an averment that the respondent has not paid the rent from the year 1988 onwards. As against this statement, in the reply affidavit, the respondent who filed a counter to the same has not denied this statement. Further when Section 11(4) application was allowed, only a direction was issued for depositing the rent, but the respondent failed to comply with the same. On the other hand, he has chosen to question the maintainability of the petition u/s 11(4) of the Act. He was paying the consolidated sum of Rs. 350 only. Even that he has defaulted. He himself has referred to the fact that the institution of the petitioner is a charitable institution meant for feeding for the poor children and solely depended on the income of the property. When he was not even paying the sum of Rs. 350 per month, it is but natural that the petitioner has chosen to let out to another tenant for a rent of Rs. 2,000 per month as soon as possession was taken from the respondent.

17. Considering the aforesaid facts, I feel the equity is in favour of the petitioner. Hence, the civil revision petitions have to be allowed. Accordingly, they are allowed, however, there will be no order as to costs.