

(2010) 11 MAD CK 0186

In the Madras High Court

Case No : Second Appeal No. 1172 of 2004, Civil Revision Petition No. 336 of 2004 and C.M.P. No's. 2779 of 2004 and 1092 of 2009

Anser Bi

APPELLANT

Vs

The Sherfunissa Begum Sahiba Mosque Wakf

RESPONDENT

Date of Decision : 26-11-2010

Acts Referred:

Income Tax Act, 1961 — Section 226(3)

Transfer of Property Act, 1882 — Section 106, 111, 116

Citation : (2011) 3 MLJ 44

Hon'ble Judges : R. Subbiah, J

Bench : Single Bench

Advocate : S. Sadasivam, for V.S. Subramanyan, for the Appellant; R. Nithish Kumar, for R1 and J. Dilip Kumar, for R2, for the Respondent

Final Decision : Dismissed

Judgement

R. Subbiah, J.—This second appeal has been filed at the instance of the Plaintiff, challenging the decree and judgment dated 23.10.2001 passed by the learned v. Additional Judge, City Civil Court, Chennai, in A.S. No. 43 of 2000, whereby the decree and judgment dated 28.12.1998 passed by the learned V Assistant Judge, City Civil Court, Chennai, in O.S. No. 8186 of 1994, were partly modified.

2. The present civil revision petition has been filed at the instance of the 1st Defendant, aggrieved over the decree and judgment dated 09.10.2003 in Ejectment Suit No. 2 of 2000 passed by the learned III Judge, Small Causes Court, Chennai, whereby the suit filed by the Plaintiff wakf was allowed, directing the 1st Defendant to vacate and deliver the possession of the suit property with the Plaintiff within the stipulated time.

3. Since the issue involved as well as the parties in both the matters are also one and the same, the second appeal and the civil revision petition are disposed of by this common judgment.

4. Firstly we deal with the second appeal.

The Plaintiff herein, viz., Anser Bi, filed a suit in O.S. No. 8186 of 1994 against the Respondents/Defendants stating that she is the owner of the suit property, namely, entire superstructure consisting of ground floor and the first floor in Plot No. 83 bearing Municipal Door No. 16, G.N. Chetty Road, Madras-6 and the land, on which the said superstructures stand belongs to the 1st Respondent Wakf, viz., Sherfunnissa Begum Sahib Mosque Wakf. The Appellant/Plaintiff purchased the said superstructures from T.P. Abdul Jabbar Sahib along with the leasehold rights by a registered sale deed dated 27.02.1967 and since then, she is in possession and enjoyment of the same and is paying the corporation tax and rent for the said land to the Mosque endowment. The 2nd Defendant became a tenant under the Plaintiff in respect of the said property on a monthly rent of Rs. 275/- by way of rental agreement for 11 months on 21.04.1971 and the said agreement was subsequently renewed from time to time and now he is paying the enhanced monthly rent of Rs. 700/-. While so, the Plaintiff's husband died in the year 1989 and by taking advantage of the situation, the 2nd Defendant wanted to grab the said property and he instigated the 1st Defendant wakf to issue a lease agreement in his favour. Under such circumstances, the 1st Defendant wakf sent a letter dated 06.04.1994 to the Plaintiff stating that the Executive Committee decided to terminate the Plaintiff's land tenancy; for which, the Plaintiff sent a letter dated 10.04.1994 stating that the Executive Committee has no authority to do so as the rent has been paid regularly to the Trust. Hence, the Plaintiff filed the said suit for a direction to the 1st Defendant Wakf to renew the lease agreement in her favour and also for a permanent injunction restraining the 1st Defendant Wakh from transferring the lease in favour of the second Defendant.

5. The case of the Plaintiff was resisted by the 1st Defendant Wakf by filing a written statement alleging that the Plaintiff is not the owner of the entire superstructure of the subject land and she is the owner of the ground floor portion only and the 1st floor portion was constructed by the 2nd Defendant. The Plaintiff purchased the superstructure of ground floor only under the sale deed dated 20.02.1967 and subsequently she has been recognised as a tenant for the land by the wakf and has been paying the land rent to the Mosque at the rate of Rs. 100/- per month. In the said situation, the 2nd Defendant, a mortgagee of the superstructure with leasehold rights of the land, put up the first floor portion at his cost. When the present Committee took charge on 11.01.1994, the Committee members inspected the property and after conducting enquiry, the Committee took a view that though the Plaintiff was not in actual physical possession, considering her status as a widow, it decided to execute the lease agreement in respect of both the parties and as such, they requested the Plaintiff and the 2nd Defendant to execute the lease agreements as they are in joint possession and enjoyment of the wakf land. Though the 2nd Defendant signed the lease agreement, the Plaintiff was reluctant to sign the same and in the meantime, filed the present suit. Since the tenancy was terminated by the letter

dated 06.04.1994, the Plaintiff is not entitled to get the reliefs sought for in the plaint.

6. The 2nd Defendant also filed a written statement confirming the joint meeting that took place between him, the Plaintiff and the 1st Defendant wakf with regard to the execution of the joint lease of land in favour of the 1st Defendant wakf. Thus, he prayed for the dismissal of the suit.

7. On the basis of the above said pleadings, the trial court framed three issues and on the side of the Plaintiff, the son of the Plaintiff was examined as P.W.1 and Exs.A-1 to A-26 were marked and on the side of the 1st Defendant, D.W.1 was examined and Exs.B-1 to B-3 were marked. No oral and documentary evidence was adduced on the side of the 2nd Defendant. The trial court, on consideration of the entire evidence on record, both oral and documentary, decreed the suit. As against the said judgment of the trial court, the 1st Defendant filed an appeal in A.S. No. 43 of 2000 before the v. Additional Judge, City Civil Court, Chennai.

8. During the pendency of the said appeal, the 1st Defendant filed an ejectment suit No. 2 of 2000 before the 3rd Small Causes Court, Chennai against the Plaintiff and the 2nd Defendant in O.S. No. 8186 of 1994, stating that the Plaintiff, who purchased the superstructure along with the leasehold right from one Abdul Jabbar Sahib, was not in actual physical possession of the property and on the other hand, the 2nd Defendant is in occupation of the same and hence, the 2nd Defendant is the unauthorised sub tenant and, as such, by notice dated 06.04.1994, the tenancy of the Plaintiff was terminated with the end of 30.04.1994. Therefore, the Plaintiff and the 2nd Defendant are liable to vacate the suit property and deliver vacant possession of the same to the wakf.

9. The said suit was contested by the Plaintiff by filing a written statement stating that the ejectment suit was filed only with an ulterior motive to help the 2nd Defendant. Thus, she prayed for the dismissal of the suit.

10. By its judgment dated 23.10.2001, the appellate court, namely, the v. Additional Judge, City Civil Court, Chennai, partly allowed the appeal No. 43 of 2000 by reversing the judgment and decree of the trial court in respect of the first prayer, i.e. for a direction to the wakf to renew the lease agreement in her favour and with regard to the second prayer, granted an injunction restraining the wakf not to execute the lease agreement in respect of land in favour of the 2nd Defendant till the disposal of the ejectment suit filed by the wakf before the Small Causes Court, Chennai.

11. In order to prove the claim in the ejectment suit, the Office Superintendent of the wakf was examined as P.W.1 and Exs.A-1 and A-2 were marked and on the side of the Plaintiff and the 2nd Defendant, no oral evidence was adduced but Exs.B-1 to B-3 were marked on the side of the Plaintiff. The trial court, after analysing the entire evidence both oral and documentary, allowed the ejectment suit. Thereafter, feeling aggrieved by the judgment and decree of the appellate court in A.S.43 of 2000 and the ejectment suit, the Plaintiff filed S.A. No. 1172 of

2004 and C.R.P. No. 336 of 2004 respectively. To avoid confusion, the parties are referred to as they are arrayed in O.S. No. 8186 of 1994.

12. At the time of admission of the second appeal, this Court framed the following substantial questions of law for consideration:

(1) Whether the learned Judge was right in holding that there was valid termination of lease?

(2) Whether the appellate Judge was right in not taking into consideration the collusion between the Respondents and the attempt of the 1st Respondent to favour the 2nd Respondent ?

(3) Whether the judgment of the learned Judge that the parties will have to abide by the decision in the Ejectment Suit filed by the 1st Respondent is proper ?

13. Learned Counsel for the Plaintiff (Plaintiff) advanced his arguments in the appeal that the lower appellate found that since the 1st Defendant wakf has issued the termination notice dated 06.04.1994, the wakf cannot be compelled to renew the lease deed in favour of the Plaintiff. Attacking the said finding, the learned Counsel for the Plaintiff submitted that it is an admitted fact that subsequent to the termination of notice, the Plaintiff as well as the 2nd Defendant were called upon by the 1st Defendant for enquiry and in the enquiry, it was decided by the wakf to execute a joint lease in favour of the Plaintiff and the 2nd Defendant with regard to the tenancy of the land. The learned Counsel further submitted that the facts were admitted in the written statement filed by both the Defendants. Under such circumstances, the fact that the 1st Defendant wakf had agreed to execute a joint lease in favour of the Plaintiff would amount to assent to the continuation of possession with the Plaintiff in the subject property. Therefore, the Plaintiff is entitled for further renewal as per Section 116 of the Transfer of Property Act. That apart, the learned Counsel submitted that though the Plaintiff had filed the civil suit to direct the 1st Defendant wakf to renew the lease deed in her favour in 1994, the ejectment suit was filed by the 1st Defendant after a period of six years i.e. in the year 2000. This fact also would show that the Plaintiff was allowed to continue as a tenant even after the termination notice. Therefore, the Plaintiff is entitled to the renewal of lease by the 1st Defendant wakf.

14. The learned Counsel for the Plaintiff further submitted that there was no specific prohibition in writing terminating the Plaintiff from leasing out the superstructure; but, the trial court in ejectment suit, without noticing this aspect, had decreed the suit on the ground of sub-letting. Moreover, the Plaintiff had taken reasonable steps to deposit the rent before the lower appellate court when the 1st Defendant wakf had denied to receive the same. Therefore, it cannot be said that there was a default on the part of the Plaintiff in paying the rent. Under such circumstances, the Plaintiff is entitled to get the renewal of lease and the second appeal has to be allowed. Further, the learned Counsel submitted that the Plaintiff was allowed to continue as the tenant for a period of six years.

Therefore, the continuance of tenancy in terms of assent would amount to "holding over" by virtue of Section 116 of the Transfer of Property Act. The learned Counsel also relied on the judgments reported in AIR 1949 124 (Federal Court) and Ram Barai Singh Vs. Tirtha Pada Misra, in support of his contentions.

15. Combating the said submissions, the learned Counsel for the 1st Defendant wakf made his submissions that the Plaintiff has failed to take a defence u/s 116 of the Transfer of Property Act before the courts below and under such circumstances, she cannot raise that plea in the appellate stage. In support of this contention, the learned Counsel relied upon the judgment reported in 2009(3) CTC 59. Therefore, the Plaintiff is not entitled to raise the plea u/s 116 of the Transfer of Property Act herein. That apart, to raise the defence u/s 116 of the said Act, the Plaintiff should fulfil two conditions, namely, (i) there should not be arrears of rent; and (ii) he/she should be in actual physical possession of the property. But, in the instant case, the Plaintiff has not satisfied both the conditions. Therefore, she is not entitled to take the defence u/s 116. In support of this contention, the learned Counsel has relied upon the judgment reported in AIR 2009 Cal 47.

16. With regard to the civil revision petition, the learned Counsel for the 1st Defendant submitted that the court below, by correctly appreciating the evidence, had come to the conclusion that the Plaintiff had unauthorisedly sublet the property to the 2nd Defendant and that there was a default of rent, thereby directed the Plaintiff to vacate the suit property and deliver the possession of the same. The trial court had correctly decreed the ejectment suit on the well considered finding and therefore, the civil revision petition has to be dismissed.

17. Heard the learned Counsel for all the parties and perused the materials available on record.

18. It is an admitted fact that the Plaintiff herein had purchased the superstructure in the ground floor in plot No. 83 bearing Municipal Door No. 16, G.N. Chetty Road, Madras from one Abdul Jabbar Sahib along with the leasehold rights and the land upon which the superstructure stands belongs to the 1st Defendant wakf. Subsequently, the 2nd Defendant became a tenant under the Plaintiff in respect of the said property on 21.04.1971 and the 2nd Defendant had put up a construction in the first floor and he was in occupation of the said building. It is the case of the Plaintiff that in the year 1994, the present Committee of wakf took charge and inspected the property and issued a termination notice dated 06.04.1994 to the Plaintiff. Thereafter, the present suit came to be filed by the Plaintiff for a direction to the 2nd Defendant wakf to renew the lease in her favour and also by way of injunction to the 1st Defendant from transferring the land lease agreement in favour of the 2nd Defendant. Now, the main submission of the Plaintiff in this appeal is that subsequent to the termination notice, the 1st Defendant wakf called the Plaintiff as well as the 2nd Defendant for an enquiry, in which it was decided to execute a joint lease in respect of land tenancy in favour of the Plaintiff and the 2nd Defendant. Since

the 2nd Defendant wakf had requested the Plaintiff and the 2nd Defendant to execute the lease agreements subsequent to the issuance of the termination notice, now it is the submission of the Plaintiff that after the termination of notice, the 1st Defendant had assented for the continuation of tenancy by expressing its intention to renew the lease in favour of the Plaintiff. Hence, the acceptance would tantamount to holding over. Moreover, the 2nd Defendant had chosen to file an ejectment suit after the period of six years from the date of termination notice and thereby, the 1st Defendant wakf allowed the Plaintiff to continue as a tenant in the subject property. Therefore, on that ground also, the Plaintiff is entitled for renewal of lease as per Section 116 of the Transfer of Property Act. Further more, the Plaintiff has taken reasonable steps in the appellate stage to deposit the rent before the court since the 1st Defendant wakf has refused to receive it. Therefore, it cannot be said that the Plaintiff was in arrears of rent. Looking at any angle, the Plaintiff is entitled for renewal of lease.

19. On a perusal of the judgments relied on by the learned Counsel for the Plaintiff in AIR 1949 124 (Federal Court) and Ram Barai Singh Vs. Tirtha Pada Misra, , I find that they would show that there is a landlord's assent to the possession of the property by the tenant by acceptance of rent, after the termination of lease and it would constitute a tenancy by holding over and under such circumstances, the Plaintiff is entitled for renewal of further lease. There is no quarrel with regard to the principle laid down in the said cases, as pointed out by the learned Counsel for the Plaintiff. But it depends upon the facts and circumstances of each case.

20. According to the 1st Defendant, firstly, the Plaintiff has not taken the plea with regard to Section 116 of the Transfer of Property Act before the courts below and therefore, she cannot raise this plea at the appellate stage. Secondly, to make the plea u/s 116, the tenant should be in actual physical possession and there should not be arrears of rent. But, in the instant case, admittedly, the tenant was not in actual physical possession and only the 2nd Defendant was in possession of the property. That apart, there was an arrears of rent. Under such circumstances, it would be appropriate to go through the judgments relied upon by the learned Counsel for the 1st Defendant to appreciate his submissions.

21. In M.B. Subramaniam v. A. Ramasamy Gounder 2009(3) CTC 59, this Court has held as follows:

21. It is a trite proposition of law that any amount of evidence, without pleadings should be eschewed. Here the Respondent/Ramasamy Gounder, despite knowing the existence of Ex.A6, simply had chosen to file the suit as though M.B. Subramaniam was a tenant under him. The learned Senior Counsel for the Appellant would correctly point out incidentally that not even the termination notice, terminating the alleged tenancy of the Appellant herein was marked before the Lower Court, for which, the learned senior counsel for the Respondent would argue that admitted facts need not be proved and that the Appellant admitted such issuance of termination notice. In my considered opinion,

statutory notice u/s 106 of the Transfer of Property Act should have been specifically marked during trial, but the Respondent failed to do so during the joint trial of both the suits

22. Relying upon the above proposition of law, the learned Counsel for the 1st Defendant wakf submitted that since the Plaintiff has failed to take a plea u/s 116 of the Transfer of Property Act, now, he cannot raise the same at the appellate stage in the second appeal, for which, by way of reply, the learned Counsel for the Plaintiff submitted that the plea u/s 116 is only a question of law and, as such, the same could be raised at the appellate stage. But, the judgment reported in *Tralok Chand and Another Vs. Arjun Singh and Others*, , relied on by the learned Counsel for the 1st Defendant, would give a fitting answer to the submission made by the Plaintiff, wherein it has been held as follows:

The principle of holding over as found enacted in Section 116 rests on an implied agreement between the landlord and the tenant concerned regarding the continuation of the tenancy rights even after the original tenancy has come to an end. Hence, this implied agreement must be pleaded and the attentions of the parties should be focussed on that plea so that both the parties have ample opportunity to prove their respective stands with regard to this plea. Where the only and the simple plea raised by the Defendants in their written statements was that from the very beginning the tenancy rights were acquired by the joint Hindu family of one K and, therefore, the other male members of the family of K were entitled to enjoy these tenancy rights even after the death of K, if the Defendants failed in proving this specific plea, they could not fall back upon a fresh plea of holding over involving certain disputed questions of facts

From the said decision, it is clear that the plea u/s 116 is a question of fact and the same ought to have been raised before the trial court and the evidence also ought to have been adduced on the said pleading. But, in the instant case, as contended by the learned Counsel for the 1st Defendant, absolutely, there was no pleading in respect of the principle of holding over. Therefore, I am of the opinion that the Plaintiff cannot raise the plea u/s 116 at the appellate stage. Had the plea with regard to assent of landlord been taken by the Plaintiff before the trial court, the 1st Respondent would have had a chance of meeting out the same. Therefore, looking at any angle, the plea u/s 116 is a question of a fact and not a question of law. Moreover, in the instant case, the facts on record would show that when the Plaintiff was called upon to sign a joint lease agreement, she refused to sign the joint lease agreement, which would amount to waiver. Under such circumstances, the Plaintiff is not entitled to take a plea u/s 116 at this length of time.

23. Moreover, it is clear from the judgments relied on by the learned Counsel for the 1st Respondent that the Plaintiff should be in actual physical possession for claiming rights u/s 116 of the Transfer of Property Act. At this stage, it is appropriate to rely on the following decisions. In *Estate of M. Venktesa Sarma, etc. v. A.N. Rajalakshmi and Ors.* 1998 (3) L.W.369, it has been held that a

person who is not a tenant on her own showing cannot claim any rights under Sections 111 and 116 of the Act.

24. In *Shanti Prasad Devi and Another Vs. Shankar Mahto and Others*, , the Supreme Court has held as follows:

The lessor in the instant case, had neither expressly nor impliedly agreed for renewal of lease. The renewal as provided in the original contract was required to be obtained by following a specified procedure i.e. on mutually agreed terms or in the alternative through the mediation of Mukhias and Panchas. The said renewal clause in the contract prescribing a particular period and mode of renewal which was "an agreement to the contrary" within the meaning of Section 116. In the face of specific clauses in contract for seeking renewal there could be no implied renewal by "holding over" on mere acceptance of the rent offered by the lessee. Further the option of renewal was exercised by lessee not in accordance with the terms of renewal clause that is before the expiry of lease. It was exercised after expiry of lease and the lessee continued to remain in use and occupation of the leased premises. The rent offered was accepted by the lessor for the period the lessee overstayed on the leased premises. The lessee, in the above circumstances, could not claim that he was "holding over" as a lessee within the meaning of Section 116. On expiry of period of lease, mere acceptance of rent for the subsequent months in which the lessee continued to occupy the leased premises cannot be said to be a conduct signifying "assent" to the continuance of the lessee even after expiry of lease period. The order of ejectment passed against him would not be liable to be interfered with

25. In *Md. Ahmed Amolia and Others Vs. Nirmal Chandra Roy and Others*, , it has been held as follows:

Both Section 116 and Section 111(a) of the T.P. Act should be read together. It is for the lessee to prove that (1) the lessee remained in possession after determination of the lease and (2) the lessor or his legal representatives accepted rent from them or otherwise assented to their continuing in possession. Mere continuing in possession after determination of the term of the lease does not indicate tenancy by holding over

26. In *Tara Properties Pvt. Ltd. v. Shalimar Paints Ltd.* AIR 2009 Cal 47, the Head Notes are as follows:

Transfer of Property Act (4 of 1882), Section 116 " Effect of holding over " Payment made by tenant to income tax Officer in response to notice u/s 226(3) of income tax Act, 1961, on account of landlord " Will not amount to acceptance of rent by landlord " For fulfillment of condition of Section 116 tenant required to offer rent to landlord and landlord was required to accept it as such " For renewal of lease parties were required to act ad idem " Tenant as described by English Law was a mere tenant at sufferance, it having remained in possession of suit property even after determination of lease " By issuing notice, the income tax Officer could not create a lessor-lessee relationship between the tenant and

landlord

27. A conjoint reading of all the judgments would show that the person, who seeks the renewal of lease, should be remaining in possession and should not be in arrears of rent. Though it was alleged that the Plaintiff has taken steps to deposit the rent, as could be seen from the dictum laid down from the above judgments, it is clear that mere acceptance of rent offered by the lessee would not amount to "assent". Moreover, in the instant case, the Plaintiff had taken steps to deposit the rent only at the appellate stage. Therefore, I am of the opinion that since the Plaintiff is not in actual physical possession and she has not taken a plea with regard to Section 116 of the Transfer of Property Act and notwithstanding the plea under the said Act is a question fact, this Court is not in a position to appreciate the submissions made by the Plaintiff. Therefore, I do not find any infirmity in the finding arrived at by the lower appellate court and, as such, the substantial questions of law are answered against the Plaintiff and the appeal has to be dismissed.

28. With regard to the civil revision petition, the trial court, after considering the entire facts, had come to the conclusion that there was a sub-letting. The property was sublet by the Plaintiff to the 2nd Defendant unauthorisedly and the Plaintiff was also not in actual physical possession and she has not produced any evidence to show that she was authorised by the 1st Defendant to sub-let the property to a third party. Under such circumstances, I do not find any infirmity in the judgment rendered by the trial court in the ejectment suit.

29. For the reasons stated above, the second appeal as well as the civil revision petition are dismissed. No costs. Consequently, connected C.M. Ps. are closed. The Plaintiff is granted two months" time to vacate and deliver vacant possession of the suit property to the 1st Defendant wakf.