

(2014) 02 MAD CK 0198

In the Madras High Court

Case No : Application No. 2239 of 2013 in C.S. No. 930 of 2010

Hindustan Petroleum Copn. Ltd.

APPELLANT

Vs

T. Aditya Rao Rep. by His Power Agent, Mrs. S.P. Susheela
Kumar and M/s. MRK. Agencies

RESPONDENT

Date of Decision : 11-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 23 Rule 1, Order 23 Rule 2,
Order 7 Rule 11, Order 7 Rule 11(d)

Citation : (2014) 2 MLJ 599 : (2014) 2 RCR(Rent) 53

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.S. Ramanathan, J.—The first respondent/plaintiff filed the above suit for recovery of vacant possession of the suit property from the defendants 1 and 2 and for recovery of a sum of Rs. 53,78,400/- towards damages and for other reliefs. The first defendant filed the above application to reject the plaint on the ground that the suit filed by the respondent/plaintiff is barred by law and is also barred by limitation.

2. It is submitted by the learned counsel for the applicant/first defendant that as per the averment in the plaint, the first respondent/plaintiff admitted that the tenancy between the applicant/first defendant and the respondent/plaintiff was determined by the issuance of notice dated 27.1.1983 and thereafter, the respondent/plaintiff filed O.S. No. 2058 of 1984 before the VI Assistant City Civil Court, Chennai, for eviction of the applicant from the suit property and in that suit, the applicant/first defendant filed I.A. No. 13204 of 1984 u/s 9 of the Tamil Nadu City Tenants Protection Act, 1921 for purchasing the suit property and thereafter, the suit was dismissed for non-prosecution by order dated 10.9.2003 and consequentially, I.A. No. 13204 of 1984 filed by the first defendant was also dismissed for default. As the tenancy was terminated as early as on 27.1.1983

and the respondent/plaintiff filed the suit O.S. No. 2058 of 1984 for recovery of possession and that was allowed to be dismissed for default, the present suit for recovery of possession and for damages is clearly barred by law under Order 2, Rule 2 of the CPC and also under Article 67 of the Limitation Act. He, therefore, contended that under Article 67 of the Limitation Act, as between the landlord and tenant, when the tenancy is determined, the suit for recovery of possession ought to have been filed within 12 years from the date of determination of tenancy and in this case, tenancy was terminated by issuance of notice dated 27.1.1983 and the suit was filed only on 12.2.2010 after a period of 27 years from the date of termination of tenancy and therefore, the present suit is barred under Article 67 of the Limitation Act. He also submitted that it is admitted that the respondent/plaintiff filed O.S. No. 2058 of 1984 for eviction against the same defendants and that the suit was dismissed for default and therefore, the present suit, without obtaining leave of the Court in the earlier suit, is not maintainable and is also barred under Order 2, Rule 2 of CPC and Order 23, Rule 1 of CPC.

3. The learned counsel relied upon the following judgments in support of his contention that the suit is barred by limitation by virtue of Article 67 of the Limitation Act.

(a) Smt. Shakuntala S. Tiwari Vs. Hem Chand M. Singhanian, .

(b) K. Arjunan Vs. Kuppuraj and others .

(c) M. Gnanasambandam (since deceased) and 3 Others Vs. M. Raja Appar and 4 Others,

(d) M. Banupriya Vs. M/s. Nuziveedu Seeds Limited, No. 905, Kanchunjanga Building, Barakhamba Road, Connaught Place, New Delhi-110 001 and M/s. Zillion Estates Pvt. Ltd., 6/12, Brodipet, Guntur, Andhra Pradesh,

(e) Hardesh Ores Pvt. Ltd. Vs. Hede and Company,

4. He also relied upon the following judgment reported in R. Vetrivelan Vs. Tamil Nadu Merchantile Bank Ltd., King and Patridge, Vicnivas Agency and Ram Meenakshi (Firm), in support of his contention that without getting liberty while withdrawing the earlier suit, the second suit on the same subject matter and on the same cause of action, is not maintainable.

5. He also relied upon the judgment reported in (2008) 3 MLJ 821 in the matter of M. Somasundaram and another Versus District Collector-cum-Accommodation Controller, Chennai and others in support of his contention that the suit is liable to be rejected as it amounts to re-litigation and abuse of process of Court and having realised that Section 9 application filed by the application was allowed, the respondent/plaintiff allowed the suit to be dismissed for default and consequentially, the application filed u/s 9 was also dismissed and therefore, it is a clear case of re-litigation and abuse of process of Court. He also relied upon the judgment reported in Saleem Bhai and Others Vs. State of Maharashtra and Others, in support of his contention that the allegation in the plaint alone has to

be looked into for rejection of claim and having regard to the admission made by the respondent/plaintiff in this suit that the tenancy was determined by issuance of notice dated 27.1.1983 and the first defendant is occupying the property thereafter as a trespasser, the suit is liable to be dismissed as barred by limitation.

6. On the other hand, the learned counsel for the first respondent/plaintiff submitted that the law of limitation is a mixed question of fact and law, without framing any issue as to whether the suit is barred by limitation and without letting in evidence, the Court cannot reject the plaint and therefore, the rejection of the plaint sought for by the applicant/first defendant on the ground of limitation is not maintainable. He also submitted that even though the tenancy was determined by issuance of notice dated 27.1.1983, by virtue of the provisions of the Tamil Nadu City Tenants Protection Act, 1921, the applicant continues to be the tenant and in that capacity only, the applicant filed the application u/s 9 of the Tamil Nadu City Tenants Protection Act, 1921 in I.A. No. 13204 of 1984 in O.S. No. 2058 of 1984 and, in that application, order was passed permitting the applicant/first defendant to purchase the portion in its occupation and the first respondent also agreed to sell the property to the applicant for a consideration of Rs. 15,00,000/- per ground and thereafter, the applicant did not exercise the option and was sending erstwhile rent of Rs. 600/- per month and therefore, in 2004, the respondent/plaintiff was advised not to proceed with the suit and therefore, he did not prosecute the suit and the suit was dismissed for default on 10.09.2004 and I.A. No. 13204 of 1984 was also dismissed. Therefore, it is not a case where Article 67 of the Limitation Act will apply and when the tenant is entitled to continue in possession of the property as a statutory tenant, Article 67 cannot be made applicable and he relied upon the judgment reported in Kamakshi Builders Vs. Ambedkar Educational Society and Others, in support of his contention. He also submitted that the Hon'ble Supreme Court in the judgment reported in V. Dhanapal Chettiar Vs. Yesodai Ammal, , and Gian Devi Anand Vs. Jeevan Kumar and Others, , considered the scope of a statutory tenant under the provisions of Rent Control Act and held that even after the determination of tenancy as per the provisions of Transfer of Property Act, the tenant does not cease to be a trespasser and by virtue of protection under the Rent Control Act, he is entitled to continue in possession by paying the rent and his possession cannot be termed as unlawful or trespasser and therefore, viewed from that angle also, Article 67 cannot be made applicable to the facts of the case. He also relied upon the judgment reported in (2006) 5 SCC 658 in the matter of Balasaria Construction (P) Ltd. vs. Hanuman Seva Trust and others in support of his contention that the suit cannot be dismissed as barred by law of limitation without proper pleading, framing of issue of limitation and taking of evidence. The question of limitation is a mixed question of law and fact and ex facie on reading of the plaint, suit cannot be held to be barred by limitation.

7. He also submitted that the earlier suit O.S. No. 2058 of 1984 was dismissed

for default as evidenced by Document No. 12 and it was wrongly mentioned in the plaint that it was allowed to be dismissed as withdrawn. He, therefore, submitted that under Order 9, Rule 4, when a suit was allowed to be dismissed for default, either the plaintiff can file an application to set aside the dismissal and restore the suit or file a fresh suit subject to law of limitation and on the same cause of action and there is no need to apply for leave for filing a fresh suit. He, therefore, submitted that the respondent/plaintiff has chosen to file a fresh suit for recovery of possession and therefore, it cannot be stated that the suit is barred under Order 2, Rule 2 or Order 23 Rule 1 and 2 as leave was not obtained before the withdrawal of the suit so as to enable the plaintiff to file a fresh suit on the same cause of action. He, therefore, submitted that the application is liable to be dismissed.

8. Point for consideration is whether the suit is liable to be rejected as contended by the applicant?

9. It is settled law that the plaint has to be looked as a whole to consider whether the plaint is liable to be rejected either on the ground of limitation or on the other grounds as enumerated under Order 7 Rule 11 of CPC. It is also settled that law of limitation is a mixed question of law and fact and therefore, when the pleading in the plaint makes it clear that the suit is barred by limitation, the suit can be rejected on the ground of limitation and when there are allegations in the plaint which require a roving enquiry to give a finding whether the suit is barred by limitation and in that context, the Court should not conduct a roving enquiry to find out whether the suit is barred by limitation. Bearing these principles in mind, we shall see whether the allegations made in the plaint make out a case that the suit is barred by limitation.

10. It is admitted that the agreement of lease dated 19.11.1963 was entered into between the respondent/plaintiff with the predecessor in title and the applicant/first defendant and the same was renewed for a further period of 5 years from 1.6.1973 to 31.5.1978, thereafter, by virtue of the passing of enactment of the ESSO (Acquisition of Undertakings in India) Act, 1974, the lessee was entitled to automatic renewal of the lease for the same period for which the earlier lease deed was entered into on the same terms and conditions and therefore, the lease period was extended upto 31.5.1983. But, earlier to 31.5.1983, termination notice was issued by the respondent on 27.1.1983 calling upon the applicant to deliver vacant possession on 31.5.1983. Thereafter, the applicant did not vacate the premises but continued to pay a sum of Rs. 600/- as rent and that was treated as mesne profit by the respondent/plaintiff and in the year 1984, the respondent/plaintiff filed O.S. No. 2058 of 1984 for eviction and in that suit, I.A. No. 13204 of 1984 u/s 9 of the Tamil Nadu City Tenants Protection Act, 1921 was filed by the applicant/first defendant to buy the leasehold property. Therefore, in these circumstances, it cannot be stated that the suit is barred by limitation under Article 67 of the Limitation Act on the ground that the tenancy was terminated by issuance of notice dated 27.1.1983

and the present suit was filed only on 12.2.2010 after more than 27 years.

11. In the Judgment reported in *Hardesh Ores Pvt. Ltd. Vs. Hede and Company*, , the Hon"ble Supreme Court held that the averments made in the plaint as a whole have to be seen to find out whether Order VII, Rule 11 (d) is applicable. It is further stated that it is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense.

12. In the said judgment, the Hon"ble Supreme Court relied upon the judgment reported in *N.V. Srinivasa Murthy and Others Vs. Mariyamma (dead) by Proposed LRs. and Others*, wherein the Hon"ble Supreme Court held that by the device of clever drafting of the plaint, the question of limitation cannot be camouflaged by making it appear as if the suit was within the period of limitation.

13. In the judgment reported in *M. Banupriya Vs. M/s. Nuziveedu Seeds Limited*, No. 905, Kanchunjanga Building, Barakhamba Road, Connaught Place, New Delhi-110 001 and *M/s. Zillion Estates Pvt. Ltd., 6/12, Brodipet, Guntur, Andhra Pradesh*, , the learned Judge of this Court followed the judgment of the Hon"ble Supreme Court reported in 2007(5) MLJ 187 (SC) supra, wherein it is held that wordings, "any law" envisaged in Order VII, Rule 11 (d) includes law of limitation also and having regard to the facts of the case, held that the suit was barred by limitation.

14. In the Judgment reported in *M. Gnanasambandam (since deceased) and 3 Others Vs. M. Raja Appar and 4 Others*, , the suit was rejected on the ground of barred by law and the suit was not rejected on the ground law of limitation.

15. The judgment reported in (2008) 3 MLJ 821 supra cannot be applied to the facts of the case and at this stage, it cannot be stated that the present suit amounts to re-litigation and abuse of process of Court. The question of re-litigation arises when an issue was decided in the earlier suit and a finding was rendered on that issue and thereafter, another suit cannot be filed on the same issue. In this case, no finding was given in the earlier suit and it was dismissed for default. Therefore, we will have to find out whether on the basis of the allegations made in the plaint, whether the suit is barred by limitation.

16. In the judgment reported in *Gian Devi Anand Vs. Jeevan Kumar and Others*, , the character of a tenancy after the termination of tenancy, having regard to the Rent Control Legislation was discussed and the Hon"ble Supreme Court followed the earlier judgment reported in *V. Dhanapal Chettiar Vs. Yesodai Ammal*, held that the term "statutory tenant" as used in English Rent Act has been used by the Indian Courts to denote a tenant whose contractual tenancy has been terminated but who has become entitled to continue to remain in possession by virtue of the protection afforded to him by the statutes in question, namely, the various Rent Control Acts, prevailing in different States of India. The Delhi Rent

Control Act does not make any distinction between a "so-called statutory tenant" and a contractual tenant and the Act proceeds to treat both alike and to preserve and protect the status and rights of a tenant after determination of the contractual tenancy in the same way as that a contractual tenant. Mere determination of the contractual tenancy does not in any way bring about any change in the status of a tenant.

17. It is held that the termination of contractual tenancy does not bring any change in the status and position of the tenant unless there are contrary provisions in the statute. It is also held that the distinction between the contractual tenancy and statutory tenancy is completely obliterated by the Rent Control Legislation and though genetically the parentage of these two legal concepts is different, they are equated with each other and their incidents are the same.

18. In the judgment reported in *Kamakshi Builders Vs. Ambedkar Educational Society and Others*, , it is held that Article 67 of the Limitation Act would not be attracted in a case where the tenant remains a statutory tenant.

19. As stated supra, it is the contention of the first respondent/plaintiff that though the tenancy was terminated by issuance of a notice dated 21.7.1983, admittedly, the tenant filed an Application u/s 9 of the Tamil Nadu City Tenants Protection Act, 1921, claiming status of the tenant in the suit filed by the first respondent/plaintiff. Therefore, having regard to the definition of tenant u/s 2(4) of the Tamil Nadu City Tenants Protection Act, 1921, even after the determination of tenancy, the applicant/first defendant continued to be the statutory tenant and therefore, the suit is not barred by limitation and Article 67 cannot be made applicable. Though such specific pleading was not made in the plaint, as now contended by the learned counsel for the first respondent/plaintiff, it is stated in the plaint that the applicant/first defendant was sending the amount which was paid earlier and he also filed an Application u/s 9 of the Tamil Nadu City Tenants Protection Act, 1921 and that Application was allowed and he failed to purchase the property even though the same was offered by the first respondent/plaintiff. In my opinion, it requires enquiry and framing of issue whether in such context, the plaint can be rejected on the ground of limitation.

20. In the judgment reported in *Popat and Kotecha Property Vs. State Bank of India Staff Association*, , it was observed in paragraphs 19 and 25, as follows:

19. There cannot be any compartmentalisation, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention

of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.

....

25. When the averments in the plaint are considered in the background of the principles set out in *Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others*, , the inevitable conclusion is that the Division Bench was not right in holding that Order 7 Rule 11 CPC was applicable to the facts of the case. Diverse claims were made and the Division Bench was wrong in proceeding with the assumption that only the non-execution of lease deed was the basic issue. Even if it is accepted that the other claims were relatable to it they have independent existence. Whether the collection of amounts by the respondent was for a period beyond 51 years needs evidence to be adduced. It is not a case where the suit from statement in the plaint can be said to be barred by law. The statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11. This is not so in the present case.

21. In the Judgment reported in *Ramesh B. Desai and Others Vs. Bipin Vadilal Mehta and Others*, , it is held as follows:-

15. The principle underlying clause (d) of Order 7 Rule 11 is no different. We will refer here to a recent decision of this Court rendered in *Popat and Kotecha Property Vs. State Bank of India Staff Association*, where it was held as under in para 10 of the report: (SCC p.515)

10. Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force.

16. It was emphasised in para 25 of the report that the statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11 CPC. The principle is, therefore, well settled that in order to examine whether the plaint is barred by any law, as contemplated by clause (d) of Order 7 Rule 11 CPC, the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence....

19. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. The question whether the words "barred by law" occurring in Order 7

Rule 11(d) CPC would also include the ground that it is barred by law of limitation has been recently considered by a two-Judge Bench of this Court to which one of us was a member (Ashok Bhan, J.) in *Balasaria Construction (P) Ltd. v. Hanuman Seva Trust*¹¹ it was held: (SCC p.661, para 8)

8. After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time.

This principle would be equally applicable to a company petition. Therefore, unless it becomes apparent from the reading of the company petition that the same is barred by limitation the petition cannot be rejected under Order 7 Rule 11(d) CPC

22. In the judgment reported in *C. Natrajan Vs. Ashim Bai and Another*, , the Hon"ble Supreme Court reiterated the principle as follows:-

To attract the provision of Order 7, Rule 11(d) of CPC (5 of 1908), the averments in the plaint, without addition or subtraction, must show that the suit is barred by any law. Question of limitation is a mixed question of law and fact. Hence, the plaint cannot be rejected under Order 7, Rule 11(d) of C.P.C. on the ground that the suit is barred by limitation.

23. Therefore, having regard to the fact whether the applicant/first defendant has become a statutory tenant by virtue of provisions of the Tamil Nadu City Tenants Protection Act, 1921 and also the fact that the applicant/first defendant invoked Section 9 of the Tamil Nadu City Tenants Protection Act, 1921 to treat him as tenant and was also paying the rent of Rs. 600/- even after the determination of tenancy and having regard to the definition of tenant u/s 2(4) of the Tamil Nadu City Tenants Protection Act, 1921, it cannot be decided at this stage without framing any issue as to whether the applicant/first defendant is in possession of the property as statutory tenant as alleged by it or a trespasser as alleged by the first respondent/plaintiff and whether Article 67 of the Limitation Act would apply to the facts of the case and all these are mixed question of fact and law, which cannot be decided while deciding the petition under Order 7 Rule 11(d) of CPC to reject the plaint on the ground of limitation. Admittedly, the earlier suit in O.S. No. 2058 of 1984 was allowed to be dismissed for default and therefore, under Order 9 Rule 4, option is given to the plaintiff either to file a fresh suit subject to law of limitation or to file an Application to set aside the dismissal and to restore the suit. Therefore, there is no need to obtain liberty before instituting a fresh suit in such circumstances. Therefore, the argument of the learned counsel for the applicant that the suit is barred by Order 2 Rule 2 or suit is not maintainable as no liberty was obtained for filing a fresh suit, cannot

be entertained.

In the result, the Application is dismissed.