

(2012) 09 MAD CK 0051

In the Madras High Court

Case No : Second Appeal No. 1227 of 1999

K. Sethu Ammal and Others

APPELLANT

Vs

Ranga Nayaki and Another

RESPONDENT

Date of Decision : 17-09-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Constitution of India, 1950 — Article 14, 21

Citation : (2012) 5 LW 593

Hon'ble Judges : V. Periya Karuppih, J

Bench : Single Bench

Advocate : M. Balasubramaniam, for the Appellant; H.S. Mohammed Rafi, for the Respondent

Final Decision : Allowed

Judgement

V. Periya Karuppih, J.—This appeal is directed against the judgment and decree passed by the first appellate court in A.S. No. 95 of

1982 dated 31.08.1998 in reversing the judgment and decree passed by the trial court made in O.S. No. 392 of 1973 dated 21.06.1982 in

decreeing the suit. The appellants were the plaintiffs and the respondents were the legal representatives of the deceased defendant, who were

impleaded during the pendency of first appeal in A.S. No. 95 of 1982. For convenience, the rank of parties are referred as to their rank before the

trial Court in this judgment.

2. The case of the plaintiff as stated in the plaint would be as follows:-

The first plaintiff's husband and father of the plaintiffs 2 to 6, by name Krishnamurthy Iyer, was the owner of the suit properties. He died one

month back. The plaintiffs are the only heirs entitled to succeed the said

properties. The suit property bears T.S. No. 1388. The suit property measures 2/3rd of 9300 sq.ft. The defendant executed a paguthy chit in favour of the said Krishnamurthy Iyer on 19.08.1961, agreeing to pay Rs. 2.50p per month. Subsequently, it was increased to Rs. 3/- per month. The defendant was permitted to put up a thatched shed and reside in the suit property and he is in possession only from 1961. He has got no other right on the property. The period of tenancy was only for one year. But, the defendant continues on the same terms of tenancy. A notice was issued to him terminating his tenancy on 02.09.1970 by the deceased Krishnamurthy Iyer. The defendant gave a reply on 01.10.1970 and the contents of the same are all false. The defendant pleaded that he is liable to pay only Rs.2.50p by way of paguthy per month. The property is situate west of the road. The middle portion in that Survey Number belongs to one Pattu Iyer. The northern and southern portions abutting the portion of Pattu Iyer belongs to the plaintiffs. The defendant was put into possession of the said property and the western extremity ends till the well portion on the western side in the backyard. Further west of the well, the defendant has got no right. The plaintiffs are in possession of these properties. There is a lane portion on the southern side in the suit properties, and the plaintiffs are having access to their backyard through the lane portion. The plaintiffs in order to avoid unnecessary controversy, restrict their claim of rent to Rs. 2.50 per month. The plaintiffs are in need of the premises. The defendant is not entitled to the benefits of the City Tenants Protection Act, as he became a tenant only from 1961. The plaintiffs are now constrained to file the suit for recovery of possession and the rent for the month of March to May 1973.

3. The case of the defendant as stated in the written statement would be as follows:-

(a) The suit is not maintainable either in law or on facts. The suit is bad for non-joinder of parties. Apart from the plaintiffs, there are other heirs of

Krishnamurthy Iyer, i.e., three daughters. Hence, the suit filed by plaintiffs alone is not maintainable. The description of property is not clear and

there is no demarcation or clear extent of the suit property given in the plaint. The defendant became a tenant of the suit property along with the

middle 1/3rd portion, which belong to one Pattu Iyer as early as 1956. Hence, it

is false to state that the defendant is in possession of the suit

property only from 1961. The defendant put up a superstructure in the middle portion as well as in a small extent in the share of plaintiffs for shop

and for residential purpose. The entire extent has been fenced all around and the defendant is in enjoyment of about the entire 9300 sq.ft from then

onwards. The defendant is not aware of the alleged paguthy chit dated 19.08.1961. He is an illiterate person and the deceased Krishnamurthy Iyer

was helping him in the dispute between defendant and Pattu Iyer. During that time, Krishnamurthy Iyer might have taken some ante-dated

document from the defendant without his knowledge. The defendant is not aware of the contents and recitals of the said document, which is not

produced in Court. The defendant will file a detailed written statement if necessary after the document is produced.

(b) The share of the plaintiffs and Pattu Iyer, which comprise the entire extent, measures about 9300 sq.ft. Defendant has put up a masonry

superstructure in a portion, which will be worth Rs. 2000/-. Defendant is entitled to the benefits of the City Tenants Protection Act, since the

superstructure was originally put up for non-residential purpose and it has been so held by the High Court in S.A. No. 328 of 1969, in the

proceedings between the defendant and Pattu Iyer in respect of middle portion of the suit survey number. Hence, the present suit without proper

notice u/s 11 of the City Tenants Protection Act is liable to be thrown out.

(c) The defendant is also entitled to the benefits of Kudiyruppu Act, since he is residing in the suit property. He has no other manicut of his own.

He is an agriculturist earning his livelihood mainly depending upon agriculture and he is a tenant in respect of about 100 kulies of Perumalkoil lands,

in which he is raising plantains. Hence, on that ground also plaintiffs are not entitled to the relief of possession. In major portion of the property,

excluding the portion occupied by the superstructure, the defendant is cultivating plantains, chillies, etc., by contributing his own physical labour. As

such, the defendant is entitled to the benefits of the Cultivating Tenants Protection Act and the suit is not maintainable.

(d) The plaintiffs are not in possession of any property beyond the well. There is no lane portion on the south nor the plaintiffs are having any

access through the same. The portion west of the well is being cultivated with

plantains, vegetables, etc., by the defendant. The claim for arrears of
paguthy is not sustainable, since the same has been paid by M.O. The notice to
quit is not proper and on that ground also, the suit is liable to be
dismissed. The plaintiffs are not entitled to the reliefs claimed for more than one
reason and it is prayed that the suit may be dismissed with costs.

4. The trial court had framed necessary issues and entered trial. After appraising
the evidence, the trial court had come to the conclusion of

decreeing the suit in O.S. No. 392 of 1973 on 30.06.1975. Having aggrieved
against the judgment and decree passed by the trial court on

30.06.1975, the defendant preferred an appeal in A.S. No. 111 of 1975
challenging the judgment and decree dated 30.06.1975. After hearing

both parties, the then first appellate court allowed the appeal with costs and
thereby, the suit filed by the plaintiffs was dismissed with costs.

Challenging the said reversal judgment and decree passed by the then first
appellate court, an appeal was preferred in S.A. No. 340 of 1978

before this Court. This Court after admitting the said appeal, formulated the
substantial questions of law and had allowed the appeal and remanded

the matter with specific direction to the Execution Court and passed a conditional
decree on 25.02.1981. The said order was misunderstood by

the trial court that it was remanded to the said Court and the suit was once again
tried and the trial court after appraising the evidence once again

decreed the suit with costs on 21.06.1982. The defendant had challenged the
said judgment and decree passed by the trial court dated

21.06.1982 in A.S. No. 95 of 1982. The first appellate court heard the arguments
of both sides and had allowed the appeal and thus, remanded

the matter to the trial court for fresh disposal in accordance with law. The said
order of remand was challenged by the plaintiff before this Court in

CMA. No. 329 of 1984 and this Court after hearing both parties allowed the
appeal and directed the first appellate court to hear the appeal and

to pass judgment and decree, in accordance with law. In obedience to the said
order passed by this Court in CMA. No. 329 of 1984 dated

20.11.1996, the first appellate court heard the arguments of both sides and
allowed the appeal on 31.08.1998 and thereby, the suit filed by the

plaintiff before the trial court was dismissed, once again.

5. Having aggrieved by the order of dismissal of the suit in the reversal judgment

of the first appellate court made in A.S. No. 95 of 1982 dated

31.08.1998, the plaintiffs have preferred this Second Appeal before this Court.

6. On admission, this Court had formulated the following substantial questions of law for consideration in this appeal:-

(a) Whether the proceedings culminating in a judgment of lower appellate Court in A.S. No. 95 of 1982 dated 31.08.1998 will be a nullity and are

liable to set aside in view of the judgment rendered by this Hon"ble Court in S.A. No. 340 of 1978 dated 25.02.1981 whereunder no remand had

been made. The decree rendered by the trial court on date in favour of the plaintiff for recovery of possession was confirmed and directed the

eligibility or otherwise of the benefits of Tamil Nadu Act XL of 71 claimed by the defendant are to be decided by Executing Court?

(b) Whether the lower appellate Court erred in law in placing the burden of proving that the suit property being used not for residential purpose

while it is imperative for the persons claiming benefits of Tamil Nadu Act XL of 71 to establish his case ?

(c) Whether the lower appellate Court erred in law in failing to give a finding regarding the status of the respondent that is to say that they are

agriculturists or agricultural labour?

(d) Whether the lower appellate Court erred in law in failing to note that the respondents would not be entitled to Tamil Nadu Act XL of 71 by

reason of the exclusion of Clause contained in clause 3(3) of the Act ? And

(e) Whether the lower appellate Court in any event in dismissing the suit for recovery of possession in respect of 9300 sq.ft while respondents

claimed that there is a dwelling house 3 ft x 24 ft and in failing to take definition ""Kudiyiruppu"" which restricts the area of the extent occupied by

superstructure and the adjacent area for convenient enjoyment ?

7. However, the learned counsel for the respondents had suggested additional substantial questions of law in his argument and the said additional

questions of law are referred hereunder and its necessity will be discussed during the disposal of the appeal:-

(1) Whether in Second Appeal by the Hon"ble High Court u/s 100 of CPC in continuation suit proceedings other than execution proceedings

(when no execution proceedings are pending in any court or not being filed within 12 years) any direction could be issued to the execution court.

(2) Whether the plaintiffs could now maintain a stand that the trial Court erred in law in deciding O.S. No. 392 of 1973 and thereby, treating that

decree dated 21.06.1982 in O.S. No. 392 of 1973 nullity, when no cross appeal was filed by the plaintiffs.

(3) Whether the plaintiffs could now raise a plea of any error said to have been committed by the trial Court and the first appellate Court after

participating in the trial courts subsequent to the remand order, and also first appeal and in CMA before this Hon''ble High Court respectively

before this Hon''ble High Court.

(4) Whether u/s 100 CPC in Second Appeal the Constitution of the Civil Court could be changed.

8. Heard Mr. M. Balasubramaniam, learned counsel appearing for the appellants / plaintiffs and Mr. Mohammed Rafi, learned counsel appearing

for the respondents / defendant.

9. The learned counsel appearing for the appellants/ plaintiffs would submit in his argument that the suit was originally filed by the plaintiffs for

recovery of possession of 9300 sq.ft of land excluding Pattu Iyer''s land in the middle portion of the front side i.e., abutting the road and for costs.

He would also submit that the defendant''s case was that he had put up superstructure in the middle portion in Pattu Iyer''s land as well as in a small

extent in the land of plaintiffs for a shop and residential purpose and therefore, it could be easily construed that the portion occupied in the

plaintiffs'' property was predominantly for shop and the ancillary purpose is for residence.

10. The learned counsel appearing for the appellants / plaintiffs would also submit that the defendant was claiming the benefits of The City Tenants

Protection Act, The Cultivating Tenants Protection Act and also The Occupants'' Kudiyruppu Act in order to safeguard his possession. He would

further submit that the said submissions of the defendant that he would entitle to The City Tenants Protection Act and The Cultivating Tenants

Protection Act were not upheld by this Court in S.A. No. 340 of 1978 and therefore, he is not entitled to the said benefits of those Acts. He

would further submit that the possession of the defendant in Pattu Iyer''s land was confirmed to be under The City Tenants Protection Act in the

decision made in S.A. No. 328 of 1969, in which the plaintiffs are not parties. He

would further submit in his argument that the defendant did not object the ownership of the plaintiffs and his only claim was that he is entitled to the benefits of The Tamil Nadu Occupants of Kudiyruppu (Conferment of Ownership) Act, 1971.

11. The learned counsel appearing for the appellants / plaintiffs would further submit that this Hon''ble Court in S.A. No. 340 of 1978 had remanded the matter to the Execution Court. This Hon''ble Court directed in the said judgment that whether on the date when the Act came into force, namely, The Tamil Nadu Occupants of Kudiyruppu (Conferment of Ownership) Act, 1971 and subsequently thereafter, the defendant was in occupation of any portion for the purpose of running the shop and if the respondent / defendant ceases to run the shop, that cannot prevail with the Executing Court. The order further says that the test to determine as to whether the shop was run or not during the period when the Act 1940 of 1971 came into force until this date i.e., 25.02.1981. It is open to the Execution Court for appointing the Commissioner for the purpose of ascertaining the said fact and the parties are to be permitted to adduce evidence oral and documentary for that purpose. With the said order of remand, the suit was decreed to that extent and a conditional decree was passed.

12. The learned counsel appearing for the appellants / plaintiffs would also submit that when this Court in Second Appeal has passed a conditional decree with a direction to the Execution Court to find out certain facts and to pass orders thereon, the trial court had erroneously taken cognizance of the case and conducted the case, after appointment of a Commissioner to inspect the suit properties and to note the particulars as ordered by this Court in the Second Appeal. After the Commissioner filed his report and on further evidence adduced by parties, the trial court had passed a judgment and decree as prayed for. He would further submit that the defendant had preferred an appeal and the first appellate court had ordered remand and against which, the plaintiffs preferred a Civil Miscellaneous Appeal in CMA. No. 329 of 1984 and the Hon''ble High Court allowed the appeal and directed the first appellate court to consider the matter once again.

13. The learned counsel appearing for the appellants / plaintiffs would further submit that all the things happened in taking cognizance, conducting

trial, passing judgment by the trial court as well as receiving the appeal made by the defendant before the first appellate court and passing a

judgment of remand therein and the preference of Civil Miscellaneous Appeal by the plaintiff before this Court and the judgment passed by this

Court in the Civil Miscellaneous Appeal remanding the matter to the first appellate court itself and the impugned judgment passed by the first

appellate court are all against the judgment passed by this Court in S.A. No. 340 of 1978. The direction made by this Court in S.A. No. 340 of

1978 was to the effect that the Execution Court has to go into the said fact for finding the entitlement of the benefits of Kudiyiruppu Act and to

either proceed with Execution Proceedings or to close the Execution Proceedings depending upon the finding reached. He would also submit that

the Execution Court can proceed in accordance with the directions passed by this Court in S.A. No. 340 of 1978 dated 25.02.1981, after filing an

Execution Petition by the plaintiffs. He would further submit that instead, the trial court had committed the first mistake by taking the case on file

and it was followed by the first appellate court and also this Court in disposing the appeal and the CMA preferred by the parties. He would also

submit in his argument that such judgment passed for want of jurisdiction is clearly "non-est" in the eye of law. The learned counsel appearing for

the appellants / plaintiffs would cite a judgment of the Hon"ble Apex Court reported in Kiran Singh and Others Vs. Chaman Paswan and Others,

in support of his argument.

14. Relying upon the aforesaid judgment of the Hon"ble Apex Court, he would argue that the jurisdiction assumed by the trial court was very much

against the orders passed by this Court in S.A. No. 340 of 1978 and the further proceedings are also not in accordance with the directions and

any orders passed therein would be a nullity.

15. The learned counsel appearing for the appellants / plaintiffs would also submit that wrong cognizance made by the trial court was certainly

against the tenor of the order passed by this Court in S.A. No. 340 of 1978. He would also submit that the mistake committed by the trial court

was continued by the first appellate court as well as this Court inadvertently and thereby, the plaintiffs were not given the fruits of the decree made

in S.A. No. 340 of 1978. He would further submit that the celebrated maxim

"Actus curiae neminem gravabit" which means, no person shall be prejudiced by an act of the Court, should have been followed. He would cite a judgment of the Hon'ble Apex Court reported in A.R. Antulay Vs.

R.S. Nayak and Another, in support of the principle of law he relied upon. Such a judgment passed without jurisdiction would also be considered

"per incurium", as decided by the Hon'ble Full Bench of Orissa High Court reported in AIR 1992 Orissa 261 (Krishna Chandra Pallai..vs.. Union

of India and another), which describes the meaning of "per incurium". In support of his argument, he would also cite yet another judgment of the

Hon'ble Apex Court reported in Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another,

16. The learned counsel appearing for the appellants / plaintiffs would further submit that when the matter is pending before the higher forum, the

said dispute is considered to be merged with Subordinate Forum's decision. For that, he has cited a judgment of the Hon'ble Apex Court

reported in Kunhayammed and Others Vs. State of Kerala and Another, He would also rely upon the judgments of the Hon'ble Apex Court

reported in Amba Bai and Others Vs. Gopal and Others, and Om Prakash Marwaha (D) thr. LRS. and Others Vs. Jagdish Lal Marwaha (D) thr.

LRS.,) for the same principle.

17. The learned counsel appearing for the appellants / plaintiffs would also submit that even otherwise, the wrong cognizance taken by the trial

court and subsequently, by the first appellate court and thereafter, by this Court is construed to be a mistake, whether the plaintiffs have got a right

to recover possession of the property from the defendant ought to have been considered by this Court. The trial court and the first appellate court

have rendered different judgments, but the first appellate court has not meted out the point on which the trial court had come to a conclusion in

decreeing the suit. He would further submit that it had simply referred to the direction of this Court and had reversed the finding of the trial court on

the said point.

18. The learned counsel appearing for the appellants / plaintiffs would also submit that the defendant was having the house property adjacent to the

property of the plaintiffs and he is also in possession of 3 feet breadth and 24 feet length in the property of the plaintiffs and in which, he is seeking

for the benefit of The Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act, 1971, which is not eligible to the defendant since he

has already got a residential property adjacent to the suit property put up in Pattu Iyer's land.

19. The learned counsel appearing for the appellants / plaintiffs would further submit that if for any reason, this Court finds that the entire

proceedings before the trial court, first appellate court and this Court are not "non-est" in the eye of law, the decision reached by the first appellate

court is very much against the provisions of law in reversing the well considered judgment of the trial court. He would, therefore, request the Court

to set aside the judgment and decree passed by the first appellate court and to pass a similar judgment as was rendered in S.A. No. 340 of 1978

authorising the Execution Court to go into the facts once again or in the event, these proceedings are sustainable to reverse the judgment of the first

appellate court, to restore the judgment and decree passed by the trial court and thus, the Second Appeal may be allowed.

20. The learned counsel for the respondents / defendant would submit in his argument that the argument advanced by the learned counsel for the

plaintiffs that the proceedings before the trial court, first appellate court and before this Court in Civil Miscellaneous Appeal would be a "non-est"

in the eye of law, cannot be sustained and if it is held so, the present Second Appeal which has arisen out of the First Appeal would also become

"non-est" in the eye of law, despite the cognizance taken by the trial court was a sheer a mistake. The further argument advanced by the learned

counsel for the plaintiffs that no man shall be prejudiced by the act of the Court is a well settled principle laid down by various pronouncements and

the said doctrine is also applicable to the defendant and merely because the mistaken cognizance has been taken without understanding the order

passed by this Court in S.A. No. 340 of 1978 should not prejudice the right of the defendant.

21. The learned counsel for the respondents / defendant would further submit that admittedly there was no execution proceedings pending before

the Execution Court and therefore, the direction issued to the Execution Court was assumed by the trial court and the trial was commenced once

again as if, it was remanded to the trial court. He would further submit that the plaintiffs cannot now turn round and say that the mistake was

committed by the trial court in taking trial of the matter as if it was remanded to the said Court instead of Execution Court, despite he has

participated in the whole trial. He would further submit that the plaintiffs did participate in the first appeal proceedings in which, remand order was

passed once again to the trial court against which, the plaintiffs alone preferred CMA before this Court and got an order of a direction to re-hear

the matter by the first appellate court.

22 The learned counsel for the respondents / defendant would also submit that even now the plaintiffs alone have taken the matter before this

Court in the Second Appeal despite this Second Appeal is emanating from the wrong cognizance of the trial court mistaking the order passed by

this Court in S.A. No. 340 of 1978. He would further submit that the trial court was directed by this Court in S.A. No. 340 of 1978 to decide the

factual issues as to whether shop was run from a particular date or not. He would also submit that since the trial court did not appreciate the

Commissioner's report as directed by this Court, the first appellate court had interfered with the findings of the trial court and accordingly,

adjudicated the matter. He would also submit that this Court had already come to a conclusion that the defendant was entitled to The Tamil Nadu

Occupants of Kudiyiruppu (Conferment of Ownership) Act, 1971, and therefore, there is no need for the trial court to go about the applicability of

the Act to the defendant. He would therefore, submit that the first appellate court was right in coming to the conclusion that the benefits of the said

Act was applicable to the defendant and the findings of the Commissioner was only in favour of the defendant and the first appellate court had

rightly reversed the judgment of the trial court. He would further submit that the proceedings, right from the trial court to the level of this Court

conducted after the pronouncement of the judgment in S.A. No. 340 of 1978 by this Court cannot be declared as "per incurium" as argued by the

learned counsel for the plaintiffs. He would therefore, request that there is no reason for interfering with the reversal judgment of the first appellate

court and therefore, the said judgment of the first appellate court may be confirmed and the Second Appeal preferred by the plaintiffs may be

dismissed.

23. I have given anxious thoughts to the arguments advanced on either side.

24. The suit was originally filed by the plaintiffs against the defendant for the following reliefs:-

- a) to direct the defendant to deliver possession of the suit property, after removing the superstructure put up by him;
- b) to pass a decree for a sum of Rs.... being the past profits claimed and to award future profits claimed and to award future profits till delivery of possession;
- c) to award the costs of the suit.

25. The admitted facts are that the first plaintiff's husband and plaintiffs 2 to 6's father, namely, Krishnamoorthy Iyer was originally the owner of

the property and he had permitted the defendant to put up a thatched shed and reside in the suit property on tenancy for the payment of Rs. 2.50p

per month, which was subsequently raised to Rs. 3/- per month and the defendant had put up a hut in one Pattu Iyer's property located at the

centre of the plaintiffs' property and also for 3 feet length in the property leased to the defendant.

26. The plaintiffs want the suit property for their use and therefore, they have terminated the tenancy on 02.09.1970 and sought for delivery of

possession of the suit property and for past profits and future profits. The said suit was originally decreed on 30.06.1975. However, the appeal

preferred by the defendant in A.S. No. 111 of 1975 was allowed on 13.12.1976 and thus, the suit was dismissed with costs. The aggrieved

plaintiffs preferred Second Appeal in S.A. No. 340 of 1978 before this Court and this Court on 25.02.1981 had passed an order of remand with

certain findings. The relevant passage regarding the findings in the said judgment would be as follows:-

....I am of the view that instead of relegating the matter to the Authorised Officer to find out as to what exactly is the portion in which the

respondent / defendant is residing under the Tamil Nadu Occupants of Kudiyiruppu Act, it is better that the matter be left to the Executing Court.

Therefore, there will be a decree in favour of the plaintiffs / appellants, subject to the following :-

In the Executing Court, if it is found that in the suit property the respondent has put up a betel nut shop and is residing there for the purpose of

running the shop, from that portion, he is liable to be ejected. On the contrary, if

the suit property is actually used for residential purpose, there will be no ejectment of the respondent/defendant. It requires to be considered by the Executing Court whether on the date when the Act came into force and subsequently thereafter the defendant was in occupation of any portion for the purpose of running the shop. The reason why I say so is that in view of this order if the respondent / defendant ceases to run the shop, that cannot prevail with the Executing Court. The test to determine is whether the shop was run or not during the period when Act 40 of 1971 came into force until this date viz., 25.02.1981. It will be open to the Executing Court to appoint a Commissioner for this purpose and allow the parties to adduce evidence, oral or documentary, which they may deem fit.

The second appeal is allowed only to the limited extent and remanded to the Executing Court and the decree will be in the terms as stated above.

There will be no order as to costs.

27. On a careful perusal of the aforesaid judgment of this Court made in S.A. No. 340 of 1978 dated 25.02.1981, I could see that this Court had

come to a conclusion that the finding of the then first appellate court that the defendant was entitled to the Tamil Nadu Occupants of Kudiyruppu

(Conferment of Ownership) Act, 1971 would apply to the defendant, has to be tested by the Executing Court instead of Authorised Officer as

designated in the said Act. According to the said direction, the Executing Court has to execute the decree subject to a finding to be reached by it

after appointing a Commissioner to find out the nature of possession of the defendant in the suit property as to whether he has put up a betel nut

shop and he is residing and if the residing is for the purpose of running the shop, the execution can be carried out and in case if the defendant is

using the portion only for residing purpose, then there would be no ejectment. The Execution Court was also directed to find whether on the date

of enforcement of this Act in the year 1971 and subsequently thereafter, the defendant was in occupation of any portion for the purpose of running

the shop and whether the shop was run or not during the period when the Act came into force until the date 25.02.1981.

28. The tenor of the order was that the suit was decreed and a conditional decree was passed subject to certain directions issued to the Execution

Court instead of Authorised Officer. It is very clear that the Execution Court alone has to find it out the said fact during the execution of the decree.

But, it was not done and it was once again placed before the original side of the said Court and the trial was commenced as if it was remanded to

the trial court. Judgment was also pronounced by the trial court. Against the judgment passed by the trial court, first appeal was also preferred. But

the first appellate Court remanded the matter to the trial court. Against which, the plaintiffs themselves preferred CMA before this Court and

certain directions have also been issued for disposal of the appeal by the first appellate court itself in the order passed by this Court. Therefore, the

direction issued to the Execution Court was not exercised by the Execution Court, but the trial court had assumed the said jurisdiction for finding

the said facts as directed by this Court in S.A. No. 340 of 1978.

29. According to the judgment of Hon'ble Apex Court reported in Kiran Singh and Others Vs. Chaman Paswan and Others, , the lack of

jurisdiction would vitiate the entire findings. The relevant passage would run as follows:-

6....It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set

up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of

jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the

Court to pass any decree, and such a defect cannot be cured even by consent of parties...

30. However, it has been challenged by the learned counsel for the respondents / defendant that the plaintiffs have also acquiesced to the

procedure adopted by the trial court taking the case to its file instead of sending it to Execution Court and even the plaintiffs have participated in

the appeal preferred by the defendant and the plaintiffs alone preferred CMA before this Court in CMA. No. 329 of 1984 challenging the said

order of remand made by the first appellate court at an earlier occasion. In the said circumstances, the learned counsel for the respondents /

defendant would submit that it could not be considered as lack of jurisdiction, but only an error of jurisdiction. He would also submit that both the

Execution side as well as Original side were conducted only by the same or similar Presiding Officer and therefore, there is no question of any different jurisdiction or lack of jurisdiction.

31. According to the submission of both, the Court had committed a mistake and no party shall be prejudiced by an act of the Court. For that, the learned counsel for the appellants / plaintiffs referred to the following judgments, viz.,

(1) A.R. Antulay Vs. R.S. Nayak and Another,

(2) AIR 1992 Orissa 261 (Krishna Chandra Pallai..vs.. Union of India and another)

(3) Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another,

The relevant passage in A.R. Antulay Vs. R.S. Nayak and Another, would be as follows:-

83....No man is above the law, but at the same time reiterate and declare that no man can be denied his rights under the Constitution and the laws.

He has a right to be dealt with in accordance with the law and not in derogation of it. This Court? in its anxiety to facilitate the parties to have a

speedy trial gave directions on 16th February, 1984 as mentioned hereinbefore without conscious awareness of the exclusive jurisdiction of the

Special Courts under the 1952 Act and that being the only procedure established by law, there can be no deviation from the terms of Article 21 of

the Constitution of India. That is the only procedure under which it should have been guided. By reason of giving the directions on 16th February,

1984 this Court had also unintentionally caused the appellant the denial of rights under Article 14 of the Constitution by denying him the equal

protection of law by being singled out for a special procedure not provided for by law. When these factors are brought to the notice of this Court,

even if there are any technicalities this Court should not feel shackled and decline to rectify that injustice or other wise the injustice noticed will

remain forever a blot on justice. It has been said long time ago that ""Actus Curiae Neminem Gravabit""-an act of the Court shall prejudice no man.

This maxim is founded upon justice and good sense and affords a safe and certain guide for the administration of the law.

32. The relevant passage in AIR 1992 Orissa 261 (Krishna Chandra Pallai..vs.. Union of India and another) would be as follows:-

10. As to the decision in Union of India (UOI) Vs. Parma Nanda, being per

incuriam as it has not taken note of the fact that according to Bhagat Ram Vs. State of Himachal Pradesh and Others, disproportionate sentence violates. Article 14 of the Constitution, let us first see what is meant by the aforesaid expression. In this connection, we may first refer to the Constitution Bench decision of seven Judges in A.R. Antulay Vs. R.S. Nayak and Another, in paragraph 42 of which it was stated that per incuriam are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step of the reasoning on which it is based is found on that account to be demonstratively wrong.

11. The expression ""per incuriam"" was explained in paragraph 11 of Municipal Corporation of Delhi Vs. Gurnam Kaur, by stating that a decision should be treated as given per incuriam when it is given in ignorance in terms of a statute, or of a rule having the force of a statute.

12. In paragraph 40 of Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others, , it was stated that the latin expression in question means ""through inadvertence"". In that paragraph it was further stated that a decision can be said generally to be given per incuriam when a Court has acted in ignorance of a previous decision of its own, or when a High Court has acted in ignorance of a decision of the Supreme Court.

13. Finally, we may note what was stated in paragraph 40 of State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, , wherein Sahay, J. stated that in practice, per incuriam appears to mean per ignoratium. It was then stated that this principle was developed in relaxation of the rule of stare decisis inasmuch as ""quotable in law"" is avoided and ignored if it is rendered ""in ignoratium of a statute or other binding authority".

33. The relevant passage in Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another, would be as follows:-

16....As stated earlier, if the decree strikes at the jurisdiction of the court or the court lacks jurisdiction it strikes at the very root of the authority to pass the order or the decree. As seen, the Amendment Act 68 of 1984 has no application to the lands acquired under the Act. It was amended only w.e.f. August 1, 1987 and it was made applicable only to the pending

proceedings. It would, therefore, be clear that the order awarding additional benefits is clearly without jurisdiction and thereby it is a nullity. Its nullity can be assailed at any stage including at the execution or in a collateral proceedings since it strikes at the very jurisdiction and authority of the court.

34. No doubt, it is true that no man shall be prejudiced by the act of Court. The celebrated maxim is ""Actus curiae neminem gravabit"". It has been

very clearly dealt with in the aforesaid judgment. The said maxim is applicable for both the parties. In case, the entire proceedings are struck down

as "non-est" as per the judgment of the Hon''ble Apex Court reported in Kiran Singh and Others Vs. Chaman Paswan and Others, and the parties

are once again directed to go before the Execution Court and to adduce evidence from the beginning, it would certainly prejudice both the parties.

The fact finding was done by the trial court. This Court had also disposed the CMA preferred against the remand order passed by the first

appellate court. Both the parties have acquiesced to the proceedings initiated by the trial court and also the first appeal filed before the first

appellate court and the CMA preferred before this Court on an inadvertent mistake committed by the Court. In the said circumstances, can the

judgment and decree passed by the above three Courts can be held as "non-est" in the eye of law as per the judgment of the Hon''ble Apex Court

is the question.

35. It has to be borne in mind that the facts and circumstances of the case should have been considered before holding any proceedings "non-est"

in the eye of law or as "per incurium". The judgment of the Hon''ble Apex Court reported in Budhia Swain and Others Vs. Gopinath Deb and

Others, is guiding us to reach a conclusion in this point. The relevant passage in paragraph No. 8 and 9 would run as follows:-

8. In our opinion a tribunal or a court may recall an order earlier made by it if (i) the proceedings culminating into an order suffer from the inherent

lack of jurisdiction and such lack of jurisdiction is patent, (ii) there exists fraud or collusion in obtaining the judgment, (iii) there has been a mistake

of the court prejudicing a party or (iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had

died and the estate was not represented. The power to recall a judgment will not

be exercised when the ground for re-opening the proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence.

9. A distinction has to be drawn between lack of jurisdiction and a mere error in exercise of jurisdiction. The former strikes at the very root of the exercise and want of jurisdiction may vitiate the proceedings rendering them and the orders passed therein a nullity. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings and the order passed thereon unless set aside in the manner known to law by laying a challenge subject to the Seth Hiralal Patni Vs. Sri Kali Nath, , it was held :-

.... The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it.

36. According to the aforesaid judgment, the Court may recall the order earlier made by it when there has been a mistake of the Court prejudicing a party. This Court has not committed any mistake, but the trial court has committed a mistake in taking cognizance of the case as per the order passed by this Court in S.A. No. 340 of 1978 dated 25.02.1981. However, the dictum is "no man shall be prejudiced by an act of the Court".

This Court has also disposed the CMA. As already stated, there is a specific order that the Execution Court has to find out the fact while executing the decree. The suit was filed in the year 1973. On three occasions, the matter was remanded and adjudicated. If this Court is once again ordering remand to stick on its original order in S.A. No. 340 of 1978 dated 25.02.1981, it would certainly affect both the parties and their right.

Therefore, the order passed by this Court directing the Execution Court to go into

the matter may be modified since the rights of the parties should not be prejudiced.

37. It is also laid down in the aforesaid judgment that the lack of jurisdiction would vitiate the entire proceedings, whereas the error in the exercise of jurisdiction could be corrected by the Court. When we apply the principles laid down as to the rights of parties should not be prejudiced and also that the parties having already participated in the proceedings throughout, this Court is of the opinion that the entire proceedings held by the trial court, first appellate court and this Court in CMA could not be held as invalid or illegal proceedings or to be considered as "non-est" in the eye of law.

38. In the said circumstances, what would be the remedy for the parties in this Second Appeal has to be decided. In an earlier occasion, while disposing the Second Appeal, this Court had passed an order directing the Executing Court with various instructions to follow and to execute the decree. As per the said direction, the Commissioner was appointed and he has also filed a report. As per his report, the defendant had sold the property on 10.07.1979 during the pendency of the suit to a third party and on the date of promulgation of the Act, the defendant was in possession of 3 feet x 24 feet in the suit property along with other portion, put up in the land belonging to Pattu Iyer. Similarly, the Advocate Commissioner has also referred that the defendant was residing in the property and he had installed a bunk shop incidentally and he was not living there for conducting the bunk shop.

39. The clear direction issued by this Court was that in case, the defendant was having the bunk shop in the portion of the suit property belonging to the plaintiff and is residing for the purpose of running the shop, then ejectment has to be ordered by the Executing Court. However, the first appellate court had come to the conclusion that the plaintiff was in possession of the portion of the suit property as per the definition of "Kudiyiruppu Act" and therefore, he is entitled for the said premises. The first appellate court did not understand the order passed by this Court in

S.A. No. 340 of 1978 that except the portion referred in 3 feet x 24 feet, wherein the house has been put up by the defendant, the other portions of the suit property were already ordered to be ejected. But it was not

considered by the first appellate court. The first appellate court has dismissed the entire claim of the plaintiffs in respect of the suit property.

40. Moreover, the first appellate court did not consider the point raised by the trial court regarding the applicability of the Kudiyiruppu Act to the defendant as per Section 3(3) of the said Act. For better appreciation, Section 3(3) of The Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act, 1971, has to be extracted, which would run as follows:-
Occupant of Kudiyiruppu to become owner:

3 (1) Save as otherwise provided in this Act, any agriculturalist or agricultural labourer who was occupying any kudiyiruppu on the 1st day of April, 1990, either as tenant or as licensee shall, with effect from the date of the commencement of this Act, be the owner of such kudiyiruppu and such kudiyiruppu shall vest in him absolutely free from all encumbrances.

(2) Where, in the case of an occupant of kudiyiruppu, in whom such kudiyiruppu vests under sub-section (1) the superstructure belongs to any person other than such occupant, such superstructure shall also with effect from the date of the commencement of this Act, vest in such occupant absolutely free from all encumbrances.

(3) Nothing in sub-section (1) shall be deemed to confer the right of ownership of kudiyiruppu on any agriculturalist or agricultural labourer if he already owns a dwelling house or hut or a house - site, within a distance of one kilometre from the kudiyiruppu referred to in sub-section (1).

Provided that the site on which the dwelling house or hut is erected or the house site concerned is more than three cents in extent. Of course, the

said point has not been argued before this Court at an earlier point of time and was referred by this Court to the consideration of the Execution

Court in its direction. The said point is a legal point and it can be raised at any time so as to find the correct position of law in order to render

justice. Therefore, the finding of the first appellate court reached against the judgment and decree passed by the trial court as well as the finding

regarding the applicability of the Act are not in accordance with law. Therefore, it has become necessary for this Court to set aside the judgment

and decree passed by the first appellate court.

41. While considering the overall facts and circumstances of this case, I could see

that the additional substantial questions of law suggested by the respondents cannot be sustained. The first question of law framed in this appeal, even though, not helpful to the appellants, the other questions of law are necessarily to be decided only in favour of the appellant.

42. For the foregoing discussions, I am of the considered view that the point referred to ""Execution Court"" even though not taken by the Execution Court, but was taken by the trial court and it was found by the trial court in favour of the plaintiffs and such wrong cognizance taken by the trial court was found as "error in jurisdiction" and it was ratified by the parties themselves by participating in the proceedings and such mistake of the Court shall not prejudice any of the parties and therefore, those proceedings cannot be set aside as "non-est" in the eye of law. Similarly, the finding of the trial court as to the inapplicability of the benefits of the Kudiyiruppu Act to the defendant u/s 3(3) of the said Act was also a legal point and therefore, it cannot be found as exceeding the direction and the first appellate court having failed to reach a finding against the said finding of the trial court was not correct in reversing the judgment. Therefore, it has become necessary for this Court to interfere and set aside the judgment and decree passed by the first appellate court and to pass an order of ejectment as sought for by the plaintiffs in the suit as prayed for. In fine, the Second Appeal is allowed. The judgment and decree of the first appellate court are set aside. The suit filed by the plaintiffs before the trial court is, thus, decreed as prayed for with costs. Time for vacating the premises for the respondents / defendant is four months. No costs in this appeal. Undertaking Affidavit shall be filed in three weeks from today.