

(2008) 04 MAD CK 0035
In the Madras High Court
Case No : S.A. No. 1491 of 2003

N. Moshin Ahmed

APPELLANT

Vs

Abdul Hussain Kulsumbi Public Charitable Trust

RESPONDENT

Date of Decision : 29-04-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 96
Transfer of Property Act, 1882 — Section 106

Citation : (2008) 04 MAD CK 0035

Hon'ble Judges : M. Jaichandren, J

Bench : Single Bench

Advocate : T.S. Bhaskaran, for the Appellant; K.S. Narayanan, for the Respondent

Final Decision : Dismissed

Judgement

M. Jaichandren, J.—This second appeal has been filed against the judgment and decree, dated 27.9.2002, made in A.S. No. 121 of 1998,

on the file of the VII Additional City Civil Court, Chennai, confirming the judgment and decree, dated 6.1.1998, made in O.S. No. 4906 of 1994,

on the file of XIII Assistant City Civil Judge, Chennai.

2. The defendant in the suit is the appellant in the present second appeal. The plaintiff, who is the respondent herein had filed a suit in O.S. No.

4906 of 1994, on the file of XIII Assistant City Civil Judge, Chennai, praying that the trial Court may be pleased to pass the judgment and decree

directing the defendant to quit the shop in the ground floor bearing Corporation Door No. 35/1, Mannady Street, Madras, morefully described in

the plaint schedule and to deliver the vacant possession thereof to the plaintiff and for costs.

3. It has been stated that the plaintiff is a Muslim Public Charitable Trust constituted as per the deed of Public Trust, dated 27.11.1980, registered as document No. 1453 of 1980. The income tax of the Trust is spent for charitable purposes as stated in the Trust Deed. The property bearing Corporation Door No. 35/1, Mannady Street, Madras, belongs to the plaintiff Trust. The defendant's father, late Nazeer Ahamed, was a tenant in respect of the plaintiff schedule mentioned shop in the said building. He was carrying on the business of selling sweetmeats under the name of his proprietary concern "Majestic Halwa House".

4. It has been further stated that after the death of Nazeer Ahamed, on 22.10.1993, the defendant as his legal heir, became a tenant in the said shop to carry on the business. The plaintiff had recognised the defendant as the tenant and the defendant has been paying the rent for the shop to the plaintiff Trust. As the defendant was paying Rs. 513/- per month as rent, which was very low, the plaintiff had requested the defendant to pay a higher rent. Since the defendant was not prepared for the enhancement of rent, the plaintiff had issued a legal notice, dated 31.3.1994, terminating the tenancy of the defendant from 30.4.1994 and had directed the defendant to vacate the plaintiff schedule shop and to deliver vacant possession of the shop to the plaintiff, on 1.5.1994. Having received the said notice, on 5.4.1994, the defendant had sent a reply notice, dated 7.4.1994, admitting his tenancy under the plaintiff Trust. However, the defendant had refused to comply with the demand made in the notice of termination of tenancy, dated 31.3.1994.

5. It has also been stated that in the notice of termination, dated 31.3.1994, the door number of the suit property has been shown as 4/35 Mannady Street, Madras, while the correct door number is 35/1, Mannady Street, Madras. As the mistake had happened inadvertently, it was rectified as per the plaintiff's legal notice, dated 1.7.1994, issued to the defendant.

6. It has been further stated that by virtue of G.O.Ms. No. 2000-Home, dated 16.8.1976, the property of the plaintiff Trust bearing Door No. 35/1, Mannady Street, Madras, had been exempted from the provisions of The Tamil Nadu Buildings (Lease & Rent Control) Act, 1960. As such, the defendant is not entitled to any of the benefits or protection under the

said Act. Since the defendant had failed to comply with the demand of the plaintiff to vacate the plaint schedule shop and to deliver the vacant possession of the same, the plaintiff has been constrained to file the suit for recovery of vacant possession of the plaint schedule shop from the defendant.

7. In the written statement filed by the defendant, the claims made by the plaintiff have been denied. However, the defendant has admitted that he was in occupation of the shop in door No. 35/4 as tenant under the plaintiff.

8. It has also been stated that the plaintiff Trust must be a Religious Charitable Trust in accordance with law to entitle the plaintiff to seek

exemption from the purview and operation of The Tamil Nadu Buildings (Lease & Rent Control) Act, 1960. The Deed of Trust does not satisfy

the essential requirements of a Religious Charitable Trust to qualify to be exempted under G.O.Ms. No. 2000-Home, dated 16.8.1976. After the

demise of his father, the defendant, who was carrying on the business in the suit schedule mentioned shop, had agreed to pay a monthly rent of Rs.

498. Subsequently, the rent had been increased to Rs. 513 creating a fresh tenancy in favour of the defendant with respect to the suit schedule

shop. The defendant had issued a suitable reply to the notice, dated 31.3.1994, issued by the plaintiff determining the tenancy of the defendant.

The termination of the tenancy is neither valid nor proper, since the plaintiff had accepted the increased rent of Rs. 513/- from the defendant. The

principle of waiver would apply and there would be a fresh tenancy in existence. The termination of the tenancy is not in accordance with Section

106 of The Transfer of Property Act. Further, the termination has been with reference to a wrong door number and therefore, it is not effective.

Further, the suit is not maintainable as prayed for and therefore, the said suit is to be dismissed with costs.

9. Based on the pleadings of the plaintiff as well as the defendant, the trial Court had framed the following issues for consideration:

(i) Whether the plaintiff is entitled to the relief of recovery of vacant possession as prayed for?

(ii) What other reliefs the plaintiff is entitled to

10. The additional issue had also been framed for consideration:

(i) Whether the suit is unsustainable due to the failure of the plaintiff to issue the notice of termination of the tenancy under the relevant provisions of

law?

11. With regard to the first issue and the additional issue, the trial Court had found that there was no dispute with regard to the fact that the defendant has become a tenant under the plaintiff Trust on the death of his father, Nazeer Ahamed, on 22.10.1993, paying a rent of Rs. 498/- per month for the suit schedule shop. It was also not in dispute that the defendant had paid an increased rent of Rs. 513/- per month for the suit schedule shop, subsequently. From the Trust Deed, dated 27.11.1980, marked as Exhibit A.1, it was seen that the plaintiff Trust is a Religious Charitable Trust exempted from the application of the provisions of The Tamil Nadu Buildings (Lease & Rent Control) Act, 1960, in accordance with G.O.Ms. No. 2000-Home dated 16.8.1976.

12. The plaintiff had marked Exhibit A.2, dated 31.3.1994, which is the notice issued by the counsel on behalf of the plaintiff terminating the tenancy of the defendant. Exhibit A.3, dated 7.4.1994, is the reply sent on behalf of the defendant and Exhibit A.5, marked on behalf of the plaintiff is the legal notice, dated 1.7.1994, issued on behalf of the plaintiff. From the said documents, the trial Court had found that the plaintiff had issued a notice terminating the tenancy of the defendant. Even though the notice, dated 31.3.1994, marked as Exhibit A.2 had described the suit schedule shop under a wrong door Number, it was later rectified in the second notice issued by the plaintiff, on 1.7.1994, marked as Exhibit A.5.

13. It was found by the trial Court that the defendant, in his reply notice, dated 7.4.1994, marked as Exhibit A.3 had accepted the fact that he was a tenant under the plaintiff Trust after the death of his father Nazeer Ahamed and that he was paying a monthly rent of Rs. 498/- which was later increased to Rs. 513/- per month. Even though certain objections had been raised with regard to the nature of the plaintiff Trust, the trial Court had found from the clauses of the Trust Deed that it is a Religious Charitable Trust to help the indigent, the poor and the needy persons and therefore, it is exempted from the application of the provisions of the The Tamil Nadu Buildings (Lease & Rent Control) Act, 1960, in accordance with G.O.Ms. No. 2000-Home, dated 16.8.1976.

14. The trial Court had also come to the conclusion that according to the Trust Deed, the plaintiff Trust shall sue and be sued in the name of the

Managing Trustee. The trial Court had also found that the claim of the defendant, that there was a new tenancy created in respect of the suit

schedule shop, since the plaintiff had accepted the increased rent of Rs. 513/- per month paid by the defendant, to be unsustainable. Therefore, the

notice issued by the plaintiff to the defendant, u/s 106 of The Transfer of Property Act, is proper and that it would have the effect of terminating the tenancy of the defendant, as stated therein.

15. The trial Court had also noted that no oral evidence was adduced on behalf of the defendant and there was no document marked as evidence

in support of the contentions raised on behalf of the defendant. Thus, the trial Court had decreed the suit as prayed for.

16. Aggrieved by the judgment and decree of the trial Court, dated 6.1.1998, made in O.S. No. 4906 of 1994, the defendant had filed an appeal

in A.S. No. 121 of 1998, on the file of VII Additional City Civil Court, Chennai.

17. The first appellate Court had framed the following points for consideration:

1. Whether the appeal is to be allowed setting aside the judgment and decree, dated 6.1.1998, made in O.S. No. 4906 of 1994?

2. What reliefs the appellant/defendant is entitled to?

18. Considering the contentions raised by the plaintiff and the defendant and in view of the oral evidence adduced and the documents marked on

behalf of the plaintiff, the first appellate Court had come to the conclusion that the notice issued by the plaintiff, on 31.3.1994, terminating the

tendency of the tenant is in accordance with law. Even though the door number of the plaint schedule shop has been wrongly shown as 35/1, it was

subsequently rectified as door number 35/4 in the second notice issued by the defendant, on 1.7.1994. Since no reply had been sent by the

defendant to the plaintiff's notice, dated 1.7.1994, there is no irregularity in the notice of termination issued by the plaintiff terminating the tenancy

of the defendant.

19. The first appellate Court had also come to the conclusion that the plaintiff Trust is a religious Charitable Trust exempted from the provisions of

The Tamil Nadu Buildings (Lease & Rent Control) Act, 1960, and that the suit is not bad in law for not including the trustees as parties to the suit.

From the Trust Deed it was found that the Trust can sue and be sued by the Managing Trustee and it is the Managing Trustee, who has filed the

present suit against the defendant for recovery of vacant possession of the suit mentioned shop.

20. Thus, the first appellate Court had confirmed the findings of the trial Court by dismissing the appeal filed by the defendant, by its judgment and

decree, dated 27.9.2002, made in A.S. No. 121 of 1998.

21. Aggrieved by the judgment and decree of the first appellate Court, the defendant had filed the present second appeal raising various grounds

as stated in the memorandum of appeal.

22. The second appeal has been admitted on the following substantial questions of law:

1. Whether the VII Add. City Civil Judge was in grave error in failing to consider the issue of creation of new tenancy by payment and acceptance

of enhanced rent invalidating the notice under Ex.A.2 and consequently rendering the suit as not maintainable? 2. Whether the VII Addl.City Civil

Judge was in error in failing to consider all issues of fact and law as a final court of fact u/s 96 of CPC?

23. The learned Counsel appearing for the appellant/defendant had submitted that the suit filed by the plaintiff in O.S. No. 4906 of 1994, is not

maintainable in law as the plaintiff Trust is not a Trust qualified to be exempted from the application of the provisions of The Tamil Nadu Buildings

(Lease & Rent Control) Act, 1960, in accordance with G.O. Ms. No. 2000-Home, dated 16.8.1976. The notice issued by the plaintiff, u/s 106 of

The transfer of property Act, cannot be held to be proper after the subsequent event of the defendant paying the enhanced rent of Rs. 530/- per

month to the plaintiff since a new tenancy starts thereafter. There is no proof shown by the plaintiff to support the claim that the suit property

belongs to the plaintiff Trust. The Trust had come into existence only in the year, 1980. The Trust came into existence much after the defendant late

Nazeer Ahamed had become a tenant in respect of the suit schedule shop. The trial Court had not considered all the relevant issues raised by the

defendant and it had come to the wrong conclusions while decreeing the suit filed by the plaintiff.

24. The learned Counsel appearing for the appellant/defendant had further submitted that the first appellate Court had not considered the additional

points raised by the defendant, including the issue regarding the creation of a

fresh tenancy subsequent to the payment of enhanced rent by the defendant in respect of the suit property. Even though the first appellate Court had decided on the issue relating to all trustees being made parties to the suit and the aspect regarding the question whether the plaintiff Trust is a public Charitable Trust or not, the other grounds have not been dealt with by the first appellate Court. Therefore, it would be proper for this Court to remit the matter back to the first appellate Court to give a finding on all the issues raised.

25. It has also been contended that the plaintiff has not shown sufficient evidence in support of the claim that the suit property belongs to the Trust.

Exhibit A.1 Trust Deed does not mention the suit property as a Trust property. After the payment of increased rent, the earlier notice issued by the plaintiff Trust, marked as Exhibit A.2, cannot continue to be valid. In such circumstances, the suit is not maintainable in law. Further, there is no cause of action for the suit filed by the plaintiff Trust. Hence, the suit filed by the plaintiff Trust is not maintainable.

26. The learned Counsel appearing for the appellant had relied on the following decisions in support of his contentions:

26.1. In *Madhukar and Ors. v. Sangram and Ors.* 2001 3 L.W. 294, the Supreme Court had held that the Court sitting as a Court of first appeal

has a duty to deal with all issues and the evidence let by the parties before recording its findings. The first appeal is a valuable right and the parties

have the right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself in all the issues of law and

fact and decide them by giving reasons in support of its findings.

26.2. In *Santosh Hazari v. Purushottam Tiwai* 2001 3 L.W. 308, the Supreme Court had held that Section 100 of the Code, as amended in 1976,

restricts the jurisdiction of the High Court to hear a Second Appeal only on "substantial question of law involved in the case". An obligation is cast

on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant

proposes to urge before the High Court. The High Court must be satisfied that a substantial question of law is involved in the case and such

question has then to be formulated by the High Court. Such question or questions may be the one proposed by the appellant or may be any other

question which though not proposed by the appellant yet in the opinion of the High Court arises as involved in the case and is substantial in nature.

At the hearing of the appeal, the scope of hearing is circumscribed by the question so formulated by the High Court.

27. The learned Counsel appearing for the appellant/defendant had emphasised on the first and second substantial questions of law raised in the present second appeal to be important for deciding the basic issues before this Court. It was also contended that a sum of Rs. 35,000/- had been paid by the father of the plaintiff, as rental advance, to an individual and not to a Trust.

28. The learned Counsel appearing for the respondent/plaintiff had submitted that both the Courts below have arrived at the right conclusions in decreeing the suit in favour of the plaintiff.

29. It was also pointed out by the learned Counsel appearing for the respondent/plaintiff that there was no oral or documentary evidence on behalf of the defendant/appellant. There is no new tenancy as claimed by the defendant on payment of the increased rent of Rs. 513/- in respect of the suit schedule shop, as alleged by the defendant. Even though there was some discrepancy in the door number of the suit schedule shop in the notice issued by the plaintiff to the defendant, it was rectified by a subsequent notice. The suit schedule property is a Trust property belongs to the plaintiff Trust, which is a Religious Charitable Trust. Further, the tenancy of the defendant had ended, on 30.4.1994.

30. It was also contended by the learned Counsel appearing for the respondent/plaintiff that both the Courts below have rightly decided that the plaintiff Trust is exempted from the application of the provisions of The Tamil Nadu Buildings (Lease & Rent Control) Act, 1960, in accordance with G.O.Ms. No. 2000-Home, dated 16.8.1976. There is no specific denial in the written statement, as required under the relevant provisions of the Civil Procedure Code, with regard to the Charitable and religious nature of the plaintiff Trust, as there is no waiver on the part of the plaintiff by the acceptance of the enhanced rent from the defendant. Since there was no ground raised by the defendant regarding the payment of the enhanced rent by the defendant at the time of the first appeal, the first appellate Court had not dealt with the same, specifically. There is no fresh

lease due to the acceptance of rent by the plaintiff as held by this Court in G.M. Ali Vs. Mrs. M. Rosary Ammal, . In the said decision it was held

that it is by now well established that it cannot be said with certainty that a fresh lease emerges by reason only of the fact of acceptance of an

increased rent by the landlord when the tenant began to hold over. The question is one of inference from the facts and circumstances of the

particular case whether the parties intended by the new term as to rent to put an end to the old tenancy and create a new tenancy.

31. The learned Counsel appearing for the respondent had also relied on the decision in Prabhakaran and Shanta Vs. Parish Priest, St. Michael's

Church, . In the said decision of this Court it was held that the acceptance of rent after the issuing of termination notice would not amount to

waiver.

32. Based on the contentions raised by the learned Counsels appearing for the parties concerned and on a perusal of the records available and in

view of the decisions cited, this Court is of the considered view that the defendant/appellant has not shown sufficient cause or reason to interfere

with the concurrent findings of the Courts below. The trial Court as well as the first appellate Court had found that the plaintiff Trust is a Charitable

Religious Trust, in accordance with the Trust deed, dated 27.11.1989, marked as Exhibit A.1. It was also found by the Courts below that the

plaintiff Trust is exempted from the provisions of The Tamil Nadu Buildings (Lease & Rent Control) Act, 1960, in accordance with G.O. Ms. No.

2000-Home, dated 16.8.1976. The defendant, having accepted the tenancy under the plaintiff Trust, cannot be permitted to turn back to plead

that the plaintiff Trust is not a Religious Charitable Trust qualified to be exempted from the application of the provisions of The Tamil Nadu

Buildings (Lease & Rent Control) Act, 1960, in accordance with G.O. Ms. No. 2000-Home, dated 16.8.1976, and that the suit schedule shop

does not belong to the plaintiff Trust. The Courts below had also found that there was no tenancy on payment of the increased rent by the

defendant and that there was no waiver by the plaintiff on the acceptance of the rent from the defendant. It was also found that there was no oral

or documentary evidence on behalf of the defendant in support of his contentions.

33. A notice, dated 31.3.1994, marked as Exhibit A.2, had been issued to the

defendant by the plaintiff and in the reply notice, dated 7.4.1994,
issued by the defendant, marked as Exhibit A.3, there is an acceptance of the
tenancy by the defendant under the plaintiff Trust. While so, it is not
open to the defendant to contend that he is not a tenant under the plaintiff Trust.
In such circumstances, both the Courts below have rightly held
that the plaintiff is entitled to the reliefs prayed for in the suit. Thus, the
substantial questions of law arising in the present second appeal are
answered in favour of the respondent. Accordingly, the second appeal stands
dismissed, confirming the judgment and decree of the Courts below.
Consequently, connected C.M.P. No. 2841 of 2004 and C.M.P. No. 2597 of 2007
are dismissed. No costs.