

(2015) 04 KAR CK 0286
In the Karnataka High Court
Case No : Regular First Appeal No. 1792 of 2010

Shashirekha

APPELLANT

Vs

D. Vijay Kumar and Others

RESPONDENT

Date of Decision : 28-04-2015

Acts Referred:

Citation : (2015) 04 KAR CK 0286

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : P.S. Manjunath and T.P. Vivekananda, for the Appellant; D.R. Sundaresh, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Anand Byrareddy, J.

1. Heard the learned Counsel for the appellant and the Counsel for the respondents.
2. The appellant was the defendant before the trial court in a suit for recovery of security deposit.
3. The facts of the case are as follows :--

"The respondents were the plaintiffs and they were said to be partners of a firm, namely, M/s. Raghuveer Sports. The respondents had been inducted into the suit schedule premises under a registered sale deed dated 28.2.2000. In terms of the lease, the lease was for a term of nine years commencing from 28.2.2000, on a monthly rent of Rs. 6,000/-. There was also an agreement for periodical enhancement whereby the respondents were liable to pay the rents at Rs. 6,000/- for three years and at Rs. 6,900/- for the next three years and Rs. 7,933/- for the rest of the period. There was also a clause, whereby the respondents had deposited the security deposit of Rs. 9.00 lakh, which was refundable deposit, subject to the circumstance that there were no arrears

outstanding. It transpires that the plaintiffs had defaulted in making payment of rents from July 2003 onwards. On 23.9.2006, the plaintiffs had got issued a legal notice claiming that they are in peaceful possession and were being disturbed and that they were facing threats of enjoyment of the leased premises, since the appellant's son had assaulted the respondents as well as their servants and therefore they were no longer willing to continue with the lease and had sought to terminate the lease and demanded the refund of the security deposit of Rs. 9.00 lakh. The appellant is said to have replied negating the termination of tenancy and refused to accept the termination. It transpires that the respondents continued in occupation. The respondents had again got issued a legal notice terminating the tenancy with effect from 31.1.2004 and again demanded repayment of the security deposit. It was further stated that if there was failure to repay the deposit the appellant was required to pay interest on the said amount at 24% per annum till the date of payment. It was also the contention that the appellant was bound to repay the same by way of bankers cheque and the same should be done on or before 25.1.2004 and that no amount should be deducted towards the rent or alleged arrears of rent. It is the case of the appellant that the appellant did not receive the said notice and became aware of such notice only when allegations were made in the plaint and copies of the same were produced as exhibits in the course of the trial. It is in this background that ultimately, the appellant herein had also got issued a notice on 18.6.2006 demanding arrears of rent of Rs. 2,60,475/- from July 2003 to July 2006 and also arrears of electricity charges of Rs. 16,038/- and further stated that out of the security deposit of Rs. 9.00 lakh outstanding with the appellant, the appellant was only bound to pay Rs. 6,23,487/-, after deducting the aforesaid arrears of rent and electricity charges and such refund would be made only upon delivery of possession of the suit schedule premises within 30 days from the date of receipt of notice. The respondents are said to have failed to comply with the said demand, but proceeded to file a civil suit in OS 1133/2006 before the IV Additional Senior Civil Judge, Mysore, claiming that the suit property was vacated and delivery of possession of the property was offered to the appellant and therefore, the appellant was bound to refund the amount of Rs. 9.00 lakh with interest amounting to Rs. 5,71,200/- from 1.2.2004 to 10.9.2006 and for future interest from the date of the suit till the date of payment. The suit so filed was resisted by the present appellant and it was denied that there was valid termination of the lease and redelivery of possession to the appellant and the question of refund of the deposit did not arise as the respondents continued in occupation of the premises."

The court below had framed the following issues on the said pleadings:--

- "1. Whether plaintiff proves that he has terminated the tenancy by issuing notices on 23.9.2003 and 1.1.2004 and kept the premises vacant?
2. Whether plaintiff proves that he is not liable to pay rent from 23.9.2003, as the premises kept vacant?

3. Whether defendant proves that the plaintiff is under due of Rs. 2,60,475/- as arrears of rent?
4. Whether plaintiff is entitled to recover Rs. 9,00,000/- which was given to defendant as deposit?
5. Whether plaintiff proves that the defendant is liable to pay interest at the rate of Rs. 24% p.a. from 1.2.2004?
6. Whether plaintiff proves that the defendant is liable to pay Rs. 5,71,200/- as interest from 1.2.2004 to 10.9.2006?
7. Whether plaintiff is entitled to recover Rs. 14,71,200/- with future interest as sought for?
8. What order or decree?"

The court below has answered issues 1 and 2 in the negative and issue No. 3 in the affirmative and issues 4 to 7 partly in the affirmative and held that the present appellant was obliged to repay the sum of Rs. 6,23,487/- within two months from the date of receipt of a copy of the order and that if he fails to pay the above amount, the plaintiff was at liberty to recover the same by following due process of law. It is that which is under challenge in the present appeal.

4. Incidentally, the learned Counsel for the appellant would submit that the appellant in turn had filed a suit in OS 447/2012 after termination of the lease deed by recourse to a notice dated 18.1.2012 and claimed arrears of rent for the period upto the date of termination of rent and also for mesne profits for the use and occupation of the property from the date of termination of the lease till the date of delivery of possession. The suit was resisted on the footing that the defendant had also vacated the premises and the question of terminating the lease did not arise as it was also terminated by the defendant himself and in respect of which, the aforesaid earlier suit was filed in OS 1133/2006, which had culminated in a judgment and decree and therefore, the question of again terminating the tenancy did not arise or the payment of arrears of rent or damages for use and occupation did not arise in view of the defendant having vacated the premises well prior to the earlier suit filed, seeking recovery of the advance amount of security deposit. It is on these pleadings that the court below had framed the following issues:--

"1. Whether the plaintiff proves that the tenancy of the defendants was legally terminated?

2. Whether the plaintiff is entitled for the reliefs as sought for?"

The court below has answered points 1 and 2 in the affirmative and the suit was decreed holding that the defendant shall hand over vacant possession of the suit schedule property and there shall be a separate enquiry to quantify the mesne profits subject to the findings given in OS 1133/2006, which is pending in appeal before this court in the present appeal.

In this background, the only controversy is as to whether the respondents herein were liable to pay arrears of rent from the date of the alleged termination of the lease by the respondents by virtue of the notice of termination dated 23.9.2003 issued by the respondents and whether the appellant would be entitled for any mesne profits subsequent to the termination of lease as per notice dated 18.1.2012.

The appellant in turn had instituted a suit on expiry of the term of lease, namely, the lease period which was for 9 years commencing from 28.2.2000, had expired in the year 2009 and since the respondents had continued in occupation of the premises even thereafter, the notice of termination was issued on 18.1.2012.

5. The learned Counsel for the appellant would therefore point out that in the suit in OS 1133/2006, the present appellant had asserted that out of Rs. 9.00 lakh, deposited with the appellant the appellant was bound to refund only Rs. 6,23,487/- after taking into account the arrears of rent as on the date of the suit, apart from the rents that the respondents would be obliged to pay till the termination of the lease by the appellant as on 18.1.2012. However, the court below while disposing of the suit of the respondent and in partly decreeing the same, has only taken into account the arrears of rent as on the date of the suit of the respondents and has not taken into account the arrears of rents which the respondents were liable to pay up to the date of actual termination of the lease by the appellant namely, 18.1.2012 and even thereafter, when the respondents continued to be in occupation, and for which they were liable to pay damages for use and occupation. In this regard the learned counsel would point out that the only question is as to whether there was valid termination of the lease by the respondents and whether they had vacated the premises thereby negating the obligation to pay rents or arrears of rents. In this regard, he would point out that there is categorical finding by the trial court in the suit filed by the respondents in OS 1133/2006 to the following effect:

"Moreover, on the basis of the oral evidence of the parties as well as documents, I come to the conclusion that, there are no authenticated document by the side of the plaintiff to believe that, he has vacated the suit schedule premises in the month of September 2003. This aspect has to prove by the plaintiff by oral as well as documentary evidence, then it would have been different one. Moreover, the admission given by PW-1 during the course of evidence itself is sufficient to hold that as on today he has not handed over the vacant possession of the suit schedule property to the defendant. As such, the plaintiff has no voice to say, he is not liable to pay the rent to the defendant. On all these grounds, I come to the conclusion that, the plaintiff is unable to prove this issue by oral as well as documentary evidence. Hence, answer this issue in the negative."

The trial court having thus found that the appellant had not vacated the premises as claimed by him in the month of September 2003 was obliged to pay the rents for the period till such date of termination of tenancy and for payment of damages for use and occupation thereafter till possession was taken by the

appellant by recourse to execution proceedings subsequent to the decree passed in OS 447/2012. Since that judgment has left it open for the mesne profits to be determined, subject to the result of the present appeal, the appeal may be disposed of while clarifying that the trial court has taken into account only the arrears of rents as on the date of the suit in OS 1133/2006 filed by the respondents and has not taken into account any other charges and rents that were due to the appellant subsequent thereto. Therefore, the matter would be open for enquiry and determination for mesne profits, which is left open as on date.

In any event, according to the appellants, they are entitled for arrears of rent till determination of the lease as on 18.1.2012 and for damages for use and occupation thereafter and seeks that the appeal be allowed with an observation that it is for the appellant to work out mesne profits in the appropriate inquiry which is kept in abeyance by the judgment in OS 447/2012.

6. While the learned Counsel for the respondents would vehemently seek to canvass that there was a constant offer of delivery of possession of the premises which the appellant has stoically resisted and therefore, the default was clearly on the part of the appellant in not taking possession of the suit schedule property and hence the respondents being mulcted with the liability to pay rents, notwithstanding such a default and a willful default on the part of the appellant, can hardly be sustained. And would further submit that insofar as the judgment and decree in OS 447/2012 is concerned, it is the subject matter of challenge in an appeal in a Regular Appeal before the lower appellate court and is subject to the result of the same and hence it cannot be said that the matters have attained finality. And would further submit that it is the appellant's own case that of the amount of Rs. 9.00 lakh the refund that was to be made to the respondents was in a sum of Rs. 6,23,487/- and hence the appellant is estopped from claiming any further amounts as being deductible out of the security deposit of Rs. 9.00 lakh.

7. In the above circumstances, as the respondents have not challenged the partial decree in favour of the respondents, it is clear that the appellant had not restricted his claim to Rs. 6,23,487/- and it was the amount calculated on the basis that as on the date of the suit, the respondents were due in certain sum of money towards arrears of rent and towards the electricity charges and that has been excluded by the trial court. This did not preclude the appellant from claiming further arrears of rent till the premises was actually vacated and damages for the use and occupation on termination of the lease deed. This is yet to be determined in an inquiry. Hence, it is made clear that the appellant is entitled to further arrears of rent which would be deducted out of the amount in deposit, of which 50% has already been deposited before the court. It is without prejudice to the claim of the appellant for further arrears of rent and damages for use and occupation apart from other charges and subject to the same the sum of Rs. 1.00 lakh is permitted to be withdrawn by the respondents and the

remaining amount shall be refunded to the appellant subject to the final result of the inquiry for mesne profits now to be continued pursuant to the judgment in OS 447/2012.

The appeal stands disposed of in terms as above.