R. Krishnakumar Vs Sri Salai Vinayagar Temple

Court: Madras High Court

Date of Decision: Dec. 20, 2006

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 41 Rule 27
Transfer of Property Act, 1882 â€" Section 106

Hon'ble Judges: M. Chockalingam, J

Bench: Single Bench

Advocate: A. Anbarasu, for the Appellant; G. Jayachandran, for the Respondent

Final Decision: Dismissed

Judgement

M. Chockalingam, J.
This judgment shall govern these two appeals in S.A.Nos.1863 and 1864 of 2003.

2. The plaintiff temple filed a suit in O.S. No. 862 of 1991 for recovery of possession of the plaint schedule property from the tenant who is the

appellant herein. The suit was dismissed. The first appeal filed by the plaintiff in A.S. No. 10 of 2003 was allowed and hence the defendant has

brought forth this second appeal.

3. The other suit in O.S. No. 864 of 1991 was filed by the same plaintiff seeking recovery of possession of a small piece of vacant site that it was

an encroachment made by the defendant/appellant. The said suit was decreed. Aggrieved over the same, the defendant took it on appeal and the

same was dismissed. Hence, the second appeal at the instance of the defendant.

4. The plaintiff-temple filed a suit on the following allegations. The suit building belongs to the plaintiff temple and the same was let out to the

defendant for carrying on business on a monthly rent of Rs. 125/- and the tenancy is oral and is for month to month commencing on the 1st of

every calendar month and ending on the last day of every month; that on 10.8.1991, the defendant highhandedly made an opening on the eastern

wall of the suit building and illegally occupied the vacant site belonging to the plaintiff-temple and encroached it by raising a wall of 7 feet high on

the northern side. Under the circumstances, the plaintiff-temple terminated the tenancy in respect of the suit mentioned building by a notice to quit

dated 6.9.1991 stating that the defendant is liable to surrender possession of the suit building. Since the defendant failed to do so, the plaintiff filed

a suit in O.S. No. 862 of 1991 for recovery of possession.

5. In so far as O.S. No. 864 of 1991 is concerned, it was filed by the plaintiff-temple alleging that the defendant is a tenant under the plaintiff as

referred to above and that he encroached upon a small portion which was the subject matter of the suit and hence sought for recovery of

possession of the suit mentioned site and injunction against the defendant.

6. Both the suits were contested by the defendant inter alia stating that the suits are not maintainable, since the tenancy was not according to

English calendar month; that it is false to state that the defendant made an opening on the eastern wall on 10.8.1991 and he encroached the vacant

site by raising a wall of 7 feet high on the northern side. On the contrary, the defendant has been in possession right from the tenancy and in

occupation of the entire property, which is the subject matter of both the suits. Apart from this, the defendant has been in possession of the entire

property and hence both the suits were to be dismissed.

7. The trial Court after framing necessary issues, dismissed the suit in O.S. No. 862 of 1991, but decreed the suit in O.S. No. 864 of 1991.

Aggrieved parties, viz. the plaintiff in the first suit and the defendant in the second suit filed appeals in A.S.Nos.10 of 2003 and A.S. No. 50 of

2003 respectively. Both the appeals were taken up by the learned Principal District Judge, Vellore and by a common judgment, O.S. No. 862 of

1991 was reversed and A.S.NO.10 of 2003 was allowed and O.S. No. 864 of 1991 was affirmed by dismissing the appeal in A.S. No. 50 of

2003. Hence, two second appeals have been arisen before this Court.

8. Advancing his arguments on behalf of the appellant/defendant in both the suits, learned Counsel for the appellant would submit that the trial

Court was perfectly correct in refusing to grant the relief in a suit for recovery of possession in respect of the building which was let out to the

defendant/appellant; that even PW1 who was examined by the plaintiff has candidly admitted that there was a written agreement between the

parties. But the written agreement was not produced before the Court. Notice u/s 106 of the Transfer of Property Act was issued and the said

notice is also not valid so long as the plaintiff is able to prove that the the tenancy is commencing on the 1st of every calendar month and ending on

the last day of every month. All along the agitation by the appellant before filing of the suit and after filing of the suit, since the rent was received by

the respondent-temple, the notice originally issued u/s 106 of the Transfer of Property Act determining tenancy was not valid and hence fresh

notice determining tenancy should have been issued before filing the suit. The trial Court has rightly accepted the said contention and dismissed the

suit.

9. Pending appeal before the first appellate Court, an application has been filed by the respondent temple for reception of certain documents and

the said application was also taken along with the appeal and the application for reception of additional evidence was allowed and the documents

were also received. No sufficient reason has been given. Added further, learned Counsel would submit that the first appellate Court should not

have allowed the application for reception of additional documents, because Order 41 Rule 27 CPC stipulates that in order to adduce additional

evidence, what was produced before the first appellate Court should not have been in the custody of the party. The additional evidence which was

sought to be produced before the first appellate court, is nothing but the counter-foils of the rent Book issued for the rent to the appellant and thus

it was well in the custody of the temple. No reason was adduced why it was not produced before the trial Court. Under such circumstances, the

first appellate Court should have dismissed the application. The first appellate Court not only allowed the Interlocutory application, but also did not

afford opportunity to the appellant to put forth his contentions on the documents which were produced as additional evidence and in so far as those

documents are concerned, sufficient oral evidence should also have been adduced by the respondent. Under the circumstances, the first appellate

Court''s Judgment has got to be set aside and the Judgment of the trial Court has to be restored.

10. In so far as the other suit is concerned, the plaintiff has never proved that there was any encroachment as alleged upon in the suit building and

hence the appeal filed by the tenant before this Court has got to be allowed.

11. The Court heard the learned Counsel for the respondent on the above contentions.

12. Learned Counsel for the respondent in short would submit that in the instant case, the tenancy agreement between the parties is an admitted

fact and both the Courts have given concurrent findings that during the pendency of the suit, the appellant/tenant has made an encroachment and

the appellate Court has affirmed the judgment for removal of the construction and when there was a specific pleading in the plaint that the tenancy

was oral and it was commencing on the 1st of every calendar month and ending on the last day of every month, there is no denial on the part of the

defendant neither in respect of the pleading nor the defendant has come forward to file a suit stating that there was a written agreement. Apart from

this, even a reply notice was also given under Ex.B.1 and the first appellate Court has clearly found that the tenancy was oral and is from month to

month commencing on the first day of every English calendar month and ending on the last day of the month.

13. In so far as the next contention of waiver of notice was concerned, this contention was raised before the trial Court and the same was

accepted by the trial Court also and the suit was dismissed on that ground. Aggrieved plaintiff took it on appeal and during the pendency of appeal,

an interlocutory application was filed for reception of additional evidence. Since the defendant tendered rent which was received by the temple,

during the pendency of the suit, without prejudice to the result of the suits, it cannot be stated as a waiver of notice and hence the first appellate

court was correct in accepting the said contention. Under such circumstances, the judgment of the first appellate court is correct in allowing the

appeal and hence the judgment of the first appellate court has to be sustained.

14. The Court paid its anxious consideration on the submissions made and also scrutinized the materials available on record.

15. It is not the fact in controversy that the appellant was a tenant in respect of the property which was attached to the plaint in the first suit on a

monthly rent of Rs. 125/- and that a notice determining the tenancy was sent to the appellant who also sent a reply to the said notice. In that notice,

it was specifically stated that the tenancy was oral and it also started from month to month as per English Calendar month. When a reply was given

by the tenant, he never denied that either tenancy was oral or there was a written agreement. The pleadings in the plaint were also to the effect that

tenancy was oral and this was also taken note of by the tenant in his written statement. Thus, it would be quite clear that the tenancy was oral.

What was contended by the appellant before the Courts below and equally here also is there was a waiver notice u/s 106 of the Transfer of

Property Act on the reason that during the pendency of the suit, rental payments were made by the appellant/tenant and they were also received by

the temple without prejudice to the result of the suits and thus, the waiver notice u/s 106 of the Transfer of Property Act is only valid and the said

contention was accepted by the trial Court also. Pending appeal, at the instance of the temple, an interlocutory application was filed for reception

of the additional evidence under Order 41 Rule 27 CPC, since those documents were not filed before the trial Court. The interlocutory application

was allowed by the appellate Court and the receipts were taken as additional evidence. It is also stated that the rentals received by the temple are

without prejudice to the result of the two suits. Now, at this juncture, the contentions raised by the appellant have got to be considered. Learned

Counsel for the appellant would submit that first of all, to receive additional evidence under Order 41 Rule 27 of CPC it is mandatory that those

documents should not have been in the custody of the party during the pendency of the suit or even when the matter is dealing by the Court, it

could not be produced. But, in the present case, though the document in question was in the custody of the temple, the same was not produced

before the trial Court. At this juncture, the Court has to point out that in an affidavit filed in support of the said application for reception of

documents before the appellate court, wherein it has been clearly mentioned that without prejudice to the pendency of the cases, the rents have

been paid by the defendant and which were also accepted by the plaintiff. Hence, this Court is of the considered opinion that in cases like this

instead of adopting hyper-technical approach by setting aside and remitting back the matter to the trial Court which would be a second round of

litigation which in the opinion of the Court should not be done. It is true that the documents were filed before the first appellate Court and those

documents have been received which in the opinion of the Court cannot be adjudicated upon and time was also given to verify the receipts issued

pending the suits. The contention raised by the learned Counsel for the appellant that notice u/s 106 of the Transfer of Property Act has been

waived, in view of the receipt of the rents before filing of the suit and during the pendency of the suit, has got to be legally discountenanced. Under

these circumstances, the first appellate Court considered the same and granted decree. In so far as the other suit is concerned, it is a matter of

encroachment and both the Courts have concurrently gave a finding and hence this Court is unable to interfere with the concurrent findings. Under

such circumstances, both the appeals do not merit acceptance and accordingly, they are dismissed. No costs. Consequently, VCMP.NOS.2388

and CMP. No. 1335 OF 2004 are also dismissed.

16. Learned Counsel for the appellant at this juncture would submit that the appellant is running a photo-studio in the main place and he could not

get another accommodation immediately and apart from this, pending proceedings before the Court, a request was also made by the appellant to

the Hindu Religious and Charitable Endowments for renewal of the the agreement. It is also pending consideration with the department according

to the counsel for the appellant.

17. Learned Counsel for the respondent would submit that he has no objection about the request made by the appellant or with regard to the

matter pending in the hands of the Hindu Religious and Charitable Endowment. Hence, the Court is of the considered opinion that there cannot be

any impediment for the Hindu Religious and Charitable Endowments Board to consider such request. In view of the above, both the appeals are

dismissed. Parties shall bear their own costs. Taking into consideration the running of the photo studio by the appellant/defendant in the main place

and seeking accommodation, one year time is granted, on condition that the tenant has to make payment of Rs. 125/- per month for the occupation

during the said period. The judgment made above will not stand in the way of Hindu Religious and Charitable Endowments to consider the request

of the appellant and to take its decision.