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Court : Chennai

Decided On : Sep-13-1995

Reported in : (1996)1MLJ623

Appellant : Kempraj

Respondent : Krishnappa and ors.

Judgement :

Raju, J.

1. The plaintiff, who was successful in the trial court is the appellant in the above second appeal.

2. The case of the plaintiff was that the suit property bearing Door No. 364/A within the Ooty Municipal Limits belongs to him and that it has been leased out to the first defendant. Defendants 2 and 3 are said to be the brothers of the first defendant. It is also stated has collapsed during the then unprecedented rains and floods at Ooty as a consequence of which only one room was remaining. Thereupon, the defendants were said to have attempted to put up a construction in the portion where the building had completely fallen down. It is stated that the defendants have no right to do so and consequently, it became necessary for the plaintiff to approach the trial court. In such circumstances, the suit O.S. No. 365 of 1978 was filed by the plaintiff in Sub Court, Nilgiris at Ootacamund, praying for permanent injunction restraining the defendants from putting up any construction in the suit

property or altering the nature of the suit property.

3. The defendants in their written statement while admitting the relationship of landlord and tenant with the plaintiff contended that it was a fact that due to the unprecedented rains and floods, major portion of the building was washed away and that the said fact did not have the effect of bringing about the termination of the tenancy and inasmuch as the defendants have not also elected to terminate the tenancy, it still subsisted and consequently, the defendants had a right to put up construction in order to restore the status quo-ante so that they can enjoy the rights of tenancy as per the original agreement of tenancy. On the said plea, the defendants contended that the suit was liable to be dismissed and the plaintiff was not entitled to any relief as prayed for. Documents were filed on either side and though there was no oral evidence let in for the plaintiff, the first defendant got examined himself as D.W. 1.

4. After considering the oral and documentary evidence on record, the trial court held that having regard to the provisions contained in Clause (p) of Section 108 of the Transfer of Property Act (hereinafter referred to as 'the Act'), 1882, even as a tenant, the first defendant is not entitled to put up any permanent structure even by way of re-construction, though he would be entitled to continue as a tenant. The trial court came to such a conclusion placing reliance upon the decision of the Kerala High Court reported in Kurian and Anr. v. Job and Ors. : AIR1975 Ker175 , in preference to the decision reported in Abdul Rasheed v. Bashir Hussain : AIR1972 All545 . The trial court decreed the suit as prayed for. Aggrieved the respondents filed an appeal before the learned District Judge, Coimbatore in A.S. No. 72 of 1981.

5. The lower appellate court went into the question particularly with reference to the nature of the construction put up in the present case and came to the conclusion that the trial Court may not be right in granting a permanent injunction and on the other hand, the suit for permanent injunction has to be decreed only restraining the defendants from putting up only permanent structures and not any structure. On that view, the lower appellate court considered that a modification of the decree passed by the trial court was necessary and consequently modified the

decree of the trial court as hereunder:

1. That the defendants, their men, agents, servants or any body claiming through them or in trust for them be and are hereby restrained by means of a permanent injunction from putting up any permanent structure on the vacant site adjoining the small room now in existence and in the possession of the first defendant or from altering the present nature of the property.

2. The appeal is allowed in the above terms. The parties are also directed to bear their own costs in the appeal also in the circumstances of the case.

Aggrieved against the judgment of the lower appellate court, the plaintiff has come upto this Court.

6. At the time of admitting the second appeal, this Court feel necessary to consider the question as to whether permitting the respondents to put up a temporary structure goes beyond the scope of the suit and the pleadings? The learned Counsel appearing for the plaintiff relied upon three decisions of the various High Courts in support of the claim for the relief sought for in the suit and in justification of the decree of the trial court. The decision in Kurian's case : AIR1975 Ker175 , is that of a learned single Judge of the said High Court, wherein it was held that Section 108(p) of the Transfer of Property Act prohibits the erection of permanent structures by the lessee on the leased property with the consent of the lessor and the question as to whether a structure is a permanent one or not has to be decided on the facts of each case considering its nature and extent and the intention with which it is erected. It was also observed therein that where the lessee erects a permanent structure in violation of the provisions of Clause (p) of Section 108 of the Transfer of Property Act, the lessor is entitled to get a mandatory injunction, restraining the lessee from building such a structure and the lessee cannot be allowed to plead that he will remove the structure at the end of the lease period. That was a case wherein the tenant of a non residential building attempted to put up additional constructions in the vacant space.

7. In Atul Chandra Lahiry v. Sonatan Daw : AIR1962 Cal78 , a Division Bench of the Calcutta High Court had an occasion to deal with the purport of the words

'permanent structure' in Clause (p) of Section 108 of the Transfer of Property Act. It was held therein that the word 'permanent' used in Clause (p) of Section 108 appears to have been used in contra-distinction to what is temporary, that if a structure is intended to be there only temporarily, the statutory embargo did not apply and if on the other hand, the intention was to enjoy the structure permanently and the structure was also of a substantial structure. It was also observed therein that the test of removability of demolition is not an invariable test because even permanent structures are removed and that it would be a mixed question of fact and law in each case, whether the extent or degree of construction or erection was such as to make it partake of the character of the permanent structure or not.

8. In *Leena Roy Choudhary and Ors. v. Most Indumati Bose and Ors.* : AIR1980 Pat120, while dealing with the scope of Clause (p) of Section 108 of the Transfer of Property Act, it was held by a learned single Judge of the Patna High Court that in deciding whether a construction was permanent or temporary, two factors are of primary importance viz., the nature of the structure and the intention with which it is made and if the nature of the structure was such that the structure will endure for a long time, viz., so long as the tenant expects to remain there as a lessee and the intention of the lessee in constructing the structure was that he shall use the same as long as he remains a lessee, the construction will have to be regarded as a permanent structure within the meaning of Section 108(p) of the Transfer of Property Act, even though such construction may be capable of removal without causing permanent damage to the lease premises. That was a case wherein the tenant constructed a kitchen with brick walls and tiled roofs though the walls were not plastered and the intention of the tenant was found to be to use the kitchen as long as he remained there as a lessee.

9. Per contra, the learned Counsel for the respondents relied upon the decision of a learned single Judge of the Allahabad High Court, reported in Abdul Rasheed's case : AIR1972 All545. As noticed earlier, this decision was relied upon even before the trial court. The learned Judge while construing the scope of Section 108(p) of the Transfer of Property Act held that the reconstruction complained of in that case, which had the effect of restoring the front portion of the shop in the

same shape and form as it existed prior to its falling down, will not amount to material alteration of the building so as to attract the prohibition contained in Section 108(p) of the Transfer of Property Act. That was a case wherein it appears that the premises let out was divided into front and back portions and the front portion of the accommodation let out had fallen down while the back portion remained in the use and occupation of the tenant. It was in such circumstances, the learned Judge was of the view that the tenant was within his rights to repair the fallen down portion and re-erect and no consent of the landlord need be obtained therefor.

10. In *Ramji Virji and Ors. v. Kadarbhai Esufali* : AIR1973 Guj110 , a learned single Judge of the said High Court had an occasion to deal with the scope of Section 13(1)(b) of the Saurashtra Rent Control Act, 1951 in finding out whether the structure put up in that case without the landlord's consent in writing on the premises let out were structures of permanent nature and therefore, the tenant concerned was disentitled from getting protection under the Rent Act. The construction, which was objected to in that case was said to be a Meda constructed by fixing four pillars with the walls by means nails and putting planks over those pillars and around one of the pillars, there had been a plaster of cement. The gap between the planks was set to rest on the four pillars and the ceiling was said to have been filled with planks on both sides and a door was also put up on the front side. The entire structure so put up was found to be of a wooden structure admittedly resting on the four pillars which are also not embedded in the floor and that the whole annexation was found to be so loose that it would be easily removable without causing any damage to the premises. The learned Judge adverted to some of the earlier decisions of the very Court as also the Supreme Court and the Calcutta High Court reported in *Surya Proprietors (Private) Limited v. Bimalendu Nath* : AIR1964 Cal1 , which considered once again the scope of Clause (p) of Section 108 of the Transfer Of Property Act. After noticing the principles laid down in : AIR1964 Cal1 , viz., that what would be relevant would be the nature of the structure or construction in question and the intention with which it is made, which alone would be of prime importance apart from the suits, the mode of annexation and the surrounding circumstances as the appropriate matters for consideration, the learned single Judge of the Gujarat High

Court held that when the constructions put up are early removable as one whole without any serious damage whatsoever to the premises, such construction cannot be considered to be of a permanent structure so as to offend the provisions of the Transfer of Property Act.

11. In Venkatlal G. Pittie and Anr. v. Bright Bros (Private) Limited : [1987]3SCR593 , the Apex Court, while dealing with the principles to be borne into consideration to decide the question as to whether the structure constructed by a tenant in the premises in question amounted to permanent structure leading to the forfeiture of the tenancy of the tenant observed as hereunder:

There are numerous authorities dealing with how the question whether the structure is a permanent structure or not should be judged. It is not necessary to deal with all these. One must look to the nature of the structure, the purpose for which it was intended and make a whole perspective as to how it affects the enjoyment, the durability of the building etc. and other relevant factors and come to a conclusion.

12. In Ismail Kani Rowthan v. Nazarali Sahib and Anr. 14 M.L.J. 25 : I.L.R. Mad. 211, a Division Bench of this Court had an occasion to notice the principles applicable in deciding the rights of the landlord and tenant in respect of the building erected by tenant. It was observed therein after analysis of the entire case law on the subject that both under the Hindu and the Mohammedan Law as well as under the common law of India, a tenant who erects a building on land let to him can only remove the building and cannot claim compensation on eviction by the landlord.

13. As against the plea of the learned Counsel for the appellant to justify the judgment of the trial court, the learned Counsel for the respondent would contend that no exception could be taken to the decision of the lower appellate court and that having regard to the nature of constructions put up by the respondents, it could not be legitimately contended that there has been any violation of Section 108(p) of the Transfer of Property Act. Consequently it is contended, by the respondents that the appeal before their court has no merits. I have carefully considered the submissions of the learned Counsel appearing on either side in the

right of the principles laid down in the various decisions referred to supra. In the decision of the Supreme Court in Venkatlal's case : [1987]3SCR593 , some of the decisions to which a reference has been made by me has been also adverted to before laying down to relevant considerations in paragraph 21 of the judgment extracted supra. So far as the case on hand is concerned the intention of the first defendant/tenant, the purpose for which it has been put up and the facts and circumstances which necessitated the putting up of such structure and the quality and not one of construction put up would go to show that it cannot be said to be a permanent structure within the meaning of Section 108(p) of the Transfer of Property Act. The construction ought to be put up in the case was meant to provide a cover of protection to the remaining building and ensure privacy and also in order to effectively use the premises let out by undertaking reconstruction not even in the permanent form in which it was earlier. The photographs marked in the case also do not disclose that it is of such permanent character or so substantial nature as could not be removed also without causing any detriment to the premises standing on the land. While considering the general principles governing the interpretation of Section 108(p) of the Transfer Property Act, the observations made in some of the decisions by courts referred to supra and found expressed in a manner be fitting the facts of those cases and the construction complained of therein, and the views exposed in every case have to be understood and construed in the context of the particular fact situation and the problem posed or the grievance made in that case inasmuch as it has been uniformly held that no hard and fast rule of general and universal application can be laid down in a matter like the one which involved a consideration of the issue as to whether the construction put up in a particular case is a permanent structure or a temporary one. The observations in a particular case cannot be taken out of context and relied upon for all and any case. The decision Abdul Rasheed's case A.I.R. 1975 All. 545 appears to be also nearer in point to the case on hand having regard to the nature of the problem posed for the consideration of the court. As in this case that was also a case where the construction was necessitated due to the falling down of a portion of the premises, necessitating re-construction. The trial court, in my opinion, did not properly appreciate this aspect and its rejection of relevance of the said decision of the Allahabad High Court only demonstrates a total non-

application of mind to all the vital and relevant aspects of the case. In view of the above, I am of the view that the modification effected the lower appellate court of the judgment and decree of the trial court does not call for any interference in the second appeal. When the plaintiff appellant has come before the court seeking for a relief of permanent injunction, the court was well within its rights in also declaring and specifying also the circumstances under which such an injunction could be granted or limited or these extent to which it has to be limited and in doing so, if some positive or constructive directions are issued, on that account alone, it cannot be considered that the relief claimed in the suit. Any conditions or restrictions placed by the court for restricting the extent or limiting the ambit of the relief sought for before the court, cannot be considered to be a matter outside the purview of either the pleadings or the reliefs sought for as long as the substance of the reliefs ultimately granted is one and the same as prayed for before it.

14. The second appeal, consequently fails and shall stand dismissed. No costs.

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