IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

HONOURABLE SRI JUSTICE M. VENKATA RAMANA

SECOND APPEAL No.130 of 2020

Between:

Tiriveedhi Ramesh, S/o.Ramasubbaiah

… APPELLANT

AND

M.Subbaramaiah, S/o.Lakshmi Narasimhulu

... RESPONDENT

DATE OF JUDGMENT PRONOUNCED :22.06.2021

SUBMITTED FOR APPROVAL

HONOURABLE SRI JUSTICE M. VENKATA RAMANA

1. Whether Reporters of Local Newspapers may be allowed to see the order? Yes/No
2. Whether the copy of order may be marked to Law Reporters/Journals? Yes/No
3. Whether His Lordship wish to see the fair copy of the order? Yes/No

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M.VENKATA RAMANA, J

***IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI**

***HONOURABLE SRI JUSTICE M. VENKATA RAMANA**

+ S.A.No.130 of 2020

% Dated : 22.06.2021
Between:

Tiriveedhi Ramesh

… APPELLANT

AND

$ M.Subbaramaiah

... RESPONDENT

! Counsel for appellant : Mr. P.Ganga Rami Reddy

^Counsel for Respondent : Mr.V.Siva Prasad Reddy

<GIST :

>HEAD NOTE:

? Cases referred:

1. AIR 2005 SC 2905
2. AIR 2018 SC 2847
3. AIR 1996 SC 140

M.VENKATA RAMANA, J

HON'BLE SRI JUSTICE M. VENKATA RAMANA

S.A.No.130 of 2020

JUDGMENT:

The defendant is the appellant. The respondent was the plaintiff in O.S.No.213 of 2014 on the file of the Court of learned Principal Senior Civil Judge, Nellore. The respondent laid the suit for eviction of the appellant from the demised premises, for arrears of rent and with future interest at 12% per annum from the date of the suit till realisation.

2. The demised premises is a commercial property at Stone House Pet of Nellore City bearing Old Door No.6/72, New Door No.6/122 that included a tiled house and two godowns within the boundaries described in the plaint schedule. The demised premises admittedly belonged to the respondent. The defendant initially was his tenant of the tiled portion and later on he became the tenant of two godowns attached to it. On the date of the suit, the admitted rent was Rs.13,500/- per month.

3. The respondent instituted the suit on the ground that the appellant defaulted to pay the rents in spite of his demands and that he got issued a composite notice dated 22.11.2013 to the appellant demanding Rs.6,48,000/- being arrears of rent for four years. It was served according to the respondent, where he offered to renew the lease at the then current rental structure, and since the appellant did not come forward, the tenancy was determined thereby. Upon deducting the payments whatever made by the appellant to the respondent, ultimately, the amount due towards the arrears stood at Rs.5,88,000/- and with interest thereon, the total claim stood at Rs.8,92,750/-.

4. The appellant resisted the claim of the respondent on several grounds denying that he was a defaulter in paying the rents and denying

that a notice was issued to him on 22.11.2013 upon such terms and conditions. He further pleaded that the amount if any payable towards rent as claimed by the respondent is incorrect and this claim is settled on account of the repairs effected by him to the demised premises spending his money and that he had arranged sofas, chairs etc. for 'Sumangali Kalyana Mandapam' started by the respondent on account of which the respondent was liable to pay Rs.1,50,000/- there on with interest. He also claimed that the suit claim barred by limitation and referred to many mediations to settle this dispute in between them through the elders of the locality.

5. Basing on the above pleadings, the learned trial Judge settled the issues for trial as under:

> "1. Whether the plaintiff is entitled for eviction and delivery of the plaint schedule property from the defendant, as prayed for?
> 2. Whether the plaintiff is entitled for arrears of rent to a tune of Rs.8,92,750/-along with interest at the rate of 12% per annum?
> 3. Whether the claim of rents due is barred by limitation?
> 4. To what relief?"

6. Both the parties thereupon entered trial, where the respondent examined himself as P.W.1 while relying on Ex.A1 to Ex.A4 and that the appellant examined himself as D.W.1.

7. On the material and the evidence, learned trial Judge, by the judgment dated 22.03.2019 decreed the suit directing the appellant to vacate the demised premises within three (03) months from that date, hand over peaceful and vacant possession of the same to the respondent while further directing payment of arrears of rent at Rs.8,50,500/- along with interest at 12% per annum from the date of the suit till realisation.

However, the arrears of rent is directed to be calculated by the respondent after deducting the amounts paid by the appellant during pendency of the suit for the period from January 2014 to March 2019. It was further directed that the respondent could proceed against the appellant in the event of his failure to comply with the above directions, in accordance with law.

8. Aggrieved, the respondent preferred an appeal in A.S.No.54 of 2019 on the file of the Court of learned Principal District Judge, Nellore. By the decree and judgment dated 06.12.2019, the learned appellate Judge dismissed A.S.No.54 of 2019 and also cross-objections preferred by the respondent, numbered as A.S.No.92 of 2019 by the common judgment. Thereby, the findings of the trial Court were confirmed by the appellate Court, upon considering the questions involved in this matter raising appropriate points for determination.

9. Against it, this present second appeal is preferred.

10. Sri P.Ganga Rami Reddy, learned counsel for the appellant and Sri V.Siva Prasad Reddy, learned counsel for the respondent agreed to address arguments at the stage of admission itself in this second appeal. Therefore, upon hearing learned counsel for the parties, this second appeal is being disposed of at this stage itself.

11. The following substantial questions of law are raised by the appellant in this second appeal:

"A. Whether acceptance of monthly rents by the plaintiff after determination of lease amounts to waiver of quit notice?

B. Whether claiming and receiving rents by the Land Lord/Plaintiff subsequent to filing the suit after determination of tenancy by virtue of the statutory notice under Ex.A3 and acknowledging the monthly rents paid by

the defendant, the said acts of the plaintiff lead to conclude that the lease of the premises still holds good and the status of the defendant be "tenant by holding over" and Land Lord/Plaintiff can seek eviction of tenant?

C. Whether the notice dated 22.11.2013 issued is in accordance with the contents laid under Section 106 of the Transfer of Property Act and in the absence of non-compliance can eviction be ordered?

D. Whether the Court below acted legally in marking the unmarked documents Ex.A3 and Ex.A4 at the stage of arguments without giving opportunity to the parties is in accordance with Civil Rules of Practice?

12. Essentially, the questions required to be considered and determined in this second appeal relate to,

(1) the procedure adopted by the learned trial Judge at the stage of passing the judgment in substituting certain documents for Ex.A3 and Ex.A4 that were already on record, without notice to the parties.

(2) Application of Section 106 of Transfer of Property Act on account of notice dated 22.11.2013 got issued by the respondent to the appellant determining the tenancy.

13. Though contentions are advanced relating to application of Section 116 of Transfer of Property Act as if there is waiver of notice of determination of tenancy, having regard to the material on record and in given facts and circumstances, on account of concurrent findings recorded by both the Courts below, it is not necessary to consider now. This ground raised by the appellant is essentially based on either deposit or payment of rents pursuant to directions of the trial Court in I.A.No.882 of 2014 by the order dated 13.03.2015, filed under Order XV-A CPC. Therefore, when payment of rents by the appellant and receipt of the same by the

respondent was due to this factor, the appellant cannot lay a claim that Section 116 of Transfer of Property Act, is applicable to the present case and that, he being a tenant holding over receipt of rents thereon by the respondent would renew the tenancy time to time. Therefore, this ground which was well considered by both the Courts below for similar reason, did not exist for consideration in this second appeal.

14. Learned counsel for the respondent relied on ***SHANTI PRASAD DEVI AND OTHERS v. SHANKAR MAHTO AND OTHERS***[1] in respect of application of Section 116 of Transfer of Property Act. This ruling is not relevant for the present purpose, since question of Section 116 of Transfer of Property Act is not being considered in this matter.

15. The first question addressed on behalf of the appellant is relating to a peculiar procedure adopted by the learned trial Judge in introducing certain documents as if relied on by the respondent at the trial and its propriety or otherwise.

16. Evidence was let in at the trial by both the parties as already stated above and in all on behalf of the respondent four documents were introduced in the evidence being Ex.A1 to Ex.A4. Ex.A2 is stated to be the first notice of determination of tenancy got issued by the respondent to the appellant. It was not served on the respondent.

17. Notice initially marked Ex.A3 at the trial through the respondent as P.W.1, was a photo copy and said to bear the date 22.11.2013. Marking of this document was objected to on behalf of the appellant at the trial on account of its inadmissible nature including as secondary evidence under Section 65 of the Evidence Act. The respondent was subjected to extensive cross-examination basing on this document then marked as Ex.A3 on behalf

[1] AIR 2005 SC 2905

of the appellant. A suggestion was also given to P.W.1 on behalf of the appellant that he did not have proof to show the contents of the second notice dated 26.11.2013. However, P.W.1 asserted that there has been proof and he would produce the copy in due course. Further suggestion to P.W.1 was in the nature of questioning the authenticity of the second notice dated 26.11.2013 claiming that it is hypothetical and imaginary. These suggestions in usual course were denied by P.W.1.

18. Ex.A4 is the postal acknowledgment then marked at the trial. P.W.1 in cross-examination clearly stated that Ex.A4 did not relate to Ex.A3 notice reflected by a photo copy dated 22.11.2013. P.W.1 further stated in the cross-examination for the appellant that Ex.A3 notice dated 22.11.2013 is the first notice and that it was not served on the appellant. He also stated that a copy of the same notice was sent to the appellant again, which was served on him. According to P.W.1, only the date was changed in the second notice while the contents of the first notice remain as they have been. These two documents viz., Ex.A3 and Ex.A4 marked at the trial are not forwarded to this Court along with the material record.

19. Such being the situation as seen from the cross-examination of P.W.1, learned trial Judge chose to substitute both these Ex.A3 and Ex.A4 while preparing the judgment. The manner in which this exercise was undertaken is stated in Para – 5 of the judgment of the trial Court. It is desirable to extract the same hereunder:

> "In support of his case, the plaintiff himself got examined as P.W.1. Exs.A1 to A4 are marked. Ex.A1 is annexure showing the rents from 2001 onwards. Ex.A2 is unserved postal cover of the notice. Ex.A3 is the Photostat copy of office copy of the legal notice. The same was marked subject to objection. After verification of the record office copy of the legal notice signed by the Advocate is available on record. The Bench Clerk at the time of marking, instead of marking of office copy of the legal notice, he

made marking on Xerox copy of the notice. For that reason, the counsel for the raised objection. Office copy of the legal notice is available on record, hence, the same is treated as Ex.A3 instead of Xerox copy of the legal notice on which marking was made. Thus, the objection of the defendant is overruled. The office copy of the notice substituted and marked as Ex.A3 in the place of Xerox copy of legal notice dated 22.11.2013. Ex.A4 is postal acknowledgment dated 30.11.2013. The counsel for the plaintiff did not mention the date of postal acknowledgment. At the time of marking this document also the Bench Clerk instead of marking the document i.e., acknowledgement dated 30.11.2013 he marked the acknowledgement pertains to June, 2014. The counsel for the defendant has done lengthy cross-examination on that aspect. The counsel for the plaintiff did not rectify the mistake when the other side cross-examining the witness, he simply kept quite he did not even brought to the notice of the court he already filed the said acknowledgement, but, marking was made on another document i.e., latches on the part of the counsel for the plaintiff. After verification of the record, the postal acknowledgment dated 30,.11.2013 is found. Hence, the said document was substituted and marked as Ex.A4. Plaintiff evidence is closed. The defendant himself got examined as D.W.1. No documents are marked. Defendant evidence is closed."

20. As seen from the above extracted portion, learned trial Judge chose to blame the bench clerk as if he was responsible for marking the documents. Learned trial Judge seemed to have forgotten the role of the Presiding Officer of the Court as in the course of the trial, in respect of marking exhibits on behalf of the parties and also the role of the learned counsel appearing for the parties.

21. After all it is the learned counsel for the plaintiff, who should point out the documents produced on his behalf to be exhibited, which are relevant and offering proof of the case he has set up. Similar is the situation of the learned counsel for the defendant to point out to exhibit the documents in support of his defence in the course of trial in any civil suit. Only when the documents being relied on by the parties are marked

and exhibited, cross-examination would proceed on such basis. When a document is not exhibited at the trial and just remained as a part of the file, it cannot be expected to be subjected to cross-examination of a witness. The other side would take that this document so left out is purposely ommitted for this purpose. There cannot be any cross-examination of a witness, on the basis of an unmarked and unexhibited document, as practice required. The parties to the suit know far better as to nature of evidence to be introduced by exhibiting the required documents.

22. The trial Judge cannot remain a silent or mute spectator in the entire process. The trial Judge has a bounden duty to verify whether the document so produced is primarily admissible in evidence and if relevant for the purpose of the case. Thus, an onerous duty is cast upon the trial Judge and he or she as the Presiding Officer of the Court cannot remain quiet or shut eyes. Blaming the bench clerk as is done in the present case, is completely unwarranted and in fact is reflective of throwing the blame on the ministerial staff instead of accepting the wrong committed at that stage. This attitude needs serious deprecation.

23. It is not the business of the bench clerk or other ministerial staff to interfere in the process of the trial, where the parties would be at loggerheads, ably supported by their learned counsel in the 'august presence of the Learned Judge', who considers and determines the 'lis'. Except the ministerial business of attending to the necessity of the court through the directions, they cannot have any role in such process.

24. The learned trial Judge went to the extent of substituting Ex.A3 and Ex.A4 by replacing the documents, which were already marked. Though the learned trial Judge may not have any other intention in doing so, except in an attempt to correct the situation in her opinion, relating to the

documents exhibited, the manner in which it was resorted to at the time of pronouncing the judgment, is quite deplorable. In fact, this act goes against the principle of fair justice and fairness in the process of trial.

25. The parties to the *lis* are entitled to know what is happening in respect of their matter pending in the Court and also their learned counsel. The trial Judge cannot be expected to resort to such acts as are seen in the present case behind the back of the parties or their learned counsel.

26. It is pertinent to note that it was not as though the notice dated 22.11.2013 and the postal acknowledgment now marked by substitution as Ex.A3 and Ex.A4 by the learned trial Judge were not brought to the notice of the concerned including the learned trial Judge, who recorded the deposition of P.W.1 and D.W.1. The legal notice dated 22.11.2013 substituted Ex.A3 was produced along with the plaint and thus, it was available as a part of the file. Its acknowledgment marked Ex.A4 by substitution by the learned trial Judge was also available by then. In fact, learned counsel for the appellant at the trial had taken a risk of inviting the attention of P.W.1 to this postal acknowledgment and elicited statements from him. These statements are in the nature of admission of P.W.1 that this postal acknowledgment, in proof of service of Ex.A3 notice available on record and that it was not marked. The attention of P.W.1 was so invited in cross-examination on behalf of the appellant twice on 07.03.2018. Even learned trial Judge was aware of this fact. Neither the learned trial Judge applied herself to the cause then, verifying the documents already marked nor learned counsel for the respondent, responded to that situation. Therefore, when these facts are so staring, recording such observations and substituting the exhibits at the time of preparation of the judgment, is a condemnable practice. Apparently, the appellants suffered any amount of prejudice on account of it.

27. An attempt was made by the learned trial Judge in the judgment relying on the statement of the appellant in cross-examination for the respondent of service of this notice that he admitted. However, it cannot be a reason to permit or allow the learned trial Judge to substitute such documents, that too without affording opportunity to the parties to the suit.

28. If at all learned trial Judge was so conscious and intended to put the record straight, the best option would have been to reopen the matter recording these reasons, giving an opportunity to both the parties to explain such situation and further permitting to exhibit these two documents, which were available in the file, if so desire, as additional documents on behalf of the respondent and by permitting the appellant to further cross-examine P.W.1 thereon. It would have certainly reflected a fair procedure.

29. Though there is no reason to suspect the *bona fides* of the learned trial Judge in the matter, the hasty part displayed by her in this process, is making out a disturbing tendency, which shall not be encouraged. The learned trial Judge shall have conception of her role in the process of adjudicating the matter, as well as the trial process with its effect thereon. It is possible that there would be some unexpressed intentions for the judges and unknowingly, they would be driven by these circumstances. Yet the predominant requirement is to see that the course of justice is not affected.

30. Sri P.Ganga Rami Reddy, learned counsel for the appellant referring to effect of production of documents in terms of Order VII and XIII CPC and the manner of accepting the same provided in Rule 4 of Order XIII CPC strenuously contended that this process of substitution of the documents is a vitiating factor to affect the process of judging the issues in the matter

and therefore, an opportunity has to be given to the appellant in this case remanding for fresh determination to the trial Court.

31. Learned appellate Judge though conscious of the peculiar procedure adopted and followed by learned trial Judge, tried to justify the same relying on the effect of Section 167 of Indian Evidence Act, which directs that in case of improper admission or rejection of evidence, there shall not be new trial or reversal of any decision in the case.

32. This is not a case of either introduction of the exhibits in the course of trial or their improper admission or rejection in the evidence at that stage. There was no occasion to assume that this act of the learned trial judge was in the course of the trial and while recording the depositions of the parties. It is completely a different story, which learned appellate Judge should have considered in proper perspective. There was no justification for the learned appellate Judge to support this unwarranted and undesirable action of the learned trial Judge. Learned appellate Judge also relied on the admission of the appellant of receipt of notice of determination of tenancy in an attempt to explain the situation.

33. However, no justification can substitute for the immense prejudice suffered by the parties, more particularly, the appellant in the process.

34. Therefore, in order to give a decent quietus to this situation and since the interests of justice demand a fair trial, whereby no party should suffer, the matter is required to be remitted to the trial Court for reconsideration, upon following the procedure as suggested above.

35. Since the decision relating to the second question of application of Section 106 of Transfer of Property Act hinges upon the factor of introduction of the documents as stated above, it is desirable not to record

any finding now. It is better to keep open for the learned trial Judge, to consider this question.

36. Learned counsel for the respondent Sri V.Siva Prasad Reddy, strenuously contended that the appellant being the tenant has been squatting on the property to the detriment of the Land Lord, without regularly paying the rents inspite of directions of the Court. Learned counsel further contended that in the circumstances having regard to the concurrent findings recorded by both the Courts below, it is not necessary that the matter be remitted to trial Court again.

37. Learned counsel for the respondent relied on ***APOLLO ZIPPER INDIA LIMITED v. W.NEWMAN AND CO.LTD.***[2] referring to the effect of notice issued determining the tenancy and when no reply was issued to it. This question is left open for consideration and determination by the trial Court.

38. ***R.V.BHUPAL PRASAD v. STATE OF ANDHRA PRADESH AND OTHERS***[3] is also relied on by the learned counsel for the respondent. It is a case relating to the position of a tenant at sufferance of the demised premises, which is unlawful. This ruling is besides the point.

39. However, in view of the reasons assigned, it is but appropriate that the trial Court shall take a fresh call on the question of application of Section 106 of Transfer of Property Act after giving due opportunity to the parties in this case.

40. In the result, this second appeal is allowed setting aside the decrees and judgments of both the Courts below, subject to following directions:

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[2] AIR 2018 SC 2847
[3] AIR 1996 SC 140

1. The trial Court shall frame an issue as to whether there was a notice under Section 106 of Transfer of Property Act issued by the plaintiff to the defendant determining the tenancy and if so, the effect thereon, *vis a vis* the parties to the suit. Thereupon, the trial Court is directed to consider and determine issue No.1 afresh.
2. The trial Court is directed to permit both the parties to adduce further evidence in the suit and evidence already recorded and on record shall continue to remain as such. Ex.A3 and Ex.A4 marked at the time of preparing the judgment now impugned dated 22.03.2019 stand de-exhibited. If parties desire they shall be permitted to be exhibited afresh giving exhibit numbers on continuation on behalf of the plaintiff and Ex.A3 and Ex.A4 already marked shall remain on record as such.
3. The costs in the first appeal and this appeal shall be subject to result in the suit.
4. The trial Court is directed to dispose of the suit subject to COVID situation, within three (03) months from the date of receipt of copy of this judgment.
5. The registry is directed to return the records received from the trial Court as well as the first appellate Court immediately.
6. Interim orders, if any, stand vacated. All pending petitions, stand closed.

M. VENKATA RAMANA, J

Dt:22.06.2021
Rns

HON'BLE SRI JUSTICE M. VENKATA RAMANA

S.A.No.130 of 2020

Date:22.06.2021

Rns