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CF3771

IN THE HIGH COURT OF JUDICATURE CHHATTISGARH
AT BILASPUR

Single Bench

SECOND APPEAL NO. 09 / 2004

Appellant
(Defendant)

✓ Moolchand Agarwal S/o Rupchand
Agarwal (Santosh Dresses), Main Road,
Korba, Tehsil & Dist : Korba-(C.G.)

Versus

Respondent
(Plaintiff)

S
R Ashok Kumar Modi S/o Kishanlal Modi,
R/o Ashok Electrical and Hardware
Store, Main Road, Korba, Tehsil & Dist :
Korba-(C.G.)

SECOND APPEAL U/S 100 OF THE CODE OF CIVIL
PROCEDURE

HIGH COURT OF CHHATTISGARH AT BILASPUR

Second Appeal No. 9 / 2004

Moolchand Agarwal

..... Appellant.

Versus

Ashok Kumar Modi

.....Respondent.

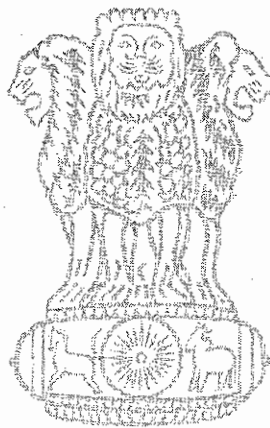
Post for pronouncement of judgment on 8th day of April, 2015.

Sd/-
Goutam Bhaduri
Judge

8 /04/2015

CHHATTISGARH

H COURT



सत्यमेव जयते

HIGH COURT OF CHHATTISGARH AT BILASPURSecond Appeal No. 9 / 2004

Moolchand Agarwal

..... Appellant.

Versus

Ashok Kumar Modi

.....Respondent.

Mr. S.S.Agrawal with Mr. Anand Dadariya, Advocate for the appellant.

Mr. K.A.Ansari, Senior Advocate with Mr. Vipin Singh, Advocate for the respondent.

Hon'ble Shri Justice Goutam Bhaduri

JUDGMENT

(Delivered on 8th April, 2015)

1. This instant appeal is against the judgment and decree dated 17.12.2003 passed in Civil Appeal No.10-A/1999 by the Additional District Judge, Korba, whereby the judgment and decree dated 16.04.1999 passed in Civil Suit No.6-A/1997 by the Court of Civil Judge Class-I, Korba, wherein the decree was passed under Section 12(1)(m) of the Chhattisgarh Accommodation Control Act, 1961 was affirmed. The instant appeal is by the tenant who has lost the case before both the Court below.
2. The trial Court by its judgment and decree had directed to restore the suit accommodation by removing the hand-pump installed in the suit premises and directed failing to do so ejectment would follow. Both the Courts have found that putting of hand-pump by tube-well has diminished the value of property and materially altered the suit accommodation. Against such concurrent finding of fact, the instant appeal is filed by the tenant.
3. The brief facts, as was pleaded by the landlord, was that he is the owner of the suit accommodation which was rented out to the appellant/tenant on 03.03.1997 for business purpose. It was stated that for such purpose, an agreement was also executed. The suit was brought on the ground that the tenant has not deposited the arrears of rent from September, 1986

and therefore on 30.01.1987 his tenancy was terminated. Further, it was pleaded that without permission, the tenant had raised super-structure, rooms and dug a tube-well and has placed a hand-pump. It was further stated that the suit house is required bonafide by the plaintiff for his own business; therefore, on different counts a suit for ejectment was filed.

4. The defendant/tenant refuted the averments of the plaint and stated that the suit house is not required bonafide by the plaintiff and he is not in arrears. It was further stated because of a fact that a tree fell down in the roof, it caused damage to the suit property wherein he was in occupation, therefore, repairs of the wall was carried out. It was further stated that he has put on a hand-pump by digging with the permission of the landlord and therefore the plaintiff is not entitled for the ejectment.
5. The learned trial Court by a judgment and decree dated 16.04.1999 disallowed the suit on the ground of bonafide need and arrears of rent, however, decreed the suit on the ground of Section 12(1)(m) of the Accommodation Control Act, 1961 (hereinafter referred to as "the Act, 1961") with a direction to remove the hand-pump by invoking the provisions of Section 12(10) of the Act, 1961. It was further directed that from the date of decree within three months, in case the hand-pump is removed, the plaintiff shall not be entitled to get the tenant evicted. The said judgment and decree was assailed by the landlord namely Ashok Kumar Modi in Civil Appeal No.8-A/1999 and another appeal was also preferred by the tenant Moolchand Agrawal which was bearing No.10-A/1999. Both the appeals were decided together by the common order of the appellate Court dated 17.04.2003 wherein the appellate Court dismissed both the appeals and the decree passed by the trial Court under Section 12(1)(m) was affirmed. Therefore, the instant second appeal by the tenant.

6. The second appeal was admitted on the following substantial question of law :

"Whether both the courts below have erred in law in passing the impugned judgment and decree under Section 12(1)(m) of the Chhattisgarh Accommodation Control Act, 1961, especially in view of the fact that no act has been done by the defendant to the detriment of the plaintiff's interest or is likely to diminish its value substantially ?"

7. The learned counsel for the appellant/tenant would submit that both the Courts below have held that the construction has not diminished the value of the property, therefore, the Court could not have passed the decree under Section 12(1)(m) of the Act, 1961. It was stated that the appellate Court too also concurred with the finding of the trial Court that the tenant had repaired the wall which fell down and therefore it is held the construction so raised has not diminished the value or materially altered the property. Therefore having held so, the decree cannot be sustained under Section 12(1)(m) of the Act, 1961. He relied on the case law reported in **2014 (13) SCALE 740** in between **Vishwanath Prasad Jaiswal v. Satya Narain Sharma** and stated that in order to sustain an eviction on the ground of 12(1)(m), it must be established that the structural alteration has diminished the value of the property and utility of the building. Therefore, the decree of both the Courts below should be set aside and prays that the appeal be allowed.

8. Per contra, the learned senior counsel for the respondent submits that he has filed certain documents in the appeal which would go to show that the appellant and his son are carrying on the trade of gambling in the said premises for which they have been convicted and fined. It is further stated that the plaintiff/respondent is deprived of his property and therefore the appeal be dismissed. He further submits that there is a concurrent finding

of fact and in this second appeal the Court may not substitute its opinion with the current finding of fact.

9. I have heard learned counsel appearing for the parties at length, perused the document and the evidence on record.
10. The decree in the instant case is under Section 12(1)(m) of the Act, 1961. So far as the prayer for arrears of rent and bonafide need, the claim has been negated. The trial Court in its judgment and decree has held that after evaluating the evidence and facts, the plaintiff has failed to prove that the defendant has made rooms and further has failed to prove the construction has diminished the value of the property but certainly has dug a tube-well and placed a hand-pump. Further, the Court has held that as per the evidence available, admittedly the defendant has excavated/dug a tube-well and placed a hand-pump without the permission of the landlord. Therefore, by invoking Section 12(10) of the Act, 1961, further time of three months was given to remove such hand-pump, in absence thereof, the decree for eviction was passed. The said finding when were challenge in appeal by the landlord, the appellate Court came to a finding that according to the evidence available on 23.09.1986, it was proved that the trunk of a tree fell on part of the suit accommodation, which was got repaired but plaintiff has failed to prove that whether such construction/repair has diminished the value of the property and held that by construction of the wall, plaintiff has failed to establish that it has diminished the value. However, with respect to putting of a hand-pump by digging the bore-well, the appellate Court concurred with the finding of the trial Court that such putting of hand-pump has altered the accommodation for which the decree passed by the trial Court to remove such hand-pump giving three months time to the tenant was completely justified and having failed to do so, the decree of the trial Court was affirmed.

11. Since the entire decree is on the basis of Section 12(1)(m) of the Act, 1961, the same is reproduced herein below :

“Section 12(1)(m) : that the tenant has, without the written permission of the landlord, made or permitted to be made, any such construction as has materially altered the accommodation to the detriment of the landlord's interest or is likely to diminish its value substantially.”

12. The clause used in Section, the term construction has not defined in the Act, it normally means actually building or construction. The term construction used in this clause is used in sense of erection of some construction of bricks or other material which either change the building or any way alters materially or substantially. It is not necessary that the construction should be of bricks and mortar. The test is that anything done which is going to alter the accommodation either in few or any utility would be construction within the meaning of this clause. Both the Courts below has held that repair of the wall has not diminished the value. The expression requiring such interpretation are (i) materially altered the accommodation, (ii) to the detriment of landlord's interest and (iii) construction is likely to diminish its value substantially and it is a vex question which the Courts faced very often. The Act does not define either the word materially or the word altered. In the absence of any legislative definition of the aforesaid words, it would be useful to refer to the meaning given to this words in the dictionaries.

13. As has been held in **2007 (2) MPLJ 52** in case of **Manisha Lalwani v. Dr. D.V.Paul**, in the absence of any legislative definition of the aforesaid words it would be useful to refer to the meaning given to these words in dictionaries. Concise Oxford Dictionary defines the word 'alter' as change in the character, position 'materially' as an adverb means 'important' essentially concerned with matter not with form. The expression

'alteration' with reference to building means *'substantial'* change, varying change the form or the nature of the building without destroying its identity. The meaning given to these two words show that the expression *'materially altered'* means *'a substantial change in the character, form and the structure of the building without destroying its identity'*. It means that the nature and character of change or alteration of the building must be of substantial and important nature.

14. Therefore, the nature of construction becomes relevant whether it is permanent or temporary and relevant consideration in determining the question of materially alteration a permanent construction tainted to make changes on an accommodation of a permanent basis while temporary construction is on temporary basis which do not ordinarily affect the form and structure of the building as it can easily be removed without causing any damage to the building. In the case in hand, admittedly a hand-pump by digging the bore-well has been installed in the suit premises. The landlord/owner has stated that without his permission the same has been done. As against this, the defendant/tenant has stated that he was orally permitted to do it as he was facing the water problem.

15. Section 12(1)(m) of the Act, 1961 contemplates that written consent from the landlord is must if it is done without the written consent of the landlord therefore no amount of oral consent can be pleaded as a defence by the tenant. Now the question comes whether the putting of a hand-pump would be in a nature of permanent in character. If the nature of the work carried out by the tenant is examined then certainly putting up a hand-pump by digging bore-well is in nature of permanent in character. The plaintiff has stated that the hand-pump was installed and rooms were constructed without his consent which is a breach of conditions of the tenancy whereby he sustained loss which was against his interest. In the cross examination of the plaintiff at para 18 it is stated that before the suit

was filed, the area of suit property was admeasured. In the cross examination, it is further stated in the suit premises, there is no Latrine or Bathroom was present at the time of induction of tenancy. He further stated that after filing of the suit, he was not able to go inside the suit premises. Such statement appears to be plausible in the sense when the relation between tenant and landlord became strange then naturally the landlord would not be easily allowed to enter into the premises.

16. Admittedly, according to the tenant's statement also, no written permission or consent is in existence for digging the tube-well and placing a hand-pump. For instance, the hand-pump could have been useful may not diminish the value of the property in any circumstances but for instance if the bore-well is excavated in the prominent part of the tenanted house against the wish and will of the landlord then certainly it would be materially diminished the value of the tenanted premises. Reading of the evidence further reflect that the plaintiff has specifically denied the fact that by putting of the hand-pump by digging a bore-well, it has added the value of the property. On a question asked to the landlord that how much loss he has sustained, on a suggestion he expressed his inability to answer the quantum of loss assessed. The plaintiff in the cross examination has affirmed the fact that after giving it to the tenant he was not able to enter the suit premises.
17. Admittedly, no consent was obtained in writing, therefore, burden of proof has two meanings- one the burden of proof as a matter of law and the pleading and the other the burden of establishing the case; the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be direct evidence, i.e., oral or documentary evidence or admissions made by

opposite party; it may comprise circumstantial evidence or presumptions of law or fact. Therefore, in the instant case, the burden initially lies on the plaintiff as per the section and since the section contemplates that a written permission has to be obtained under Section 12(1)(m) the tenant having admitted the fact the permission was not obtained in writing by the landlord, since the tube-well was inside his premises and the place of such tube-well was not known to plaintiff for want of access to the accommodation, this fact should have been established by the defendant/tenant that the tube-well has been excavated not in prominent part of the building for instance at the main door or in the main hall or prominent area but it was on a place where it will increase the value of the property.

18. Reading of the order of the trial Court and the appellate Court would show that they came to a conclusion after appreciating the evidence of the plaintiff and the defendant that the construction which was made of repairing of the wall do not fall within the ambit of Section 12(1)(m) of the Act, 1961, but in respect to putting of a hand-pump by digging a bore-well in the premises certainly was held likely to diminish the value of property. Both the Court below on appreciation of fact before it came to finding of fact that the act of tenant is covered under Section 12(1)(m) of the Act, 1961 and therefore by invoking the provisions of Section 12(10) of the Act, 1961, the tenant was given the option to restore such premises by removing bore-well and the hand-pump within a specified period of time to restore the accommodation in its original condition.
19. In view of the concurrent finding of fact found by both the Courts below that there was a material alteration by the tenant, it appears that the order of eviction passed under clause (m) was justified. The Court further followed to follow the requirement of Section 12(10) of the Act, 1961 and given time to tenant to restore the premises to its original condition to arrest eviction. But instead to comply with the same, the tenant appellant



has chosen his path of challenge. In view of the facts existing, the substantial question of law is answered in favour of landlord to hold that act of tenant was to the detriment to the interest of landlord and thereby concurrent finding of facts of both the Court below are affirmed.

20. Consequently, the appeal is dismissed. The order of concurrent finding of fact of both the Courts below are affirmed.
21. The appellant shall bear the expenses of the respondent.

Aks

Sd/-
Goutam Bhaduri
Judge

CHHATTISGARH

COURT

