

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

R.S.A. No.1681 of 2002

Decided on : 11.02.2015

Dalel Singh & Another . . . Appellants

Versus

Kalu & Others . . . Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Arvind Singh, Advocate
for the appellants.

Ms. Alka Sarin, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

1) The present regular second appeal was filed under Section 41 of the Punjab Courts Act. Framing of question of law was not necessary in the light of decision rendered by Full Bench of this Court in **'Ganpat versus Smt. Ram Devi and Ors. 1977 PLR Page-1'**, wherein it was held that the provisions of Section 41 of the Punjab Courts Act, are in no way effected and curtailed by the amendment made in Section 100 of CPC. Now, since the regular second appeal is maintainable only with the aid of section 100 CPC, therefore, substantial questions of law is *sine qua non* for maintaining the appeal.

Prior to amendment of Section 100 CPC, a second appeal could have been filed before this Court on the grounds set out in clauses (a) to (c) of Section 100 (1) CPC i.e. (a) the decision being contrary to law or to some usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law and (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

Now the interference in the second appeal could only be made if substantial question of law arises in the case. Therefore, the interference cannot be only because the order is contrary to law, but when the disputed issues raised a substantial question of law. Limiting such a power in the Appellate Authority is based on public policy having roots in the maxim '*interest reipublicae ut sit finis litium*'. The underlined purpose was to bring finality to the issues/litigation at some point of time.

2. At the admission of the appeal following substantial questions of law were formulated by this Court:-

1. Whether the plaintiff-pre-emptor was required to plead the rate of rent, the name of landlord, the date of tenancy and the payment of rent?
2. Whether without pleading these details in the plaint, is the plaintiff- pre-emptor entitled to lead evidence on these aspects and whether the said evidence can be looked into without pleadings?
3. Whether the pleading of tenancy alone would serve the purpose?

3. Defendants Dalel Singh and Karam Singh sons of Chhaju Ram are in second appeal against judgment and decree dated 01.02.2002 passed by Additional District Judge, Sonapat, confirming and upholding the judgment and decree dated 14.11.2000, passed by Additional Civil Judge (Senior Division), Sonapat.

4. Plaintiff Kalu filed suit for declaration and in alternative for possession by way of pre-emption of House No.575, situated within *abadi-deh* (Lal Dora) of village Pinana, District Sonapat having specified dimensions as shown in Para No.1 of the plaint. The aforesaid house was exclusively owned by defendants No.3 to 5 and the plaintiff claimed himself to be a tenant in a portion marked ABCDEFGH out of house marked shown by ABCDXH, which is double storeyed house.

5. Defendants No.3 to 5 sold the house in question in favour of defendants No.1 and 2 for a sale consideration of ₹50,000/- with all rights appurtenant thereto vide registered sale deed dated 16.09.1992.

6. Plaintiff claimed that the sale consideration has been wrongly fixed on the higher side and in-fact the house and the land underneath thereto was not more than ₹30,000/- on the date of sale. The plaintiff claimed himself to be tenant for the last more than 30 years and was in actual physical possession of the same, whereas defendants No.3 to 5 were non-resident of the village. Before execution of the sale deed, it was alleged that no notice was served upon the plaintiff by the vendors.

7. The plaintiff in Para No.7 of the plaintiff specifically pleaded that on 09.06.1993, the defendants No1 and 2 i.e. the appellants in collusion with BDPF, Sonapat dismantled the roof of first floor and took away wooden planks/karis which were 120 in numbers and were of the size of 4"x4"x10" and four sets of doors for which they had no right and had not returned to the plaintiff despite repeated requests. Damage to the tune of ₹10,000/- was claimed by the plaintiff, which were required to be computed and deducted in favour of the plaintiff.

8. In Para No.9 of the plaint, the plaintiff felt apprehended that the defendants were strong-headed persons and were planning to dispossess the plaintiff and in case they succeeded, in that eventuality, plaintiff claimed himself to be entitled for the relief of possession also. The tenor in which the aforesaid pleadings were made in Para No.9 has to be correlated with the prayer clause made in the plaint. The prayer was to the effect that a decree for declaration and in alternative for possession by way of pre-emption of the house on payment of actual sale consideration after deducting an amount of ₹10,000/- for the damages be passed in favour of the plaintiff and the defendants No.1 and 2 be directed by way of decree of mandate to restore 120 wooden planks/karis and four sets of doors.

9. The suit was contested by the defendants No.1 and 2 as defendants No.3 to 5 were proceeded against exparte. The defendants took all the customary pleas of locus-standi and maintainability besides negating the plea of tenancy in favour of

plaintiff. The defendants took up the stand that name of the landlord/owner had not been mentioned under whom the plaintiff claimed himself to be tenant nor the particulars of tenancy had been mentioned. The condition of the house was stated to be dilapidated and was demolished by the defendants. The Sarpanch of Gram Panchayat wrote to the defendants No.1 and 2 directing them to demolish the wall of the house within specified time apprehending injury to someone on account of its falling. BDPO, Sonapat also directed the defendants to demolish the house in dispute as some untoward incident was apprehended on account of dilapidated nature of the wall. The claim of the plaintiff was refuted on all necessary fronts.

10. The plaintiff filed replication to the written statement and on the basis of pleadings of the parties, following issues were framed by the trial Court:-

1. *Whether the plaintiff is a tenant in the house in dispute and being so is entitled to get this sale pre-empted? OPP.*
2. *Whether the sale consideration was fixed and was actually paid for Rs.50,000/-? OPD.*
3. *If issue No.2 is proved in affirmative, then what was the market value of the property at the time of sale? OP Parties.*
4. *Whether the plaintiff has no locus-standi to file the present suit? OPD.*
5. *Whether the plaintiff has no locus-standi to file the present suit? OPD.*
6. *Relief.*

11. Plaintiff got examined Tek Ram as Pw-1, Lal Chand as PW-2, Ram Phal as PW3, Ram Kishan as PW-4, plaintiff himself as PW-5 and Mahavir as PW-6 besides adducing documentary evidence Ex.P-1 to Ex.P-6. Defendants in their defence got examined Suresh Kumar as DW-1, Sumitra Clerk as DW-2, Satbir Singh as DW-3 and Mool Chand, defendant No.2, as DW-4 besides adducing documentary evidence Ex.D-1, Ex.D-2 and Mark 'A'.

12. The trial Court decreed the suit primarily on the ground that witnesses of the plaintiffs were not cross-examined by the defendants on the point of plaintiff being tenant in the house nor any such suggestion was put to PW-4 in his cross-examination to the effect that plaintiff was not the tenant in the house in question. Trial Court decided Issue No.1 in favour of plaintiffs. Issues No.2 and 3 went in favour of the defendants and Issues No.4 and 5 were decided against the defendants. Suit was decreed on the basis of findings recorded under Issue No.1 and the plaintiffs were held entitled to preempt the sale subject to conditions as formulated therein.

13. The defendants No.1 and 2 assailed the judgment and decree of the trial Court dated 14.11.2000 in appeal before the Additional District Judge, Sonapat. The lower Appellate Court also dismissed the same vide judgment and decree dated 01.02.2002.

14. In the present appeal learned counsel for the appellants has vehemently argued that the description of land in question was a house situated within *abadi-deh* of the village having number also

and therefore, the suit itself was not maintainable. However, maintainability of the suit cannot be doubted in view of definition contained in Section 3 of the Punjab Pre-emption Act. Section 3 of the Punjab Pre-emption Act includes village immoveable property also in addition to other properties mentioned therein. In view of Section 4 of the Punjab Pre-emption Act, the right of pre-emption is available to a person in respective village immoveable property also. Therefore, the suit was maintainable in view of Section 3 and 4 of the Punjab Pre-emption Act, as right in respect of house situated in village *abadi* is very much mentioned in village immoveable property.

15. Learned counsel for the appellants by referring to different paragraphs of the plaint has argued that the tenor in which the plaint was drafted is suggestive of the fact that the plaintiff pre-emptor was not in possession of any part of the house in question and that is why in the prayer clause restrain by way of mandatory injunction was prayed by alleging unfounded apprehension of dispossession during the pendency of the suit. Learned counsel supplemented his arguments by saying that the alleged apprehension of dispossession has not come from the mouth of any witness subsequently. Therefore, a suit for possession was not maintainable. Learned counsel further argued that plaintiff was merely caretaker of the house in question. No rent agreement was executed nor any rate of rent is forthcoming from the pleadings of the plaintiff. Tenancy was a bilateral agreement and the particulars of the same were not forthcoming in the plaint. Payment of rent

was a consequence of tenancy and no such averments have been made in the plaintiff so as to presume any such bilateral agreement between the parties.

16. Learned counsel has further argued that cross-examination of DW-4 Mool Chand did not yield any incriminating fact in favour of the plaintiff. Plaintiff was simply a licensee and caretaker of the building in question and the statement of vendor was also to this effect.

17. Learned counsel also attacked the statement of plaintiff Kalu himself when he appeared as PW-5. The witness did not state about the rent. Learned counsel stated that non-cross examination of the plaintiff witnesses were on account of not allowing them to make any improvement as witnesses did not make any statement of rent and its mode of payment that was why they were not cross-examined so as not to allow them make any improvement. The suggestion given to them could not make out any tenancy.

18. According to learned counsel for the appellants, witnesses PW-1 and PW-2 had gone one-step ahead of the plaintiff when they stated about the rent, which was beyond and above the scope of statement of plaintiff himself. The over weightment of witnesses over and above the statement of plaintiff himself should be viewed as of no consequence and did not prove tenancy.

19. On the other hand, learned counsel for the respondent argued that the tenancy stood proved as the witnesses have not been cross-examined. Learned counsel for the respondent relied

upon the admission made during the course of arguments by the learned counsel for the appellant that plaintiff was living in the house as care taker, so the possession of the plaintiff was admitted by the appellants and the factum of possession was duly supplemented by other evidence in the form of electricity bills in the name of the plaintiff for which PW-6 Mahavir made the statement. Learned counsel also relied upon the statement of DW-4 Mool Chand vendor to the effect that he asked the preemptor to vacate and hand over the possession to the vendee as they had sold the property to the defendants No.1 and 2. Learned counsel argued that recital in the sale deed in respect of possession was a weak type of evidence and could not be treated as conclusive evidence of delivery of possession.

20. Learned counsel for the appellant cited **1976 P.L.J. 293 Natha Singh & others v. The Financial Commissioner, Taxation, Punjab & others, 1978 P.L.R. 98 Than Singh & others v. Nandu & others, 1983 P.L.J. 182 Mukat Singh v. Shmt. Jawala Devi & others, 1991 (2) R.R.R. 69 Neti & Anr. V. Ram Kishan & Ors., 1983 P.L.J. 99 Jarnail Singh v. The Dialpur Bhaika Cooperative Agricultural Service Society Ltd, Dialpur Bhaika, 1993 (1) R.R.R. 7 Ajmer Singh v. Surjit Singh** and **1962 P.L.J. 70 Basti v. Jai Chand**, to submit that tenancy is a bilateral agreement between the parties and in the absence of payment of rent there can be no valid tenancy. Secondly, if two interpretations of a document are possible then the interpretation which defeats the right of preemptor should be accepted. Thirdly in a relationship

of landlord and tenant payment of rent is the most important circumstance to infer relationship of landlord and tenant and the same is a normal incidence of tenancy and was legally required to be proved with reference to evidence. Fourthly, according to learned counsel tenancy is a bilateral contract which may be either expressed or implied and if the column of rent in case of agricultural tenancy found to be blank then no such inference of valid tenancy can be inferred and lastly it has been argued that in terms of section 15 (i) (a) fourthly the tenancy should continue up to the date of sale.

21. On the other hand, learned counsel for the respondent cited 1975 P.L.J 151 Puran Chand & others v. Chandan, 2002 (2) P.L.R. 199 Jagir Singh v. Jagwant Singh & others, 1989 (1) P.L.R. 349 Hans Raj Puri v. Haryana State, AIR 1992 (P&H) 252 Mahant Mela Ram Chela Mehant Inder Dass v. Shiromani Gurudwara Parbandhak Committee, Amritsar and AIR 1958 (Punjab) 440 M/s Chuni Lal Dwarka Nath v. Hartford Fire Insurance Co. Ltd. & another, to contend that recital of the sale deed about delivery of possession is not conclusive in nature and does not necessarily imply that the vendee was in fact put in possession of the same; secondly a party should be put to each of his opponent's witness so much of his case as concerns that particular witness. In nut-shell, the emphasis made by the learned counsel for the respondents has been on the point that the plaintiff witnesses have not been cross-examined by the defendants and

therefore, their testimony has gone un-rebutted on material particulars and thus tenancy is proved.

22. I have heard arguments of both the learned counsel for the parties and have gone through the record.

23. Before advertng to the rival claim of the parties, it is necessary to highlight necessary facts pleaded by the witnesses. PW-1 Tek Ram has pleaded in his examination in chief that possession of the plaintiff over the suit land is continuing for the last 30-32 years and this house in dispute was on rent with him @ ₹10 per month and on many occasions the rent was paid in his presence and the cost of the house was between ₹30,000/- to ₹35,000/- and the defendants have stolen the goods worth ₹10,000/- from the house. In cross-examination the witness has stated that Om Parkash and Gian had come to collect the rent. At that time, Hari Singh, Mehri, Lal Chand and this witness was present. They had come to village about 30/32 years ago and now owner is Kalu Bhadbhuja. Statement of PW-2 and PW-3 were also on the same lines. PW-4 Ram Kishan has admitted in his cross-examination that the defendants had demolished the upper portion of the house and BDPO and Deputy Commissioner got it demolished after issuing notice. The plaintiff while appearing as PW-5 has deposed in his cross-examination that the vendor defendants No.2 to 5 were living in Delhi for the last 100 years and it was correct that for the last 100 years they were not coming to the village, but they used to come to village for collecting the rent. The witness did not state the particulars of date and month when

the vendors used to come to collect the rent. No writing qua rent was made and the vendors did not come after selling the house. PW-6 Mahavir deposed about the factum of house tax and bills in which name of plaintiff was shown. In the statement DW-4 Mool Chand has specifically deposed that the house was given to the plaintiff Kalu Ram for supervision and cleanliness and it was not given on rent and ultimately it was sold to the defendants No.1 and 2 for consideration and Kalu Ram and Mahavir were told that they have sold the house to the defendants and possession be given to them. In cross-examination the witness has admitted that "it is wrong that Kalu was given the house on rent @ ₹10/- per month (translation) and now his children are coming as tenant as such". DW-5 Karan Singh has denied the factum of tenancy.

24. In order to establish relationship of landlord and tenant, payment of rent is one of the important circumstance in order to infer such relationship. Rent is a normal incidence of tenancy, which indicates the existence of landlord and tenant. Non-payment of rent negates the relationship of landlord and tenant. The relationship of landlord and tenant comes in existence as a result of an agreement expressed or implied. In both the eventualities, the evidence must come on record to infer tenancy. It may be implied from the acts and conducts of the parties which indicate that landlord intended to divest himself of the possession of the land and the tenant intended to assume possession thereof. One of the most important circumstance from which inference can be drawn is the payment of rent. Payment of rent and mode of

payment of rent are to be specifically pleaded and proved by the plaintiff. In the absence of any such pleading of payment of rent, rate of rent, mode of payment of rent, it would lead to contrary conclusion and negate the existence of relationship of landlord and tenant. In the present case, there is no rent note. Plaintiff does not disclose the rate of rent fixed between the parties nor any pleadings regarding payment of rent were made nor mode of payment was suggested and pleaded in the plaint. The plaint as drafted indicates that it is more or less in the form of declaratory suit in which stress has been made to declare the plaintiff as tenant and then consequence of that tenant would flow for pleading the same to be a ground to preempt the house in question. The pleadings in terms of prayer becomes relevant in the present context when plaintiff seeks restoration of possession in the alleged plea of his dispossession if made during the pendency of suit. At a subsequent juncture nothing has come on record whether plaintiff was ever dispossessed from the house in question. Therefore, the tenor of the suit itself was on preemptory note even for seeking the declaration.

25. Substantial question No.1 is hereby answered in favour of defendants. The preemptor did not plead the rate of rent, name of landlord, mode of payment of rent and date of announcement of tenancy. Therefore, this question has to be answered in affirmative in favour of the appellant. No amount of evidence can be looked into in the absence of pleadings to this effect.

26. Substantial question No.2 also arises for consideration in as much as that plaintiffs did not make any foundation of their case and therefore, statement if any having over reaching consequence cannot be relied upon to prove ingredients of tenancy, rate of rent, name of landlord and mode of payment. This question is also answered in favour of the appellants.

27. Substantial question No.3 is the resultant effect of questions No.1 and 2. Pleading of tenancy alone would not serve the purpose of proving the same for want of proof of ingredients and incidence of tenancy. Since there is no foundation of these pleadings in the plaint, therefore, no such evidence can be seen from the evidence of the preemptor. Even the evidence to this effect is much wanting in the present case. Therefore, question No.3 is also answered in the same terms that pleading tenancy alone in the absence of particulars, ingredients of tenancy and incidence of tenancy, is not sufficient to create any bilateral obligation between the parties.

28. The witnesses PW-1 and PW-2 have gone even one-step ahead to the plaintiff himself. The over weightment of these witnesses virtually exceeded corroborative part of their statement. The cross-examination of such witnesses was relevant to the extent of their concern. Concern of these witnesses was to corroborate the statement of plaintiff PW-4. Anything done or deposed by them over and above the statement of the plaintiff did not come under the four corners of their concern. If these witnesses are not cross-examined on that front, that cannot be

taken to be an instance of admission of the stand of the plaintiff. The witnesses were not cross-examined so as to prevent them from making improvements. If something was not said by the witnesses in their examination-in-chief, there was no occasion for the defendants to cross-examine the same to allow them to make improvement over and above claim of the plaintiff himself.

29. The statement of vendor namely Mool Chand DW-4 has gone unrebutted. The said witness has specifically deposed that the house in question was given to the plaintiff for the purposes of supervision and cleanliness. A suggestion was given to him which was denied by the witness altogether. From the facts and circumstances of the case, in the absence of any bilateral agreement on record particularly in the absence of any proof of payment of rent, mode of rent and rate of rent, ingredients of tenancy are not proved on record.

30. If non-cross-examination of the witnesses of the plaintiff are pitched against the aforesaid glaring facts then other material available on record has to be tested in order to infer tenancy. Presence of electric bills and name of plaintiff in the voter card on the given address cannot be taken to be an instances of tenancy. Even a care-taker can get his voter card prepared on the given address and so as the installation of electricity meter connection. Such type of documents cannot form incidence of tenancy by any stretch of imagination.

31. In the given situations, the material evidence on record is not such so as to infer tenancy in favour of the plaintiff. Even if

the witnesses of the plaintiff were not cross-examined the same does not amount to creating or presuming tenancy in favour of the plaintiff which is altogether a different issue and is required to be proved by way of bilateral obligations supplemented by other necessary ingredients of payment of rent.

32. Law of preemption is very settled. In case two views are possible in a given situation, then the view, which defeats the right of preemptor has to be taken. Preemption is a piratical right and the same can be defeated by all lawful means. In a given case, preemptor can be non-suited for want of proving incidence of tenancy.

33 Consequently, this appeal is allowed and impugned judgments and decrees passed by the Courts below are set aside. Parties are left to bear their own costs.

[Raj Mohan Singh]
Judge

11.02.2015
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